Commission Scolaire Francophone, Territoires du Nord-Ouest et al. c. *Procureur Général des Territoires du Nord-Ouest*, 2012 NWTSC 44e

Date: 2012 06 01
Docket: S-0001-CV 2008000133

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Plaintiffs

-and-

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

Defendants

-and-

FÉDÉRATION NATIONALE DES CONSEILS SCOLAIRES FRANCOPHONES DU CANADA

Intervener

Corrected judgment: A corrigendum was issued on December 19, 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

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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 instruction for the French linguistic minority population of the Northwest Territories (NWT), specifically in the town of Hay River. 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 concerns the adequacy and quality of the infrastructure provided by the GNWT for the French language instruction program in Hay River, the degree of autonomy and control the Commission scolaire francophone des Territoires du Nord-Ouest (CSFTN-O) should be able to exercise, and the respective rights of the government and the CSFTN-O regarding the establishment of criteria of admission to the French language instruction program.

[3] As relief, the Plaintiffs seek an order compelling the Defendants to expand École Boréale, the school at which the French first language instruction program is offered in Hay River. They also seek various declarations regarding the scope of the CSFTN-O's powers of management. They challenge the constitutional validity of the definition of the term "parent" in the *Education Act* and a directive from the Minister of Education, Culture and Employment (the Minister) governing the criteria of admission to the French language instruction program. They claim compensatory and punitive damages and solicitor–client costs, alleging that the Defendants acted in bad faith.

[4] The Defendants submit that, on the contrary, they complied with their constitutional obligations towards Hay River'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.

II) BACKGROUND

A. PROCEDURAL BACKGROUND

[5] The present proceeding was instituted in May 2008. 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 École Boréale with three extra classrooms, access to a science laboratory and more gymnasium time for physical education classes and extracurricular activities in time for the beginning of the school year in September 2008.

[6] The motion for an interlocutory injunction was heard on July 9, 2008. On July 22, 2008, the Court granted the motion (*Commission Scolaire Francophone, Territoires du Nord-Ouest et al v. Attorney General of the Northwest Territoires*, 2008 NWTSC 53). The Court's order compelled the Defendants to implement an interim plan to provide the school's students with the following, in time for the start of classes in September 2008:

> (a) access time to gymnasiums for school and extra-curricular activities that meet École Boréale's needs and that reflect a fair division of gymnasium time with the other school, in both quantitative and qualitative terms;
> (b) a science laboratory in which secondary school science classes could be taught properly; and
> (c) three classrooms in a secondary school in Hay River, with the fit-ups necessary to create a physically distinct space for the students.

[7] In the meantime, on July 8, 2008, the Minister had issued a directive regarding the criteria of admission to the French first language instruction program. This directive stipulates that only the persons specifically mentioned in section 23 of the *Charter* are entitled to enrol their child in this program. These criteria are more restrictive than the CSFTN-O's admission policy which had governed enrolments up to that date.

[8] On July 30, 2008, the Plaintiffs filed a motion to amend their Statement of Claim in order to add a challenge of the constitutional validity of the directive. The motion also requested a suspension of the directive until the question of its validity had been decided on its merits.

[9] On August 13, 2008, the Defendants filed a motion to amend the Order dated July 22, on the ground that it was impossible for them to implement it.

[10] The Plaintiffs' and the Defendants' motions were heard on August 19, 2008. On August 21, 2008, the Court granted the motion to amend the Statement of Claim but rejected the motion to have the directive suspended: *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Procureur Général des Territoires du Nord-Ouest et al. (No 2)*, 2008 CSTN-O 65. The Court also granted

the motion to amend the Order dated July 2008: *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Procureur Général des Territoires du Nord-Ouest et al. (No 3)*, 2008 CSTN-O 66. The paragraph of the Order providing for the use of classrooms in a secondary school in Hay River was replaced by the following:

> [TRANSLATION]
>
> . . .
>
> 3. (A) The Defendants will take immediate steps to fit up three classrooms to be made available to École Boréale, according to the following parameters:
>
> (i) the space will be fit up so as to create a physically distinct space for the students to be using the classrooms;
> (ii) the Defendants will take all measures legally available to accelerate any tendering or contract signing process required to enforce this Order;
> (iii) the classrooms will not be fit up in another school unless the Plaintiffs expressly agree to this in writing through their counsel;
> (iv) no later than on September 12, 2008, the Defendants will provide the Plaintiffs with a written report on the progress made in enforcing this Order, and will continue to provide the Plaintiffs with such reports every three weeks until the classrooms are ready.
>
> (B) Until the premises described in Paragraph 3 are fit up, the Defendants will provide École Boréale with the use of
>
> (i) one classroom at Diamond Jenness Secondary School and two classrooms at Princess Alexandra School, or
> (ii) with the consent of the Plaintiffs, space elsewhere.

[11] In March 2009, the Plaintiffs filed a motion requesting an amendment to the Order. The hearing was scheduled for May 27, 2009. The Plaintiffs then asked for the motion to be stayed, to which the Defendants objected, requesting that the motion proceed or be withdrawn. The Plaintiffs refused to withdraw the motion, and the hearing was held on May 27, 2009, as scheduled. On June 11, 2009, the motion was dismissed: *Commission Scolaire Francophone, Territoires du*

Nord-Ouest et al. v. *Procureur Général des Territoires du Nord-Ouest et al. (No 5)*, 2009 CSTN-O 43.

[12] In December 2009, as a result of certain events related to the enforcement of the Minister's directive, the Plaintiffs filed another motion to amend their Statement of Claim, this time to add a challenge of the constitutional validity of the definition of "parent" in section 2 of the *Education Act.* This definition includes guardians, except for the purpose of exercising the rights provided in section 23. The motion was heard on March 8, 2010, and was granted the same day: *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Procureur Général des Territoires du Nord-Ouest et al. (No 7)*, 2009 CSTN-O 20.

[13] The proceeding was the subject of a number of case management conferences in 2009 and 2010. During the same period, another proceeding regarding the implementation of section 23 (CV2005000108) was also the subject of case management conferences. This second proceeding concerns the school that offers the French language instruction program in Yellowknife, École Allain St-Cyr. It too raises questions about the CSFTN-O's right of management. The proceeding, which was instituted in 2005, was stayed in 2006, but reactivated in 2009.

[14] The same counsel are representing the parties in both proceedings. Since the proceedings raise related, albeit distinct, legal issues, and since a number of the parties' witnesses were to testify in both proceedings, the parties agreed to both proceedings being heard at the same time and on common evidence. The hearings were scheduled to begin on October 19, 2010.

[15] On September 21, 2010, the Fédération nationale des conseils scolaires francophones (FNCSF) filed a motion to be granted intervener status in the present proceeding. The FNCSF wanted to be able to make legal submissions on the constitutional validly of the Minister's directive of July 2008. The Defendants did not object to this motion, and the FNCSF was granted intervener status.

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

B. FACTUAL BACKGROUND

1. History of the French-langue education program in Hay River and of the construction of École Boréale

[17] A number of witnesses spoke of the birth and development of the French first language instruction program in Hay River. This history also appears in various documents that were adduced and is not challenged.

[18] The Francophone parents of Hay River had been working on obtaining a French language instruction program in this community for some time. They first requested the creation of an immersion program, a request that was denied by the Hay River District Education Authority (DEA). The parents then requested that a French first language instruction program be established, and this request was granted by the GNWT.

[19] The French language instruction program was first offered in the 1998–1999 school year. During the first few years, the program was managed by the DEA. Classes were given in a classroom at Princess Alexandra School, which is under the jurisdiction of the DEA. In 1999–2000, another classroom was made available, for half a day, for the kindergarten classes. The program continued to be taught in the same premises in 2000–2001 and 2001–2002.

[20] The Conseil scolaire francophone de Hay River [Hay River French language education council] was established in 2001. The same year, it joined the Commission scolaire francophone, which became the CSFTN-O. Project development discussions to build a French school in Hay River were already under way.

[21] During the 2001–2001 school year, the Princess Alexandra School underwent renovations, and four portable classrooms were installed close to the school to house the students during these renovations. The CSFTN-O asked to appropriate them to provide the French language instruction program there as of 2002–2003, a request that was agreed to. The program moved into the portable classrooms in September 2002. Three of the rooms were used as classrooms and the fourth, for administrative purposes.

[22] On November 25, 2002, the CSFTN-O wrote to the Deputy Minister of Education to make a formal request to have a new school built in Hay River. The GNWT agreed to the request and applied to the federal government for a financial contribution to the project, given that some of the areas in the building were to be for community use.

[23] During the planning process and the negotiations with the federal government, various scenarios were examined. These scenarios considered various budget options that would be available for the construction project. The GNWT proposed contributing $579,000 in funding and making an in-kind contribution worth $552,000. The GNWT asked the federal government to contribute $3,071,000 to the construction project, for a building of a total area of 1,060 square metres (corresponding to a net area of 795 square metres) (Exhibit 18). The CSFTN-O had expressed its approval of this project (Exhibit 16).

[24] In response to this request, the federal government informed the GNWT of its intention to contribute $2,600,000.00 to the project.

[25] The GNWT therefore revised the project on the basis of the total budget that would be available, developing a project for the construction of a smaller building. The GNWT asked the CSFTN-O to approve the revised project so that it could proceed, and the CSFTN-O did so (Exhibits 20 and 130).

[26] During the planning process for this project, several meetings were held in Hay River with the architects, the CSFTN-O commissioners representing Hay River and government representatives. Parent information sessions were also held.

[27] Construction began in 2004, and École Boréale opened in September 2005. That year, 68 students were enrolled, from kindergarten to Grade 8.

[28] As a result of the interlocutory injunction granted by the Court in 2008, the GNWT was obliged to provide École Boréale with three extra classrooms in time for the beginning of the 2008–2009 school year. There were few options in Hay River. The GNWT rented rooms in a hotel, the Ptarmigan Inn, located about a kilometre away from École Boréale. About 20 students attended classes there in the 2008–2009 school year.

[29] In addition, the GNWT purchased and had installed three new modular classrooms. Their installation was completed in time for the beginning of the 2009 school year.

2. French language instruction program eligibility criteria

[30] The eligibility criteria for the French language instruction program have varied considerably since the program was created. In the first few years, there was no established policy.

[31] In late summer 2001, the school board held a retreat attended by several Board members, members of the management teams of both schools and the superintendent of the school board. The topics of discussion at this retreat included the development of a policy establishing the program admission criteria.

[32] The CSFTN-O officially adopted its admission policy (Exhibit 13) in 2002. The policy reads as follows:

> [TRANSLATION]
>
> CLIENTELE AND PROGRAM ELIGIBLITY
>
> Given the high rate of assimilation of Francophones in the NWT and the desire of the CSFD [the Commission scolaire francophone de division] to redress this assimilation, the CSFD sees its potential clientele as being:
>
> - Pre-kindergarten-age children enrolled in a francization program;
> - Kindergarten to Grade 12 students;
> - Students that fulfill the eligibility criteria but who are not participating in these programs;
> - Adults, native Francophones or members of a mixed conjugal relationship, interested in a francization or literacy program.
>
> Every student who fulfills the above eligibility criteria and who resides within the CSFD's territory of jurisdiction has the right to enrol in French-language programs offered by the CSFD, without cultural restrictions.
>
> - Any child of a right holder, as defined by section 23 of the *Canadian Charter of Rights and Freedoms*
> - Children of third-generation Francophones (sworn or notarized statement)
> - Children of permanent residents who speak and understand French
>
> Moreover, to meet the specific needs of Francophone communities outside Yellowknife:

> - Children of non-right holders who will participate in and complete a pre-kindergarten francization program will be eligible for the kindergarten program *and, afterwards, the full education program offered by the Board.*
>
> To ensure that children enrolled in the French school develop their Francophone identity, the number of non-right-holding students in this category should not exceed 20% of the school's student body.

[33] This admission policy was in effect from 2002 until July 2008, when the Minister's directive was adopted. The Minister's directive reads as follows:

> [TRANSLATION]
>
> (1) With the exception of the provisions set out in subsection 2, no new student may be enrolled in a program of French first language instruction unless the Commission scolaire des Territoires du Nord-Ouest (the Commission scolaire) has verified that the student is eligible for this program under section 23 of the *Canadian Charter of Rights and Freedoms*.
>
> More explicitly, a new student cannot be enrolled in a program of French first language instruction:
>
> (a) if he or she is of Francophone descent but unable to provide evidence supporting his or her eligibility for French first language instruction, under section 23 of the *Canadian Charter of Rights and Freedoms*; or
> (b) if he or she is not a Canadian citizen;
>
> (2) The Minister may approve the enrolment of students who are not eligible for the program of instruction under section 23 of the *Canadian Charter of Rights and Freedoms*.
>
> (3) The Commission scolaire must verify the eligibility of each new student to be enrolled in a program of French first language instruction, document its eligibility verification process and retain the documents provided by the student's parent(s) or guardian(s) to prove the student's eligibility. Information on students' eligibility must be transmitted to the Department of Education, Culture and Employment upon request within a reasonable timeframe.
>
> (4) The Commission scolaire must provide the Department of Education, Culture and Employment, in writing, with the procedure used to verify students' eligibility for enrolment in a program of French first language instruction.

[34] A certain number of enrolment permission requests were made to the Minister in accordance with section 2 of the directive. Some were granted, and others denied.

[35] In 2009, the CSFTN-O adopted a new admission policy (Exhibit 114) and sent it to the Minister. The policy set out two program admission types. The first type includes people covered by section 23, who are entitled to enrol their child in the program. The second admission type is available only upon school board permission and covers several categories of individuals: Canadian parents with a Francophone Canadian ancestor; Canadian parents who speak French or who speak neither French nor English; and Canadian parents wishing to establish an authentic link to the Francophone community (the total number of students in this category cannot exceed 10% of the school's total student body).

[36] Appended to the policy is an elaborate interpretation document that defines the various categories in more detail and lists the factors that must be considered when enforcing the policy on enrolment permissions. As the Minister's directive was still in effect, this admission policy was not implemented.

III) EVIDENCE

[37] As I mentioned previously, the parties submitted common evidence related to both this proceeding and to file CV2005000108. Some of the testimony and exhibits entered into evidence concern one or the other proceeding more specifically, but several concern both. The following summary covers aspects of the evidence that are especially relevant to this proceeding. However, in my deliberations, I have taken all of the evidence into account.

A. The Plaintiffs' evidence

1. Overview of the testimonies

a. Gérard Lavigne

[38] Mr. Lavigne, who is from Alberta, has spent his career teaching in primary and secondary schools in that province. He has taught classes for English speakers as well as French immersion programs and French first language instruction programs.

[39] Mr. Lavigne became superintendent of the CSFTN-O school board in August 2002, a position he held until 2007. He was therefore involved in discussions between representatives of the CSFTN-O and the Department of Education about the École Boréale construction project. He no longer held his position when this proceeding was instituted.

[40] When Mr. Lavigne took office, the CSFTN-O had just been through some difficult times. It had been established in 2001, and in the fall of that year, its superintendent died in an accident. The CSFTN-O 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.

[41] 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 both schools managed by the CSFTN-O and some English schools. The infrastructure of the English schools was comparable to what he had seen in schools in Alberta during his career. With regard to the schools managed by the CSFTN-O, he felt that the facilities of the Yellowknife school were incomplete and those of the French school in Hay River were inadequate.

[42] École Boréale had just been given a separate space, having moved that fall into portable classrooms, but those classrooms were old and damaged. During his visit, the school's staff asked Mr. Lavigne whether the CSFTN-O could buy paint so that they could repaint the modular classrooms themselves over the summer.

[43] Mr. Lavigne and his executive committee decided that the CSFTN-O should develop a long-term strategic plan to identify the CSFTN-O's needs and in order to do that, the situation on the ground had to be closely examined. A consultation process was launched with the Francophone community. A researcher was hired for this purpose. The researcher conducted extensive consultations and eventually issued a report entitled *Vision 20-20* (Exhibit 11). The CSFTN-O adopted this report as its strategic plan.

[44] The *Vision 20-20* report was sent to a number of organizations, including the Department, in July 2003 (Exhibit 19). It then served as a basic reference for the CSFTN-O in its negotiations with the government.

[45] In the fall of 2003, the CSFTN-O decided to submit its requests to the government in a more targeted manner. A document entitled *L'égalité des chances, l'égalité des résultats* [equality in opportunity, equality in results] (Exhibit 24) was 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 to prepare this document together with some other information, including references to case law on section 23 of the Charter. This document was sent to the Minister and to 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.

[46] Following its consultation process, the CSFTN-O determined that its most urgent school infrastructure needs were to build a permanent school in Hay River and an extension for École Allain St-Cyr in Yellowknife. When it contacted the Department of Education, the CSFTN-O highlighted these needs many times, as shown in the correspondence entered into the evidence. As the CSFTN-O's superintendent, Mr. Lavigne was in regular contact with Department of Education officials. At the same time, André Légaré, who was the CSFTN-O chair, also kept the Minister up to date on the organization's position.

[47] Mr. Lavigne explained that there were a number of meetings of CSFTN-O and government representatives regarding the two schools under the school board's jurisdiction. During those meetings, the government representatives never disputed the content of the reports submitted by the CSFTN-O. Mr. Lavigne believed that they were aware of the problems and were seeking solutions for them. In particular, they agreed to take steps with the Department of Canadian Heritage to obtain financial assistance for the projects related to these schools.

[48] Mr. Lavigne participated in planning meetings for the new Hay River school. He acknowledged that the CSFTN-O had approved the revised project which provided for the construction of a smaller building, given the budget available. But

he explained that the CSFTN-O was under pressure because it wanted to avoid keeping the children in the portable classrooms for too long.

[49] In his opinion, this is why the CSFTN-O decided to accept the project as it was. However, the CSFTN-O suggested that, in the planning and design stage, the structure and systems be designed in such a way as to allow an expansion. He said that the Department's representatives agreed with this approach. He believed that the CSFTN-O's intention was that the GNWT would continue with another phase to build a gymnasium and then additional classrooms. Mr. Lavigne said that the CSFTN-O's position had always been that École Boréale should be designed so that it could eventually offer a full educational program from kindergarten to Grade 12.

[50] The students in the French first language program were already using the gymnasiums in the English schools. It was expected that, once the new school was built, access would continue to be provided. The DEA had informed the CSFTN-O in 2002 that gym time given to the CSFTN-O would have to be allocated according to the needs of the English schools and that those schools would maintain priority at all times. (Exhibit 98).

[51] According to Mr. Lavigne, the CSFTN-O informed the Department of its dissatisfaction regarding the gym access of École Boréale's students. The time blocks allocated to them for extracurricular activities were always very early in the morning. The CSFTN-O representatives informed the Minister that they had understood that a written protocol of use would be developed and they considered that it was important to do so (Exhibit 16). According to Mr. Lavigne, such a protocol was never developed.

[52] Mr. Lavigne had not been hired yet when a retreat was held at which the CSFTN-O's admission policy was developed, but he had taken office by the time the policy was officially adopted and implemented. According to him, the provision on admitting Anglophones who had completed the francization program was included to take into account the situation at Hay River and to reverse the effects of assimilation.

[53] Mr. Lavigne acknowledged that the CSFTN-O had never required parents who said they had French ancestors to submit a sworn statement to that effect, despite the fact that the admission policy included this requirement.

[54] He also specified that, during the period that he was employed by the CSFTN-O, he never heard any complaints from a right holder parent concerning the CSFTN-O's admission policy.

[55] Mr. Lavigne said that, to his knowledge, the 20% limit provided for in the admission policy had never been exceeded.

[56] From time to time, he received a call from the school's administration about certain registration applications. He gave the example of a situation where a student had been in an immersion program for a few years, had moved to Hay River and wanted to enrol at École Boréale. After a review, the CSFTN-O decided that the student could register because the family had been subject to a certain francization process, even though the case was not covered by the admission policy. Mr. Lavigne said that this type of situation did not happen often.

[57] Mr. Lavigne confirmed that he was aware that relations with the DEA were sometimes difficult. In particular, there was an incident at the end of 2004 concerning a science fair organized each year by one of the Hay River schools. Students from École Boréale had participated in the past. In December 2004, the principal of École Boréale was notified that the school's students would not be invited to the science fair that year. The CSFTN-O wrote to the DEA to ask for this decision to be overturned.

[58] In his reply (Exhibit 39), the DEA's chairperson confirmed that students from École Boréale would not be invited to the science fair, in accordance with the policy that only DEA students could participate in the DEA's extracurricular activities. He also explained the DEA's decision regarding École Boréale in a more general way:

> There is a related issue that pertains to the Policy on Educational Partnerships, specifically, the entry criteria for the École Boréale which permits 20% of its enrolments each year to be offered to non-right holders as described in the Canadian Charter of Rights and Freedoms. This issue dates back to the initial establishment of the French First Language program in Hay River. The Hay River

> DEA has struck a special committee entitled the FFL Committee in 1998 which filed a report with Hay River DEA dated May 19, 1999. From that committee report, came a recommendation, which became a recommendation passed by the DEA on June 9, 1999, which states as follows:
>
> > That the FPG (French Parent Group) restrict the program to right holders only, as defined in the Charter. An exception will be made for children who are enrolled in the French First Language grades 1-3
>
> It has long been recognized by the Hay River DEA that offering the program to non-right holders puts the École Boréale directly in competition with our school district. For every non-right holder who enters your program, we lose a significant amount of funding. This adversely affects our programming, staffing levels and has other education repercussions as. [sic]
>
> Accordingly, the Hay River DEA has directed me to advise you that so long as the entry criteria for the École Boréale allows entry for non-right holders into your program, we will be limiting our dealings with École Boréale.

[59] On cross-examination, Mr. Lavigne was asked about the process leading to the *Vision 20-20* document. Counsel for the Defendants suggested that the objective of the exercise was to develop an advocacy tool. Mr. Lavigne did not agree with this suggestion. He said that the CSFTN-O wished to obtain a good understanding of the situation on the ground, in order to identify and prioritize needs and develop a strategic plan for the short, medium and long terms.

[60] With regard to the CSFTN-O's managerial authority, Mr. Lavigne acknowledged that the CSFTN-O was in the same situation as all other school boards in the NWT, except for the other two school boards in Yellowknife, in that it did not own its infrastructure or have the authority to collect income tax. He also acknowledged that the two school boards in Yellowknife, although they owned their own buildings, could not initiate infrastructure projects in their schools because such projects had to be included in the government's Capital Estimates before proceeding.

[61] Mr. Lavigne was cross-examined about the 2002 admission policy and the rationale for the 20% limit. It was suggested to him that the purpose of the limit was to preserve the school's linguistic and cultural integrity to prevent it from becoming an immersion program. Mr. Lavigne believed that the objective was to fulfil the school's mission. However, he acknowledged that a major objective of

the limit on the number of registrations of Anglophone children was to preserve the school's French character and avoid changing it into an immersion school.

[62] He explained that, in fact, the main reason for the policy was not the students having different language skills, since many children of right holders need to be francized because French is not the language they speak at home. Therefore, in Mr. Lavigne's view, the school's mission was the same for both right holders and non-right holders. Mr. Lavigne said he did not know the precise reasons for the 20% limit in the 2002 policy.

[63] Mr. Lavigne explained that the policy was applied on a day-to-day basis by the school's administration. He confirmed that, when calculating the 20% ceiling, once a student was registered at the school under the francization category, the CSFTN-O considered that the student's brothers and sisters had an absolute right to be enrolled at the school under section 23. If they were enrolled at the school, they were not counted for the purpose of the 20% ceiling. Mr. Lavigne also explained that students enrolled because they had participated in a francization program were considered children of right holders after spending one year in the program. From that time on, these children were no longer counted when calculating the 20%.

[64] Mr. Lavigne acknowledged that CSFTN-O did not keep a list or table in order to verify at any given time whether the 20% ceiling was met. However, he said that when the population was about 50 students, it was a simple matter to obtain a good picture of the situation. Mr. Lavigne relied on the school's administration.

[65] Mr. Lavigne was cross-examined about the admission policy adopted in 2009. He said that he had read it, but he was not as familiar with it as the one he had implemented. He did not participate in drafting the 2009 policy. He acknowledged that, under the new policy, the percentage of the school's students enrolled under the francization program could not exceed 10%.

[66] With regard to the process which led to the construction of École Boréale, Mr. Lavigne said that there was always good co-operation from the government.

He acknowledged that the planning and construction had proceeded quickly, and that the school was built in such a way as to allow for a possible expansion.

[67] It was suggested to Mr. Lavigne that the intention was to build an extension if the numbers justified it. Mr. Lavigne answered that, in his opinion, it was a question of "when" the numbers would justify it, not "if" they ever justified it. He explained that the CSFTN-O was willing to agree to the construction of a primary-level school as a first step because it was urgent to get the students out of the portable classrooms.

[68] He acknowledged that there was no guarantee or formal commitment from the GNWT to build an extension. However, he noted that the schematic plans had provided for building systems to serve a school that was double the size of the existing one.

[69] He acknowledged that the CSFTN-O had approved the building's design, including the wide open space in the atrium. He explained that the design had to take into account the fact that the federal government was a major financial contributor, so the building had to provide space for community activities.

[70] I accept Mr. Lavigne's testimony. His testimony was precise, clear and measured. He answered all the questions he was asked, both in the examination-in-chief and on cross-examination. Many aspects of his testimony are substantiated by documentary evidence. His credibility was not really called into question. In my opinion, his testimony was reliable and trustworthy.

b. André Légaré

[71] Mr. Légaré chaired the CSFTN-O from 2003 to 2008. He held the position when the *Vision 20-20* and *L'égalité des chances, l'égalité des résultats* reports were prepared.

[72] André Légaré explained that the funding for the construction of École Boréale was approved in 2004, which was when they started building. There was not enough funding available to construct a building corresponding to the CSFTN-O's demands in the reports it submitted to the government.

[73] After the school opened in 2005, Mr. Légaré continued to call attention to the need for an expansion. The CSFTN-O asked for an additional four or five classrooms and a gymnasium so that École Boréale would be comparable to the schools of the Anglophone majority in Hay River.

[74] He read the report prepared by Donald Kindt in 2008 about École Boréale. He noted deficiencies in the report, the most significant being the comments made about the number of children of non-right holders who attended École Boréale. In his opinion, there were also other, less serious, errors in Mr. Kindt's report.

[75] Mr. Légaré stated that there was considerable discussion about a possible expansion of École Boréale. In his opinion, the government had made commitments but had not kept them.

[76] Mr. Légaré was chair of the CSFTN-O when this proceeding was instituted and when the interlocutory injunction was granted. The additional space resulting from the implementation of the Order was enough, in his opinion, to meet the school's immediate needs but not all of its needs.

[77] As Mr. Lavigne had done at an administrative level by corresponding with officials at the Department of Education, Mr. Légaré often wrote to the Minister to inform him of the CSFTN-O's position on its infrastructure needs. In particular, in March 2004, he wrote to the Minister to express the CSFTN-O's disappointment with the government's response to the *Vision 20-20* report (Exhibit 116). Many other letters were also sent about the CSFTN-O's demands related to the Yellowknife and Hay River schools.

[78] Starting at the end of 2007, and then in 2008, in the months prior to the adoption of the directive, there was a lot of correspondence between Mr. Légaré and the Minister about the space problems at École Boréale.

[79] In September 2007, Mr. Légaré wrote to the Minister to ask the government to provide portable classrooms to deal with the urgent lack of space at École Boréale (Exhibit 131). The Minister answered in December 2007 that it was too late to provide portable classrooms for the 2007–2008 school year, but that a consultant had been hired to review the school's needs (Exhibit 120).

[80] Mr. Légaré immediately replied to the Minister's letter and reiterated that the situation was urgent, because École Boréale had almost 100 students and the lack of space was critical (Exhibit 121). He sent another letter in January 2008, asking the Department to install portable classrooms at the beginning of the 2008–2009 school year (Exhibit 122).

[81] Mr. Légaré wrote again to the Minister in February 2008, following a meeting that he had with the CSFTN-O (Exhibit 123). In the letter, he asked the Minister to make sure that the expansion projects of the CSFTN-O's two schools would be included in the government's Capital Estimates.

[82] To address the space needs for the 2008–2009 year, the GNWT proposed that École Boréale temporarily use space in the other Hay River schools. Mr. Légaré wrote to the Deputy Minister in April 2008 to convey the CSFTN-O's position on this proposal (Exhibit 124). The CSFTN-O asked—if it had to be done that way—that the space be at the Diamond Jenness School, that it be a physically distinct space and that École Boréale's students have equal access to the gymnasium and science laboratory with separate hours from those used by the Anglophone students (Exhibit 124).

[83] On June 10, 2008, Mr. Légaré received a letter notifying him of the Minister's intention to draft a directive governing access to the program (Exhibit 125). Mr. Légaré answered the Minister on June 18, expressing the CSFTN-O's disagreement with this directive (Exhibit 126).

[84] Mr. Légaré also received a copy of a letter dated June 26, 2008, sent by Ann Pischinger, the chairperson of the South Slave Region school board (South Slave Divisional Education Council), to the Minister, in support of the DEA's request that the Minister intervene in order to limit access to the French language instruction program to children of right holders. Ms. Pischinger also asked the Minister to adopt a directive to this effect as soon as possible (Exhibit 127).

[85] Mr. Légaré also received a copy of a letter dated June 19, 2008, sent to the Minister by Duff Spence, the chairperson of Yellowknife Education District No. 1, one of the Anglophone school boards in Yellowknife. In this letter, Mr. Spence expressed his school board's support for the proposed directive.

[86] On July 7, Mr. Légaré received a letter from the Minister confirming the implementation of the directive (Exhibit 128).

[87] According to Mr. Légaré, the Minister's directive had a significant impact. A number of parents who had children enrolled in the francization program for 3- and 4-year-olds and wanted to enrol their children in École Boréale for kindergarten were denied this option. Most of the requests for permission to enrol children of non-right holders in École Boréale were refused. These children were enrolled in other schools. Mr. Légaré believes that it would be difficult to reintegrate these children after they had spent a few years in an English school environment.

[88] In 2007 and 2008, the CSFTN-O had already had discussions about a possible review of the 2002 admission policy. Following the implementation of the Minister's directive, the review work continued. The CSFTN-O approved the new policy in 2009.

[89] One of the policy changes was to limit to 10% the percentage of students enrolled with permission in the category of children whose Anglophone parents had chosen to establish a genuine link with the Francophone community. Mr. Légaré explained that by making this change, the CSFTN-O had wanted to take into account the Minister's directive and the fact that the vitality of École Boréale had been strengthened since the beginning of the French language instruction program.

[90] The CSFTN-O's new policy was sent to the Minister on April 21, 2009, by Suzette Montreuil, who succeeded Mr. Légaré as chairperson of the CSFTN-O (Exhibit 129). The CSFTN-O hoped that the Minister would withdraw his directive and allow the CSFTN-O to implement its new policy. However, this did not happen.

[91] When cross-examined, Mr. Légaré acknowledged that the CSFTN-O had approved the proposed construction of École Boréale. He explained that the CSFTN-O supported the project, given the budget available, but had always hoped that there would eventually be a fully equipped school. He said that this wish was reflected in the plans and models which were prepared during the planning process.

[92] Mr. Légaré acknowledged that the Minister never officially agreed in his correspondence to build an extension for École Boréale but, in his opinion, there seemed to be a positive attitude with respect to the CSFTN-O's requests and an openness to approaching the federal government for funding.

[93] Mr. Légaré was cross-examined about the increase in the number of pupils at École Boréale. He acknowledged that this increase was mainly due to the registration of children not contemplated by section 23.

[94] Mr. Légaré acknowledged that he had received a letter from the Minister in May 2008 noting that no approval had been received for funding a potential expansion (Exhibit 132).

[95] He also acknowledged that he received a letter from the Minister in February 2008 in which the Minister expressed concern about the number of children of non-right holders who attended École Boréale (Exhibit 133). It was suggested to him that the CSFTN-O was thus aware before June 2008, when the proposed directive was announced, that the Minister was concerned about the number of children of non-right holders at École Boréale. Mr. Légaré said that he had not expected that the Minister would issue a directive on this subject.

[96] Mr. Légaré was also cross-examined about his knowledge of certain details related to the implementation of the directive and the procedure to be followed to process requests for permission to enrol, but he was unable to provide very detailed answers. According to him, the people [TRANSLATION] "on the ground" were those who were most directly involved in processing these requests.

[97] Mr. Légaré's testimony is amply corroborated by the documents entered into evidence. His cross-examination provided details about some subjects but did not call into question either the credibility or reliability of his testimony. I consider his testimony to be credible and trustworthy.

c. Lorraine Taillefer

[98] Ms. Taillefer was born in Quebec and studied education. She moved to Hay River in 1990 and has held various teaching positions in the community. She

worked at École Boréale as the principal and as a teacher from 2001 until she left Hay River in 2006.

[99] She talked about the Hay River community. According to her, there are many Métis in this community, with a large number of adults who do not speak French but whose parents speak it.

[100] She talked about her involvement with the Francophone community, which first occurred through the Association franco-culturelle de Hay River. She sat on its board of directors. The Association held weekly activities and sometimes organized larger gatherings for special occasions. Ms. Taillefer was surprised to learn that there were many Francophones in the community who attended the activities, even if they did not see each other the rest of the year.

[101] The first francization program, established by the Association franco-culturelle, was very popular. Ms. Taillefer explained that there were many people in Hay River who were old-stock Francophones but had lost their ability to speak French. Many of them had children. There was, according to her, a strong interest in revitalizing the Francophone community.

[102] Ms. Taillefer was involved in various aspects of the development of the French language instruction program. She became the program's director when it began in 1998–1999.

[103] She talked about the benefits of moving the school into portable classrooms in 2002–2003. The portable classrooms were old, but the parents were very happy to have the children in a single, cohesive space. They felt at home.

[104] The francization program was also taught in the portable classrooms. Ms. Taillefer explained that both the school and the parents wanted the school- and preschool-age students to be together.

[105] In her opinion, the atmosphere in the school when it was in the portable classrooms was excellent. The cohesiveness of the space and the way the program was administered offered advantages. The language of communication at École Boréale was French in the school itself, in written communications with parents and at meetings. Some parents who did not speak French experienced some

difficulties. However, to help those parents, the school developed a system to match them with Francophone parents.

[106] According to Ms. Taillefer, the impact on the parents was very positive. A number of the parents, who had lost their French, found themselves in an environment where they could readopt the language. Ms. Taillefer gave the example of an old friend with whom she had always spoken English, who now talked to her in French in connection with the school.

[107] Ms. Taillefer was not directly involved in negotiations to develop plans for the construction of the new building. The CSFTN-O was responsible for the negotiations. However, she voiced her opinions about the school's needs to the CSFTN-O.

[108] She believed that the new school would quickly run out of space. The new building would have five classrooms, and the year before it opened, the school was already using all four portable classrooms. The school was then offering kindergarten to Grade 7. With a level being adding the following year, she believed that all five classrooms in the new building would have to be used from the outset.

[109] She talked about the gap between a school's theoretical capacity (calculated based on a certain number of students per class) and the reality in a small school with relatively few students divided among several different grades.

[110] She participated in information meetings about the school where the topic of conversation included additional space to be added in the future, among other things. She saw architects' scale models (photos of these scale models were entered into evidence, Exhibit 88) and plans showing possible additions, including a gymnasium (Exhibit 38). She remembered that the best space configuration for additional classes and the best place to build the gymnasium had been discussed during meetings with architects.

[111] Ms. Taillefer testified about the space in the new school and the situation up to when she left in 2006. According to her, it was an attractive school, but it had layout deficiencies, particularly with regard to specialized space. In her opinion, more space was needed for storage, and the school needed private offices.

[112] She also talked about problems that occurred with the use of gymnasiums of other schools. The superintendent for the South Slave Divisional Education Council, Curtis Brown, had been very co-operative and had instructed the local administration to negotiate scheduling with École Boréale, but this did not happen. There were no negotiations. The other schools organized their schedules and gave École Boréale the remaining time slots, which were not always adequate. École Boréale could use the space but was not allowed to use the equipment. École Boréale could not use the gymnasium at the Princess Alexandra School for kindergarten to Grade 3, so those levels had to use the gym at the Harry Camsell School, which was a little further away.

[113] Difficulties also occurred with using the other school's gymnasium for extracurricular activities. In 2002–2003 and 2003–2004, before École Boréale moved into the new building, access was denied. In fall 2004, it was granted. However, other requests to use the gymnasium (for meetings with parents or shows) were refused.

[114] Ms. Taillefer testified about the development of the CSFTN-O's admission policy. She participated in a retreat during which the policy was developed. As I mentioned in paragraph 32, this policy adopted slightly different approaches for the two schools. Ms. Taillefer explained that the policy applicable outside Yellowknife was aimed at acknowledging the high level of assimilation in Hay River and the importance of revitalizing the Francophone community. The objective was to allow Anglophones who wanted to join the Francophone community to participate in this revitalization.

[115] Ms. Taillefer explained how the registration procedure worked when she was the principal. Most of the students who were enrolled had taken the francization program in pre-kindergarten and then entered in kindergarten.

[116] At first, when the school was under the DEA's jurisdiction, it used the Princess Alexandra School's registration form, which was eventually translated. It did not ask any questions on section 23 of the Charter but confirmed that the parents wanted their children to take the program in French. After adopting the admission policy, the school used the form developed by the CSFTN-O. The form has a space where the parents indicate whether or not they are right holders and

confirm that they wish to avail themselves of the right to participate in the program.

[117] Ms. Taillefer only checked a parent's status when she deemed it necessary. She often had to help the parents complete the form because many of them were Anglophones. Ms. Taillefer confirmed that she was always careful not to exceed the 20% limit established by the admission policy.

[118] Ms. Taillefer said that when she left in 2006, the school was crowded, especially at the kindergarten level.

[119] The Defendants objected to certain aspects of Ms. Taillefer's testimony about conversations she had with some students about their reasons for having left École Boréale. I will cover this issue later in the section on admissibility issues.

[120] Ms. Taillefer discussed the relationship between the Francophone parents' committee and the DEA. In her opinion, these relations were always very difficult. At the beginning of the program, when it was managed by the DEA, the parents' committee had asked if it could manage certain educational aspects of the program and the registration, but the DEA had refused to give it these powers. This was one of the reasons why the Conseil scolaire francophone decided to join the CSFTN-O.

[121] There were also problems when it came to selecting the location where the school would be built. The DEA's schools were grouped in the same sector of the community, and the CSFTN-O wanted its school to be part of this school district. The CSFTN-O asked the DEA to support the choice of this site (Exhibit 85). The DEA disagreed because it wanted the space to remain available to it for long-term planning (Exhibit 100). However, the government decided that the French school would be built on this site anyway.

[122] There was an incident related to moving the Princess Alexandra School's playground in order to build École Boréale. The CSFTN-O had apparently agreed to set up the playground somewhere else, then it reneged on its decision. This incident was mentioned in an email sent by Mr. Brown to Mr. Lavigne (Exhibit 94).

[123] Ms. Taillefer's testimony on the incident was rather vague. She remembered that there was a reason why the CSFTN-O had reneged on its decision about moving the playground, but she did not remember the details.

[124] The issue of the criteria for admission to the French language instruction program seems to have always been contentious. The DEA disagreed with allowing people not contemplated by section 23 to have access to the French language instruction program. This aspect of Ms. Taillefer's testimony is confirmed by certain documents issued by the DEA expressing its disagreement with the policy, including the letter of January 2004 that I mentioned earlier in paragraph 58.

[125] Ms. Taillefer explained that during the 2003–2004 school year, a student from École Boréale had asked to join a sports team at a DEA school. The DEA refused and adopted a policy under which only students from DEA schools could participate in extracurricular activities at those schools.

[126] Ms. Taillefer spoke about the incident related to the participation of École Boréale students in the science fair. She said that the incident sharply divided the community.

[127] Ms. Taillefer was cross-examined about the difficult relations with the DEA. It was suggested that the difficult relations were not only the DEA's fault. She was mainly questioned about the incident related to moving the playground. She maintained that relations with the DEA had been difficult from the beginning.

[128] With regard to the science fair incident, she acknowledged that the CSFTN-O had not brought it to the Minister's attention. (However, on redirect examination, she said that there had been complaints and the issue had been raised as part of the business of the Legislative Assembly.)

[129] In response to a question about funding losses absorbed by the DEA because the children of non-right holders were admitted into École Boréale, Ms. Taillefer said that, at the outset, the DEA did not lose funding, but it still objected to the admission policy because the DEA considered that children of non-right holders were [TRANSLATION] "its" students.

[130] Ms. Taillefer confirmed that the CSFTN-O had approved the plans for École Boréale.

[131] She was also cross-examined about the rationale for the 20% limit in the CSFTN-O admission policy. She replied that she was not sure because she did not have a clear recollection of all the discussions on the topic during the 2001 retreat, but the reason may have been to prevent it from becoming an immersion school.

[132] It was suggested to her that the possibility of admitting Anglophone children who had taken the francization program had been included in the Hay River policy because the school could not survive without them. She denied this and was cross-examined about an extract from her summary of evidence (submitted to the Defendants before the trial in compliance with the rules of procedure) which referred to the possibility that the school could not survive without a broader admission policy. She stated that the summary of evidence was incomplete in this regard.

[133] Ms. Taillefer said that the policy of the CSFTN-O was to give priority to right holders and that Anglophones who enrolled their children in the pre-kindergarten francization program were notified that their children might not be admitted to École Boréale for kindergarten. However, she was never forced to refuse access to an Anglophone child who had taken the francization program.

[134] Counsel for the Defendants questioned Ms. Taillefer about the student lists for the years when she was the principal. She confirmed Mr. Lavigne's explanation about the status of the brothers and sisters of a student admitted with permission based on francization, and the fact that the students' brothers and sisters were not counted in the calculation of a 20% ceiling.

[135] Ms. Taillefer acknowledged that some right holder parents did not send their children to École Boréale. However, the school had never conducted a recruiting campaign. She acknowledged that the lack of space that she had described at the kindergarten level seemed not to have had a negative impact on recruiting.

[136] In my opinion, the credibility and reliability of Ms. Taillefer's testimony were not seriously affected by her cross-examination. In my opinion, the difference between the content of the summary of her testimony and what was said at the trial

did not compromise the reliability of her testimony. Considering all of her testimony about the development of the admission policy at the retreat in 2001, it seems clear to me that she does not have a clear and detailed memory of these discussions. It would have been surprising had it been otherwise.

[137] With regard to the enforcement of the policy, she explained how and why she had proceeded, and nothing indicates that she did not act in good faith. Her understanding of the way the policy was supposed to work for purposes of calculating the 20% accords with the testimony of the other witnesses who discussed it.

[138] With regard to difficulties with the DEA, the documents speak for themselves. Even if we accept that certain personality conflicts could have contributed to the difficulties, and even if we assume that the CSFTN-O made certain errors regarding the playground incident, the main element of Ms. Taillefer's testimony on this subject, namely, that relations were difficult, does not seem to be contested.

[139] I find that Ms. Taillefer's testimony is credible and reliable.

d. Michael St. John

[140] Mr. St. John is from Ontario. He is a right holder under section 23. He studied education at university. He is married and has five school-age children.

[141] Mr. St. John moved to Hay River in 1993. He worked for an organization that offered continuing education programs for adults who needed to upgrade their education.

[142] Mr. St. John was a member of the DEA from 1998 to 1999. He was there when the pilot project for the French language instruction program was presented to the DEA. According to him, most of the DEA's members were not in favour of establishing this program.

[143] Mr. St. John got involved on the parents' committee when the French language instruction program began. He said that the relations were very difficult with the DEA. The parents' committee had no decision-making power. The parents' committee made requests, which in his views were very basic, to provide

support for students and professors, but those requests were rarely accepted. The members of the parents' committee attended the meetings of the DEA, but they did not have a right to vote and were only present as observers, even when the discussions touched on the French language instruction program.

[144] Mr. St. John said that the DEA had always been against giving non-right holders access to the French language instruction program. However, according to him, there was a lot of support in the community for setting up the program.

[145] He attended the retreat when the admission policy was developed. The policy's objective was to make up for the [TRANSLATION] "lost generations," i.e. people who had Francophone grandparents but who were not right holders themselves as a result of assimilation. The objective was also to allow Anglophones to integrate into the Francophone community and contribute to its revitalization. According to Mr. St. John, this approach was helpful in developing the school program, because not having enough students caused teaching problems.

[146] Mr. St. John testified about the number of right holder families in Hay River. He thought that there was a total of about 100 right holder children in Hay River. As the father of five school-age children, he knew a lot of families in the community.

[147] Mr. St. John was a member of the Francophone divisional education council in fall 2001 when a request was made for portable classrooms and for the eventual construction of a separate school. He explained that, despite the rundown condition of the portable classrooms, the parents preferred to have the school in a separate space in order to create a linguistically homogeneous school environment.

[148] According to Mr. St. John, at the time, what the parents said they needed was a separate and autonomous school that could provide a comprehensive program at the primary and secondary levels. The parents also wanted the building to house a francization program and a daycare. In 2002–2003, these requests were mentioned in the consultation process leading to the *Vision 20-20* report and were eventually incorporated into *L'égalité des chances, l'égalité des résultats*.

[149] Mr. St. John was one of the people consulted about the design of the building to house the new school. He explained that, from the CSFTN-O's point of view, the school plans were not for an entire school and would only meet needs of a primary school. However, at that time, the students were in portable classrooms, and the situation was becoming urgent. This is why the CSFTN-O agreed to the plans as they were. According to Mr. St. John, the parents wanted to get the students out of the portable classrooms; they thus agreed to proceed with what they considered to be the first construction phase.

[150] Mr. St. John attended all the planning and design meetings. The minutes of the first meeting with the architects in December 2003 confirmed that he had expressed the opinion that for the school to be a success it had to offer teaching up to Grade 12 and have a gymnasium (Exhibit 101).

[151] He explained that it seemed clear to him in the meetings that a future expansion should be part of the planning. For example, when planning the ventilation and sewage systems and choosing where to put the playground, the plans were made to take into account a possible expansion. There were also meetings where plans or models showing additional space were presented (Exhibits 38 and 88). There were always government representatives at those meetings.

[152] Mr. St. John interpreted all of this to mean that the government accepted the CSFTN-O's position that the building would need to be expanded fairly soon in order to meet the Francophone community's needs.

[153] At the time, he also made registration projections (Exhibit 104). According to these projections, École Boréale would quickly reach its maximum capacity. The CSFTN-O also prepared a document containing projections (Exhibit 105). In both cases, the projections were that the school intake would be 15 new students each year at the kindergarten level. Mr. St. John said that the CSFTN-O considered this number to be appropriate, given the population pool.

[154] Mr. St. John remembered the visit by Donald Kindt, the consultant hired by the GNWT in early 2008. Mr. Kindt had been hired to study needs at École Boréale and develop an educational plan. Mr. St. John attended a meeting with

Mr. Kindt. They discussed the school's present and future needs, as well as the CSFTN-O's projections and the way in which they were determined. The issue of the admission of children of non-right holders was never raised. Mr. St. John was therefore surprised to see a reference to this subject in Mr. Kindt's report (Exhibit 156). In his opinion, the numbers mentioned in this part of Mr. Kindt's report were incorrect, particularly concerning the breakdown of children of non-right holders in various categories.

[155] Mr. St. John said that when the school opened in September 2005, it was immediately used to capacity. He found that the school had deficiencies and could not meet the children's needs, especially for older children. In particular, he mentioned the lack of a gymnasium and its impact on extracurricular activities.

[156] According to Mr. St. John, the Minister's directive of July 2008 resulted in cutting registrations at École Boréale by approximately 40%.

[157] On cross-examination, Mr. St. John acknowledged that in the request submitted by the CSFTN-O in 2002 for the construction of a French school in Hay River (Exhibit 14), the CSFTN-O's projections were seven registrations per year in kindergarten. He also acknowledged that the project presented did not include either a secondary school wing or a gymnasium.

[158] Mr. St. John also acknowledged that in August 2003, the CSFTN-O had approved the project as submitted at the time by the government. He said that the CSFTN-O's position had changed over time, mainly following the consultation process that led to the *Vision 20-20* report.

[159] It was suggested to Mr. St. John that if this project had not been in the parents' best interest, the CSFTN-O would not have approved it. He replied that the parents' choice was either to continue to wait and leave their children in the old portable classrooms or to accept what was offered at that time with the funds that the two governments were prepared to invest in the project. He said that this was why the approval had been given, but the CSFTN-O believed that the school would be completed later.

[160] Mr. St. John acknowledged that there was no document attesting to the GNWT's commitment to carry out expansion work immediately after the building was opened.

[161] Mr. St. John also acknowledged that if the CSFTN-O had limited admission to the children contemplated by section 23 of the Charter, the school would not currently lack space because the number of children of right holders who attended remained fairly stable over the years. A number of questions were asked about this subject, but he did not always answer clearly. He kept returning to the topic of the school's revitalization role. He also maintained that in terms of the adequacy of space, they had to take into account the number of grades and not only the number of students.

[162] Mr. St. John was cross-examined about a letter that the CSFTN-O sent to the Minister in June 2009, asking that four children be exempted from the application of the Minister's directive (Exhibit 108). In this letter, Mr. Brûlot, the CSFTN-O's superintendent, spoke about the importance of maintaining the student population to guarantee the school's survival. Mr. St. John refused to acknowledge that one of the objectives of the admission of non-right holders was to ensure the school's survival. He said that the objective was to revitalize the minority community.

[163] Mr. St. John's cross-examination was a laborious process at times. Some of his answers were not really related to the question asked. Counsel for the Defendants sometimes had to ask the same question a number of times before Mr. St. John answered it. There are some questions which, in my view, he never really answered.

[164] It is difficult for me to determine whether Mr. St. John found it difficult to understand the questions or if he deliberately avoided answering them. However, because of the way he answered the questions during the cross-examination, I have some reservations about his testimony, and I call into question the cogency of his perceptions about the commitments made or not made by the Defendants with regard to the possible expansion of the school.

[165] On the other hand, many of the things he said are confirmed by the documentary evidence (e.g., the minutes of the planning meetings with the

architects, the correspondence exchanged at various steps in the planning process and the correspondence sent to GNWT before and after the school opened). For this reason, I accept his testimony, particularly regarding the content of the claims made to the government.

[166] Mr. St. John's projections are very different (close to double) from those originally provided by the CSFTN-O when the request for a French school was submitted in 2003. The projections seem to have been founded on his general knowledge of the community. He also said that he had consulted the Hay River telephone directory and noticed that many people had French-sounding names. This type of approach is not very reliable. Also, Mr. St John's projections, like those of the CSFTN-O, appear to assume a 100% retention rate, which is not realistic. For all of these reasons, I find the probative value of the projections to be limited.

e. Patrick Poisson

[167] Mr. Poisson is a teacher at École Boréale. He started working there in 2006. He teaches physical education and health classes from kindergarten to Grade 6, and teaches French to the Grade 3–4 class and to the Grade 7–8–9 class.

[168] For the physical education classes, he uses the gyms in nearby schools. The space used has varied over the years. In some years, he used the Princess Alexandra School's gym for some groups and the Harry Camsell School gym for others. Since 2009–2010, all of the courses have been given at the Princess Alexandra School's gymnasium. Mr. Poisson talked about the inconvenience and problems related to using the other schools' gymnasiums.

[169] The first problem was the lack of flexibility in the schedules. The periods available were determined by the other schools. The blocks of time were in the morning, which he said was not ideal. He believed that mornings were best for teaching academic subjects. If he could choose, he would teach physical education in the afternoon. However, he had no choice in the matter.

[170] He also referred to how much time was wasted in travelling to the neighbouring school's gym, even if it was not far away. He explained that even

five minutes of walking to go to the gymnasium and five minutes to walk back, cumulatively, represents a huge waste of teaching time.

[171] He also explained that he had to carry all of the equipment needed to give the classes because École Boréale did not have access to the other school's equipment.

[172] Mr. Poisson said that municipal facilities could be used from time to time, such as the pool and the skating rink. These facilities were located within 15 minutes' walking distance from the school.

[173] Mr. Poisson also explained that his gymnasium time had once been cancelled without advance notice. As far as possible, he tried to organize outdoor activities; otherwise the only option was to return to École Boréale and give the course in the atrium. The atrium was a large central room surrounded by the classrooms. It was not designed for physical education classes, especially since it was often used as a teaching space.

[174] In terms of extracurricular activities, Mr. Poisson organizes soccer, cross-country running and track and field activities.

[175] Mr. Poisson explained that the teachers' room was in an area that was also used for teaching secondary-level cooking classes.

[176] When cross-examined, Mr. Poisson acknowledged that the physical education curriculum was flexible and allowed them to do all kinds of activities, including several that did not require a gymnasium. He also acknowledged that Hay River had various facilities and programs that he could use with his students.

[177] Counsel for the defence asked him if he had taken steps to obtain various blocks of time for the physical education classes. He replied that as a teacher, he found that he simply had to work with the gymnasium time he was given. However, he said that the school administration was aware of his dissatisfaction with the allocated blocks of time and he raised the question every year, at the beginning of the school year.

f. Sophie Call

[178] At the time of the trial, Ms. Call was École Boréale's principal. She has studied education and taught in various locations before moving to the Northwest Territories. Her first teaching position in the Northwest Territories was at the Aklavik community school, which offered kindergarten to Grade 12 and had approximately 130 students. She worked there during the 2002–2003 school year.

[179] The École Boréale administration hired her to be principal on an acting basis for the 2003–2004 year. Ms. Taillefer was studying for a master's degree that year. Ms. Call really liked the school and stayed on as a teacher until Ms. Taillefer left in 2006. She was then appointed principal.

[180] Ms. Call described the situation at the school when it was located in the portable classrooms. In her opinion, despite the fact that the classrooms were old and too small, the atmosphere was very positive. The parents participated and were very involved. The lack of space became a more serious problem as levels were added.

[181] Ms. Call attended information meetings about the project to build a new school. From these meetings, she understood that the building would house classes from kindergarten to Grade 8. However, the issue of the future expansion was also raised. She remembered that the plumbing and heating systems, for example, were to be designed to accommodate a future expansion. She also remembered that she had seen plans and models showing where the extensions could be located.

[182] Ms. Call did not participate in the planning, but she was a member of the playground committee for a while. She explained that because some of the Princess Alexandra School playground equipment had to be moved during the construction, a committee was set up to determine where to locate the new playground and make decisions about the equipment to be purchased. Ms. Call eventually left this committee.

[183] Insofar as it was this issue that sparked the controversy with the DEA, Ms. Call's testimony did not, in my view, clarify what had happened or what had given rise to Mr. Brown's email of complaint to Mr. Lavigne, to which I referred in paragraph 122.

[184] Ms. Call talked about using the space in the new school in the fall of 2005. The school had five classrooms. The largest one was used for pre-kindergarten and kindergarten; the other four were used for the rest of the students, in groups of two grades each (Grade 1–2, Grade 3–4, Grade 5–6 and Grade 7–8).

[185] For the 2006–2007 year, the space was used in the same way, except for the addition of a Grade 9 level to the Grade 7–8 group.

[186] According to Ms. Call, the space situation became critical in 2007–2008, when a Grade 10 level was added. A teaching space was created in the atrium by installing two false walls. The conditions were difficult for students who had classes in the new classroom located in the atrium. The atrium was a large open space which was very noisy, and all the classrooms opened onto it.

[187] Ms. Call said that with the increase in numbers, some combined grades had a lot of students, which made it more difficult to teach two different grades in the same class.

[188] For the 2008–2009 year, when the school had more space available at the Ptarmigan Inn, it was used for grades 7 to 11, for a total of 21 students. They went back to École Boréale to take some courses that could not be given at the hotel.

[189] The rooms at the Ptarmigan Inn were in the basement and had no windows. There was an exercise room that was open to the public on the same floor as the rooms used for classes, which sometimes caused noise problems. Using the washrooms was also problematic; the school was supposed to have exclusive access by means of a code, but other people used them from time to time.

[190] Ms. Call talked about what she was told, when she arrived at École Boréale, regarding the CSFTN-O's admission policy. Ms. Taillefer and Mr. Lavigne both spoke with her about it. She applied the policy as she understood it. She consulted the school board in certain situations that were not covered by the policy. She refused admission to certain people who were clearly not admissible.

[191] Ms. Call explained the procedure she followed when enrolling students. The procedure was fairly simple for those who had the right to enrol in the program, and it involved filling out a form. The process was longer for those who were

admitted with permission. She explained to parents that École Boréale was not an immersion program, their involvement was very important and everything happened in French at the school. In some cases, parents were less interested once that was explained to them.

[192] For parents interested in enrolling their children in the preschool program, she explained the importance of identity building and the fact that, because of the 20% limit set out in the admission policy, their children might not be admitted to kindergarten even if they had completed the preschool program. Ms. Call said that this made some parents uncomfortable, but a number of them still chose to take the risk.

[193] Ms. Call explained that the preschool program was popular among right holders and non-right holders. She said that the children's language abilities were very similar, whether or not they were the children of right holders, because, very often, French was not the language spoken at home and almost all the children were at the same level and needed to be francized. The vast majority of right holders were in mixed-language relationships, and there were very few households where French was the language spoken at home.

[194] Using the school's records, Ms. Call created a number of tables listing students. The tables indicate each student's name, grade and "status" for the purposes of applying the admission policy and calculating the 20% limit. The tables for 2003–2004 to 2010–2011 are Exhibit 146, but two of the tables (2007–2008 and 2010–2011) contain errors which Ms. Call corrected; the corrected tables were submitted as Exhibit 144.

[195] Ms. Call also prepared a large table (Exhibit 145) indicating the number of students in each grade for all school years from 2001 to 2010, and the total number of students admitted to the school after the francization program, under the 2002 admission policy.

[196] Many questions were asked about the tables, on both examination-in-chief and cross-examination. I feel that Ms. Call explained herself well in terms of how she prepared them and why certain corrections were made. I consider the tables

reliable, and they are very useful for understanding and visualizing changes in the school's population.

[197] Ms. Call talked about her meetings with Mr. Kindt in 2008. The school board had notified her that Mr. Kindt had been hired to conduct a study of the school's needs. He contacted her before going to Hay River and sent her emails in preparation for their meeting. She did not save all of the emails but kept them in a folder on her computer with all the information she received from Mr. Kindt before he arrived, including a list of topics he wanted to discuss with her in preparing his report (Exhibit 206). Ms. Call said that there was never any mention, neither in her conversations with him nor in the emails he sent her, of a discussion about the number of children of right holders and non-right holders at École Boréale.

[198] She met with Mr. Kindt in November 2007 and again in January 2008. She remembers having a very brief conversation with him about the number of children of right holders and non-right holders at the school. At the time, the CSFTN-O was considering revising its admission policy, and Ms. Call had begun preparing a table indicating the criteria on which each student at the school had been enrolled under the admission policy.

[199] Ms. Call gave the table to Mr. Kindt. She is certain that she told him that it was only a preliminary table and was not complete.

[200] Ms. Call saw the report that Mr. Kindt prepared following his study (Exhibit 156). She thinks that a number of aspects of the report show that Mr. Kindt clearly understood what was explained to him in terms of space needs. However, she says that she was stunned to see that the report addressed the number of children of right holders and non-right holders and referred to the preliminary figures she had given to Mr. Kindt. The information on the student admission criteria is inaccurate.

[201] Generally, however, Ms. Call believes that Mr. Kindt's report provides a good description of the spaces at École Boréale as they were at the time of his visit and how they were used, as well as the school's needs and aspirations for the future.

[202] Ms. Call described the spaces she would like to have at École Boréale. She would like there to be a daycare at the school and space for the preschool and kindergarten programs. She thinks that there could be a multi-purpose space for music, theatre and visual arts. She would like there to be space for the computer lab so that it is not in the atrium. She believes that there should be spaces for teachers and student aids.

[203] For secondary-level students, she thinks that there should be a student meeting space, an adequately equipped science laboratory, a room properly equipped to teach cooking classes and a space to teach Career and Technology Studies (CTS). She thinks that the school needs a gymnasium with showers and bleachers. This space could also be used as an assembly hall.

[204] Ms. Call talked about using other schools' gymnasiums. Up until 2009–2010, it was difficult to obtain gymnasium time for extracurricular activities. She had to ask again every few months because the other schools managed their schedules every two months. According to her, things improved in 2009–2010.

[205] The school now has improved access, although the times are not ideal for extracurricular activities. Ms. Call feels that the best time for those kinds of activities is immediately after classes. The school's current time blocks are from 5:00 p.m. to 6:30 p.m., which is less advantageous for students and parents.

[206] Difficulties persist in terms of gymnasium access for other activities. École Boréale had asked to use the gymnasiums at Princess Alexandra School or the one at Diamond Jenness School for the Christmas concert and had offered to rent them at the same price as for renting the community room. The request was denied.

[207] Ms. Call spoke about the facilities at Hay River's three English schools. Harry Camsell School has between 160 and 170 students from kindergarten to Grade 3. The school has a gymnasium, a library, an art and music room and a soundproof kindergarten room.

[208] Princess Alexandra School has a multi-purpose room for teaching home economics, a library, a gymnasium with bleachers, a computer laboratory and a room for teachers and support staff.

[209] Diamond Jenness School is a high school with approximately 200 students. It has a new industrial arts teaching centre (which is the same size as École Boréale), two rooms for teaching home economics, a number of soundproof music rooms, student meeting areas, a visual arts room and two science laboratories.

[210] Hay River's other school is Chief Sunrise School, which is a kindergarten to Grade 12 school located on the Hay River reserve. It has about 70 students. It has a nice kitchen, a gymnasium, a computer laboratory, a library, administrative offices, a room for support staff, a literacy room and a preschool area. Ms. Call says that the school does not have very many students in grades 10 to 12.

[211] Ms. Call confirmed that École Boréale has never tried to do any recruiting.

[212] She said that there was no direct relationship between École Boréale's administration and the DEA, as contact was made through the CSFTN-O. She said, however, that the school "lived the consequences" of that relationship. She said that in August 2008, after the Court granted the interlocutory injunction, the DEA issued a very aggressive news release concerning the decision. Copies of the news release were distributed in Hay River mailboxes. The document was submitted as evidence (Exhibit 148). It speaks for itself.

[213] Ms. Call talked about the impact of the ministerial directive of July 2008. The directive had a considerable impact on kindergarten enrolment. For 2008–2009, the children who were already registered for kindergarten when the directive was implemented had permission to stay in the program. But most of the children who were in preschool in 2008–2009 and asked to enrol in kindergarten in September 2009 did not receive the Minister's permission.

[214] Ms. Call was asked about the impact of admitting children of non-right holders on the school. She said that it had never been a problem and, on the contrary, had been beneficial because it meant that there were good-sized groups, which is preferable from a teaching standpoint. She repeated that everyone has to be francized and there are generally no big differences in terms of language abilities between the children of right holders and non-right holders.

[215] From a cultural and identity-focused perspective, Ms. Call explained that non-right holders understand the school's requirements and are very involved in the school's activities.

[216] At various times in her testimony, counsel for the Plaintiffs made her testify regarding conversations she had with some students who decided to leave École Boréale. The Defendants object to the admissibility of this aspect of her testimony. I address this issue further on in the section about the admissibility of disputed evidence.

[217] On cross-examination, Ms. Call acknowledged that her tables show that the number of section 23 students has remained fairly stable, around 40, since 2005, while the total number of students has increased sharply. She said that if only children of right holders had been admitted to École Boréale, there would be ample space for them.

[218] Ms. Call's testimony on how the 20% limit was calculated is consistent with the testimonies of Ms. Taillefer and Mr. Lavigne. When a student is admitted through the francization program, the CSFTN-O considered any brother or sister of the student as the child of a right holder. Brothers and sisters were not counted for the purposes of the 20% limit.

[219] In addition, the 20% limit did not apply to individuals whom the CSFTN-O considered entitled to admission even though they are not covered by section 23 (for example, someone with a Francophone grandparent). Ms. Call also stated that she never requested affidavits to support applications based on having a Francophone relative because she had been told when she arrived that this was not necessary.

[220] I will not address all the aspects of Ms. Call's cross-examination that dealt with figures, various ways to combine them and resulting percentages. The evidence clearly shows that the effect of the CSFTN-O's admission policy was to enable a large number of non-section 23 students to enrol at École Boréale, and that these enrolments are the primary reason for the rapid growth of the school's student population since it opened in 2005.

[221] Moreover, Ms. Call said that the CSFTN-O's projections forecasting 15 new kindergarten students per year are not based on the number of children of right holders. In other words, these projections suggest that a number of newly enrolled students would be children of non-right holders.

[222] Counsel for the Defendants asked her what she thought about multi-grade classes. She said that this is common practice but poses certain challenges. She acknowledged that, in an affidavit prepared as part of the application for an interlocutory injunction, she had spoken about the benefits of multi-grade classes. She stated that she had filed the affidavit in 2008, now had two more years of teaching experience and noted more and more difficulties in teaching multi-grade groups.

[223] Ms. Call was cross-examined about her meeting with Mr. Kindt and their discussion about the number of children of non-right holders at École Boréale. She remembers that the topic was discussed, briefly, with Mr. Kindt. She acknowledges giving him the table included in his report dated February 2008. But she maintained that she told him that the table was preliminary and the data were not fully compiled.

[224] In terms of using the gymnasiums, Ms. Call said that the situation had improved. She acknowledged that she did not complain to the CSFTN-O regarding the less-than-satisfactory nature of certain schedules. She explained that she preferred to try and keep co-operation and negotiations at the local level.

[225] Regarding the use of space for Career and Technology Studies, she said that she has looked into the possibility of using the newly built facilities at Diamond Jenness School in the future and that this appears to be an option.

[226] Ms. Call's testimony was lengthy, and her cross-examination was extensive. She answered questions clearly and directly. She never seemed to try to avoid any questions, regardless of what they were about, and she never used an argumentative tone. I found her to be very sincere, both on examination-in-chief and on cross-examination, and I have no reservations about her testimony. I find that her entire testimony is trustworthy and very reliable.

g. Catherine Boulanger

[227] Ms. Boulanger is originally from Alberta. She has lived in various places across Canada. Her spouse is Anglophone. They moved to Hay River in 2004. She is a right holder under section 23 of the Charter.

[228] Ms. Boulanger worked as a development officer for the Association franco-culturelle de Hay River.

[229] She explained that she and her spouse sometimes disagreed about issues related to the French language. She believes that if there had been an immersion program in Hay River, they would have chosen that for their children as a compromise. Because that was not an option, her spouse agreed to have their children attend École Boréale.

[230] Ms. Boulanger explained that she was able to regain her Francophone identity through her contact with École Boréale and the Association franco-culturelle. She explained that, before, given her family context, she had more or less given up on French, because it was complicated with her husband. But, at the 2006 Census, she self-identified as a Francophone for the first time. She said that she was able to take back that heritage through her contact with École Boréale.

[231] Her daughters, C., D. and K., started at École Boréale in the 2004–2005 school year. C. had reached Grade 8, but it was not yet offered at École Boréale, so she repeated Grade 7 to be able to attend the school. D. started in Grade 5, and K. began in kindergarten.

[232] When the school moved to the new building in 2005, Ms. Boulanger noticed a big difference. The school was nicer looking and more welcoming. The number of enrolments increased after the move.

[233] In the years that followed, there started to be a need for more space. C. was among the students who had their classes in the room set up in the atrium. She was also in the group of students who took classes in rooms at the Ptarmigan Inn during the 2008–2009 school year. C. had to go back to École Boréale for her art classes, because the rooms at the Ptarmigan Inn were not equipped for that purpose.

[234] Ms. Boulanger spoke about the disadvantages of using the gymnasiums at other schools. The times reserved for extracurricular activities were often early in the morning.

[235] Ms. Boulanger talked about some drawbacks of the spaces at École Boréale. There is no room to teach music or industrial arts, nor is there is a complete science laboratory.

[236] Ms. Boulanger also spoke about her daughter, D., who has special needs. She has a passion for music, which is difficult to accommodate at École Boréale. Arrangements were made for her to take her music classes at Diamond Jenness School.

[237] Things were going well for her youngest daughter, K., at École Boréale at the time of the trial, but Ms. Boulanger said that she fears things will become harder as she gets older. She is not sure if she will keep her at École Boréale.

[238] The Plaintiffs wanted to submit two documents as evidence during Ms. Boulanger's testimony. The first, Exhibit H, *20 ans pour longtemps*, is a pamphlet prepared by Hay River's Association franco-culturelle to celebrate its 20th anniversary in 2007. The second, Exhibit K, is a report prepared by a consultant, at the request of the Association franco-culturelle, which addresses the needs of the French-language daycare service in the community of Hay River. The Defendants object to the admissibility of the two documents under the rules governing the admissibility of hearsay. I address the admissibility of these documents further on.

[239] Ms. Boulanger also reported some things her daughters said at various times about how they wanted to change schools and wondered why there was no gym at École Boréale. I will also address the admissibility of this evidence further on.

[240] In cross-examination, Ms. Boulanger acknowledged that some of the challenges facing École Boréale's programs were caused by low enrolment, not just lack of space. For example, C. was not able to take a physics class because she was the only one who registered for it.

[241] She also acknowledged that the CSFTN-O had certain programs in place to encourage student retention, including a $3,500.00 bursary for students who complete high school. She also said that the school does not need to do any recruiting; parents come themselves.

[242] With regard to the year in which C. took some of her courses at the Ptarmigan Inn, she acknowledged that the spaces had been provided following the injunction and, although they were not perfect, it was the best solution available in Hay River.

[243] Ms. Boulanger is a plaintiff in this action and is thus not a neutral or disinterested witness. However, she seemed to answer questions honestly, to the best of her knowledge. Her testimony was not always the most precise, but, overall, her credibility was not really called into question during the cross-examination. I find that her testimony is reliable and trustworthy.

h. Roger Paul

[244] Mr. Paul is originally from Maniwaki, Quebec. He completed his studies in education. He has a master's degree in education with a concentration in school counselling and, at the time of the proceedings, was in the process of completing a PhD in educational administration.

[245] Mr. Paul worked in education, teaching and school management in northern Ontario and then in the Ottawa region, from 1976 to 2009. He is familiar with how Ontario's school system operates, especially the system governing the schools of the province's French linguistic minority. Mr. Paul had a very short retirement; he retired in December 2009 and then became director general of the Fédération nationale des conseils scolaires francophones (FNCSF) in January 2010.

[246] Mr. Paul explained that the FNCSF has 31 members and includes all French school boards outside Quebec. Its mandate is to ensure that its members' rights are respected. He said that the FNSCF often has to conduct studies on topics of interest to its members.

[247] Mr. Paul spoke about his knowledge of how the admission policies of the Ontario school boards with which he had to work over the years operate. He

explained that the starting point is obviously that any child covered under section 23 has the right to be admitted. The decision is made on a case-by-case basis for all others (immigrants, people with Francophone relatives).

[248] He also explained that things have changed in terms of accepting Anglophone students into French schools. In Ontario, at the start of his career, Anglophones were not allowed to attend minority French schools. This approach evolved, however, and it became acceptable to admit Anglophones. Eventually, this practice developed in his school board. There was an admissions committee that met with students and parents, asked questions and decided whether to admit students.

[249] Mr. Paul read all FNCSF members' admission policies. He thinks that a number of them are similar. There is very often a clause that provides for the admission of children with Francophone grandparents. The same goes for immigrants, except in British Columbia, where legislation already stipulates that immigrants have the right to send their children to French or English school. Most also grant admission to Anglophone children. The majority of the school boards have an admissions committee.

[250] Mr. Paul explained that, because of this legal proceeding and a legal proceeding in Yukon, where the legitimacy of admission policies was called into question, the FNCSF compiled data on its members' admission policies and the number of children of non-right holders at their schools. The possibility of carrying out this kind of work had already been discussed, but the proceedings in the NWT and Yukon, which challenged the school boards' authority in terms of program admissions, made the issue more significant to FNCSF members. The FNCSF therefore undertook to carry out this work.

[251] The outcome of the gathering of information is Exhibit L. The Plaintiffs want it entered as an exhibit to establish the truth of its content. The Defendants object on the grounds that it is hearsay. I will therefore address Mr. Paul's testimony on the methodology used, the cross-examination on this issue, and the admissibility of the document in the next section of these reasons.

[252] Mr. Paul was also cross-examined about certain aspects of the policies for admitting children of non-right holders. He said that, in all the policies, school boards reserve the right to refuse admission. He also stated that a number of policies set out certain limits to the number of students that can be admitted. It was suggested to him that this is because admitting non-right holders may pose a certain risk. Mr. Paul answered that it was important for school boards to be able to successfully integrate students.

[253] It was suggested to Mr. Paul at various times that admitting a large number of non-right holders could threaten the Francophone character of minority schools. He did not agree with this or with the suggestion that minority schools could turn into immersion schools. He insisted that minority schools have a specific mandate which differentiates them from immersion schools.

[254] He also explained that it was not necessary for children admitted to the program to have language abilities in French. In his experience at Ontario schools, children admitted to kindergarten who did not speak a word of French had no difficulty speaking the language after completing their kindergarten year.

[255] He acknowledged, however, that it is another matter altogether if a child of a non-right holder wants to attend a minority school later on in his or her school career. But, based on his experience, the vast majority of people who join minority schools do so right from the start.

[256] Counsel for the Defendants addressed the issue of resources and asked Mr. Paul if they played a part in deciding whether to admit a child of a non-right holder. He stated that the factors to consider in a number of the school boards' policies include the schools' student capacity and available resources. But he also said that, without students, school boards have no resources, and the problem becomes circular, such that [TRANSLATION] "it's a chicken and egg question".

[257] Counsel suggested to Mr. Paul that school boards are required to take their resources into account when deciding whether to admit children of non-right holders. Mr. Paul did not agree. He said that school boards must go by their admissions policies.

[258] There is no question that Mr. Paul has extensive experience in minority education. It is also clear that he is not a disinterested witness. The organization of which he is director general has obtained intervener status in this case to support the Plaintiffs' position with regard to the CSFTN-O's right to manage admission to the French-language instruction program. It was clear during Mr. Paul's testimony, especially during his cross-examination, that he has very strong opinions about some of the issues raised in this case. But, considering his testimony as a whole, I have no reason to doubt its reliability or his credibility.

i. Andrew Cassidy

[259] Mr. Cassidy was born in the NWT. He took up residence in Hay River in 1999. His common-law spouse is from Hay River. They have a daughter, A. When she was three years old, they decided to enrol her in pre-kindergarten at École Boréale. They had discussed this with Ms. Call last year because they knew that there were a limited number of spots available. Ms. Call told them that if their daughter completed two years of the preschool program, she would be eligible to enrol in the kindergarten program at École Boréale. Ms. Call also told them about the 20% limit, and that there was no guarantee that A. could continue her studies at École Boréale until she finished kindergarten.

[260] Mr. Cassidy and his spouse understood the situation but decided to enrol their daughter in the pre-kindergarten program anyway. They thought that it was a good opportunity for her to be immersed in another culture at a young age. In addition, Mr. Cassidy and his family live 24 kilometres outside of Hay River, where there is a cluster of 12 houses. All of the other children who live there went to École Boréale at the time, and Mr. Cassidy believed that the transition would be easier for his daughter if she went there also.

[261] Mr. Cassidy explained that he understood that he and his spouse would have certain responsibilities and challenges if they went down that path. Neither of them have any Francophone relatives. He understood that correspondence from the school would be in French and that he and his spouse would have to make an effort to learn French. They understood the importance of ensuring that French was used at home. They bought movies and books. The year that A. was in pre-kindergarten,

they watched only French movies. They joined Hay River's Association franco-culturelle and attended activities it organized when they could.

[262] He said that parents with children at the school were very much involved in school activities. The school was very family-oriented.

[263] He said that by the end of her first year in the preschool program, A. was counting in French and singing French songs. He believed that she was making good progress.

[264] The documents submitted filed as exhibits attest to the attempts made by the CSFTN-O and by Mr. Cassidy to obtain the Minister's permission to enrol A. at École Boréale after the ministerial directive was issued.

[265] On June 15, 2009, the CSFTN-O sent to the Department an exemption request for four children, including A. In A.'s case, the CSFTN-O stated that it strongly supported the request because the child had already completed two preschool program years in French. On June 30, 2009, the Deputy Minister recommended to the Minister that the requests be rejected. The CSFTN-O was informed of the Minister's rejection in a letter dated July 16.

[266] In September 2009, Mr. Cassidy learned that A. would not be eligible to enrol in kindergarten at École Boréale. He was informed of her right to contest the decision, but he did not file an appeal of the Minister's decision. Instead, he decided to ignore the decision and take his daughter nonetheless to École Boréale on the first day of classes. Ms. Call, who was there to greet the pupils, was surprised to see him. Mr. Cassidy acknowledged that he had put the school staff in a difficult situation.

[267] Ms. Call agreed to allow A. to stay at the school that day, but she explained to Mr. Cassidy that she did not have the right to enrol her in the kindergarten program. Mr. Cassidy brought his daughter to school again the next day and the following day. But on the third day, Mr. Brûlot, the CSFTN-O's superintendent, came to Hay River, requested a meeting with Mr. Cassidy and his spouse and asked them to stop bringing their daughter to the school.

[268] Mr. Cassidy and his spouse then decided to request that the CSFTN-O re-enrol their daughter in the preschool program for 4-year-olds. They wanted to keep her at École Boréale. The CSFTN-O agreed, but clearly explained to Mr. Cassidy that this would not guarantee her being admitted to the school in the following year.

[269] Mr. Cassidy contacted the CSFTN-O again in December 2009 and requested that his daughter by enrolled in kindergarten during the current year. He requested that she be considered as having the right to be enrolled in kindergarten at the school under subsection 23(2) of the Charter because she had attended the preschool program during the previous two years. The CSFTN-O stated to him in a letter that her years in the preschool program could not be deemed as giving her the right to go to the school under section 23, because the Department did not recognize pre-kindergarten as being part of the school program. The CSFTN-O informed Mr. Cassidy that his request would be forwarded to the Minister.

[270] On January 11, 2011, the Minister wrote to Mr. Cassidy to confirm the GNWT's position on the status of a preschool program for the purposes of section 23.

[271] On April 12, 2010, the CSFTN-O sent a second letter to the Minister in regard to A., this time to plead in favour of granting permission to enrol her in Grade 1 during the 2010–2011 school year. A similar request was made for another child in the same situation, whose parents wanted her to be re-enrolled in the preschool program the year before rather than have her enrolled in kindergarten in an English-language school.

[272] In both cases, the CSFTN-O pointed out that these two little girls had already spent three years in a francization program, that they wanted to stay at École Boréale with their friends in an environment with which they had become familiar and that they were becoming increasingly traumatized by the idea of having to leave their school. On April 12, 2010, the Minister rejected the request.

[273] Following this rejection, Mr. Cassidy and his spouse decided to give A. instruction at home during the 2010–2011 school year rather than enrol her in an English-language school. Mr. Cassidy explained that his daughter was shy and that he did not want to make her go through the transition to an English-language school if there was a possibility of her returning to École Boréale.

[274] Mr. Cassidy has a brother living in Yellowknife. He and his wife are not right holders, but their children go to École Allain St-Cyr. Mr. Cassidy finds it unjust that his daughter does not have access to the same service.

[275] Under cross-examination, Mr. Cassidy acknowledged that he had not appealed the Minister's decision in 2009 and instead had decided to ignore the decision by taking his child nonetheless to École Boréale. He also acknowledged

that he did not file an appeal of the Minister's decision when the second request was rejected in 2010.

j. Jennifer Blackman

[276] Ms. Blackman is originally from Nova Scotia. She and her husband moved to Hay River in 2006. Her husband's father lives in Quebec. There are French speakers in her husband's extended family on his father's side.

[277] The Blackmans have a daughter named T. Ms. Blackman explained that when she was born, she and her husband wanted her not only to be bilingual, but also to develop a relationship with French culture, because this was the culture of part of her family. When the family moved to Hay River, one of the factors they took into account in their decision to move there was whether or not there was a French language instruction program.

[278] In September 2007, the Blackmans enrolled T. in École Boréale's pre-kindergarten program when she was three years old. When they enrolled her, Ms. Call explained to them that after two years in the preschool francization program their daughter would be eligible to enrol in École Boréale's kindergarten program. The Blackmans' intention was to have T. do all of her primary and secondary school education in French.

[279] In September 2008, they enrolled T. in the preschool program for 4-year-olds. They were informed of the ministerial directive of July 2008 and told that T. might not be able to enrol in the kindergarten program the following year. They decided to leave her in the pre-kindergarten program, hoping that the issue would be settled in the courts before T. was ready to start kindergarten.

[280] Ms. Blackman explained the steps that she and her husband took so that T. could begin her primary school classes at École Boréale. Her testimony is confirmed in the many pieces of correspondence exchanged between the Blackmans, the CSFTN-O and the Department in 2009 and 2010.

[281] In May 2009, Mr. Blackman requested that the CSFTN-O enrol T. in the kindergarten program during the 2009–2010 school year. The CSFTN-O forwarded this request to the Minister. The Minister refused to grant permission for enrolment on the grounds that the children concerned had not been enrolled in the kindergarten program at the time that the directive came into effect. The CSFTN-O informed the Blackmans of this decision on July 7, 2009.

[282] On August 10, 2009, the Blackmans wrote to the Minister to appeal his decision. In this letter, Mr. Blackman talked about his origins and said that there were French speakers in his extended family. He expressed his anger and frustration that his daughter could not remain with her friends in a school environment with which she was familiar. He also explained that he considered it unjust that the directive had a retroactive effect.

[283] The Minister dismissed this appeal and informed the Blackmans of this decision in a letter dated August 20, 2009. The letter of refusal explained that the directive was not applied retroactively because permission to enrol had been granted to children, who, when the directive came into effect, were already enrolled in kindergarten. In his letter, the Minister differentiated between this situation and that of children, such as T., who were not enrolled in kindergarten when the directive came into effect.

[284] On September 1, 2009, the Blackmans signed a document naming Harrison Coombs and Lorie Coombs as T.'s guardians. Ms. Coombs is a right holder for the purposes of section 23. She completed the enrolment form to have T. enrolled in the École Boréale kindergarten program. Consequently, T. began attending kindergarten, but because the situation was unusual, the CSFTN-O brought it to the Department's attention. The Department informed the CSFTN-O that under the *Education Act,* a right holder could not exercise the right set out in section 23 for a child under the right holder's guardianship. Consequently, T. was withdrawn from the kindergarten program.

[285] Rather than enrol her in the kindergarten program of an English-language school, her parents decided to re-enrol her in the pre-kindergarten program during the 2009–2010 school year. They continued their efforts to obtain permission for her to enrol in Grade 1 at École Boréale in September 2010.

[286] On November 27, 2009, the Blackmans sent an enrolment form to the CSFTN-O along with a letter requesting that T. be enrolled at École Boréale. On both the form and in the letter, they invoked the right to do so under subsection 23(2) of the Charter, based on the two years in the preschool program that T. had spent at École Boréale. Mr. Brûlot sent them a letter on December 3, 2009, that was similar to the one he had sent to Mr. Cassidy, and he forwarded the request to the Minister.

[287] On January 11, 2010, the Department rejected the request and reiterated the GNWT's position on the status of preschool programs for the purposes of section 23.

[288] On April 12, 2010, the CSFTN-O wrote to the Minister to request that he grant permission for T. to be enrolled in Grade 1 during the 2010–2011 school year. A request for permission to enrol A. Cassidy was included in this same letter and supported by the same arguments. The Blackmans also wrote to the Minister directly to make the same request. On April 12, 2010, the Minister rejected the request.

[289] At the time of the trial, T. was enrolled in Grade 1 in an English-language school because her parents had no other choice.

[290] In regard to the decision to sign the guardianship document, Ms. Blackman explained that she had gotten the idea because she had heard of parents who had done this when their son had been in hockey school outside the NWT in order to ensure that someone had the authority to make decisions on his behalf in emergencies. She explained that the intention was for T. to live with the Coombs during the week and to come home on weekends.

[291] Ms. Blackman talked about the efforts she and her husband had made to have T. educated in a French-language environment. When they enrolled T. in the preschool program, they had been informed of the school's expectations of parents. She and her husband had both taken French courses and purchased French-language books and films. They had subscribed to *L'Aquilon*, the NWT's French-language newspaper. She said that they spoke French every day and their efforts were helped by the fact that they had good friends who were right holders.

[292] T. attended a French-language summer camp in the summer of 2009. Activities were held five days a week all summer long. Ms. Blackman said that T. quickly made progress learning French.

[293] On cross-examination, Ms. Blackman was asked primarily about the guardianship agreement signed in September 2009. It was suggested to her that she and her husband had never actually intended to transfer the guardianship of their child to Ms. Coombs and that it was only a stratagem for getting around the ministerial directive. Ms. Blackman acknowledged that during the month when she was in kindergarten, T. had never slept at the Coombs home. She explained that before moving the child anywhere, she and her husband had wanted to see what would happen with the CSFTN-O's efforts to obtain confirmation from the Department that their daughter's enrolment was valid.

[294] The legal validity of the guardianship is not at issue in this proceeding, and I do not have to make a decision in that regard. I conclude – and for all intents and

purposes, Ms. Blackman admitted this - that the objective of the guardianship was not to transfer the Blackmans' parental authority to the Coombs, but rather to get T. enrolled in kindergarten despite the Minister's refusal to grant her permission to enrol. This was the reason behind all of the Blackmans' actions.

k. Lorie Steinwand

[295] Ms. Steinwand is originally from Fort Providence. She is Metis and has a very large extended family on her mother's side. During her childhood, she spoke Michif French, a combination of French and Aboriginal languages, fluently.

[296] Ms. Steinwand moved to Hay River in 2007. She said that there is a large Metis community in Hay River.

[297] Ms. Steinwand has two children. She and her husband decided to enrol their daughter in the pre-kindergarten program at École Boréale. They made this choice because they wanted their daughter to learn French and be exposed to French culture. They liked the school environment and decided to enrol their daughter in the school's kindergarten program in the fall of 2009.

[298] When she filled out the form at the time of enrolment, Ms. Steinwand identified herself as a right holder on the enrolment form. She said that she did so because she felt she was a Francophone ("I felt I was French"). It was explained to her that she did not meet the right holder criteria and that her daughter could only be admitted with the Minister's permission. On May 13, 2009, she sent a letter to the CSFTN-O in which she provided the history of her family and stated that Michif French and the Michif French culture were important to her. On June 23, 2009, Mr. Brûlot wrote to the Department to request permission to enrol M. at École Boréale and explained that she met the conditions of the CSFTN-O's 2009 admission policy because she had French-speaking ancestors. On August 6, 2009, Mr. Brûlot was notified of the Minister's refusal to grant permission.

[299] Ms. Steinwand had no other choice but to enrol her daughter in English school, but she was not satisfied with the turn of events. She requested advice from various people she knew in Fort Providence, including the president of the Fort Providence Metis Council. She asked him to help her in her efforts to get M. enrolled at École Boréale. She also contacted the Deputy Minister of Education directly. In November 2009, she wrote two letters describing her family history. On December 31, 2009, the Minister granted permission to enrol M. at École Boréale for the month of January.

[300] Once her daughter was enrolled, Ms. Steinwand and her husband took steps to use French at home. They bought French-language books as well as a self-directed program to help them learn French. She explained that the school communicated with parents only in French. She talked about the twinning system used to help parents who did not speak French or did not speak much French. She explained that her family's contact with École Boréale helped her to expand her contacts in the French-speaking community in Hay River.

[301] After permission was granted by the Minister, M. attended kindergarten at École Boréale starting in January 2010. She attended a French-language summer camp during the summer and began Grade 1 in September 2011. Ms. Steinwand says that at the time of the court case, M.'s French was better than her own.

l. Dr. Rodrigue Landry

[302] The Plaintiffs requested that the Court allow Dr. Rodrigue Landry to testify as an expert in the following areas: ethnolinguistic vitality, cultural autonomy and factors associated with the revitalization of cultural autonomy, the role of education in ensuring the vitality of cultural communities, population and language statistics, education in a minority environment, and factors contributing to student identity building in Francophone communities.

[303] Dr. Landry's resumé and its appendices (Exhibit 1) list Dr. Landry's many research activities and publications. The Defendants, very reasonably, did not contest Dr. Landry's expertise.

[304] During 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 certain phenomena and concepts within his field of expertise, including psycho-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 their representative models are complex and difficult to summarize, but Dr. Landry's explanations of them provided important background information for understanding his opinions on more tangible issues in this case. I will not talk about all of the topics dealt with in the report, but I will go over the main aspects that I believe are most significant.

i) Vitality of linguistic communities and cultural autonomy

[305] Dr. Landry explained that it is the social organization of a minority language group, not just its individuals, that enables it to express its collective identity. He said that the heritage and shared history of group members could be a source of

solidarity among group members; however, this solidarity also includes the idea of building what he called [TRANSLATION] “a community of destiny” based on voluntary choices with respect to the future.

[306] Dr. Landry said that a community’s ethnolinguistic vitality depends 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.

[307] 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”.

[308] Socializing proximity is the basic component ensuring that primary socialization occurs 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 is particularly true in the case of mixed-language families because in such families, there is often a trend to transmit the dominant language at the expense of the minority language.

[309] Institutional completeness means the taking charge of cultural and social institutions that promote the minority community in the public domain and allow it to be a distinct, 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 group in the minority group’s language. He said that the school is the cornerstone of institutional completeness. The school expands the area of socializing proximity and promotes primary socialization in the minority language.

The school helps to create an identity in the minority language as well as set up networks in the minority language.

[310] The third component that has 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. In that regard, Dr. Landry talked about the issue of the ministerial directive of July 2008 in paragraphs 110 to 113 in his report. He said that this directive represents a government approach aimed more at [TRANSLATION]"controlling" than [TRANSLATION] "helping" the minority language group.

[311] To the extent that the opinions expressed by Dr. Landry could be interpreted as suggesting an answer to the question posed in this case, that is, whether the ministerial directive complies with section 23 of the *Charter*, I have not taken them into account. However, I agree that the directive, because it takes away a portion of the minority group's control over the management of the education program, is a measure that does not promote the development of the collective identity of the Francophone minority in the NWT.

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

[312] Dr. Landry said he believes, based on the research he has done on the impact of various language behaviours, that language contact at school serves as an extension of what happens in the private domain (in families and in the community), even though school is a public institution. This contact has an effect not only on young people's language skills, but also on their identity building. He believes that the school experience is very important in that regard and plays a vitally important role, as does the family, in identity building.

[313] In his report, Dr. Landry covered the differences between the educational mission of a minority language school and that of a majority language school. The objective of all schools, whether minority group or majority group schools, is to develop the potential of their students. However, minority group schools also have to concern themselves with building their students' identities. 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 is another aspect of the minority group school's educational mission, which is not necessarily part of a majority group school's mission.

[314] Dr. Landry said that in order to be able to develop and implement this special educational mission, minority group school boards have to have complete autonomy, including control over budgets.

[315] Dr. Landry also talked about the difficulties of keeping students in minority group schools at the secondary level. Based on his experience and research, it was an observable trend in many Francophone minority schools. In order to retain a maximum number of students, he believes it is necessary to recruit a maximum number of students as soon as possible in order to promote francization. There has to be an excellent primary school program to encourage students to stay in school, and the secondary school program has to be attractive to compensate for the fact that the school might not be able to compete with the variety of courses and activities offered in majority group schools. Lastly, the infrastructure has to be up-to-date and attractive to be able to truly compete with other schools.

iii) Linguistic continuity index

[316] The linguistic continuity index indicates the degree to which the language is transmitted from one generation to the next. It is the opposite of the assimilation rate.

[317] Using data obtained from the 2006 Census, Dr. Landry concluded that the linguistic continuity index for the French language in the NWT is a cause for concern. The language spoken in the home is the measurement used by Statistics Canada. In his opinion, if a language is not spoken in the home, there is little likelihood of the language being transmitted to the next generation.

[318] 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 in the NWT is 42%. He said that the non-use of French in the home is often related to exogamy [members of a group marrying people outside the group] and the exogamy rate in the NWT is very high.

[319] In Dr. Landry's view, the non-transmission of French could only be offset by increasing parents' awareness of the consequences of their language choices and by striving for greater institutional completeness.

[320] In regard to the CSFTN-O's management authority, Dr. Landry said that the fact that it does not have full authority over its infrastructure prevents it from carrying out its educational mission. He repeated that school boards have to have some freedom to be able to carry out their missions.

[321] Dr. Landry also explained that a lack of space in minority group schools has an adverse effect on teaching conditions and that infrastructure deficiencies has a cumulative negative impact on the students and parents concerned because they make them feel like second-class citizens.

[322] 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 becomes 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 and where there were also a few Anglophone students housed in a wing of the school. The study demonstrated that the presence of Anglophone students had a considerable impact on the school climate and that Francophone students tended to speak to them in English.

[323] Dr. Landry was also asked about the importance of daycare centres in minority language communities. He explained that daycare centres and kindergartens are an excellent francization method and can provide a considerable amount of support for exogamous families. With regard to the locations of daycare centres, Dr. Landry said that he did not know of any studies that came to the conclusion that a daycare centre's location was a significant factor. But he said that in his experience, most school boards try to set up daycare centres within the schools.

iv) Number of children affected by section 23

[324] In his report and testimony, Dr. Landry expressed reservations about the reliability of the Census data for determining the true number of section 23 children in the Hay River community.

[325] First, the Census data had been rounded in a random manner, and this rounding had a greater impact on the smaller numbers.

[326] He also pointed out that the questions asked in the Census only took into account a single category of persons covered by section 23, that is, parents' first language. The other two categories of persons covered by section 23 are not identified. Dr. Landry believes that the inclusion of persons from these other categories could increase the total number of right holders by about 20%. As well, he pointed out that Census data does not make it possible to identify a child living in a single-parent family with an Anglophone parent, but whose other parent is Francophone. He believes that there could be as many as 200 right holder children in Hay River, despite the results of the 2006 Census.

[327] Lastly, Dr. Landry pointed out that the target clientele could be even larger if access to the program were given to persons not strictly covered by section 23 (French-speaking immigrants who are not Canadian citizens and persons whose parents do not speak French but whose grandparents are Francophones).

[328] Dr. Landry said he agreed up to a point with the suggestion that [TRANSLATION] "supply creates demand and not vice versa". However, he acknowledged that it was very difficult to say to what degree this was true. He also acknowledged that governments were faced with a dilemma when the time came to decide whether or not to invest public funds in building or expanding schools for the minority language group. He said the following in his report:

> [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.

[329] On cross-examination, he acknowledged that there are many complex factors affecting peoples' decisions to send their children to minority language schools. He acknowledged that a high percentage of exogamous couples decide to send their children to majority language schools and that there was a lot of movement in the NWT population.

[330] Dr. Landry also acknowledged that he did not know of any study that concluded that infrastructure has an impact on students' leaving or not leaving minority language schools. However, he stood by his opinion that it was one of the factors and said that he based his opinion on his experience. He acknowledged that he did not know of any scientific research that had specifically analyzed why students left minority language schools.

[331] With regard to the reliability of the statistics obtained from the Census, Dr. Landry acknowledged that the statisticians take the size of the sample into account when determining the margin of error of the results. He also acknowledged that the margin of error calculation is a very sophisticated process, but he stood by

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.

[332] There were a few tense moments during Dr. Landry's cross-examination. I intervened and called for a recess because the cross-examination was turning into a political debate between counsel and the witness. 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.

[333] Some of Dr. Landry's research focuses on education in minority language communities. For him, it is clearly not only a field of expertise, but also a passion. Every time he has been called as an expert witness in a case, it has been, as in this case, in at the request of the parties seeking to assert Francophone minority rights.

[334] However, the extent of Dr. Landry's expertise was not contested, and I accept his opinion about identity building, the linguistic vitality of minority language communities and the important part played by schools in this context. He has a vast amount of expertise in this field, and his conclusions are supported by substantial research.

[335] Some aspects of his testimony covered topics that had not been specifically identified as areas of expertise in which the Plaintiffs wished to have him recognized as an expert (for example, factors affecting the recruiting and retention of students in minority language communities, or factors influencing assimilation in minority language communities). However, I believe that these areas are an integral part of the fields for which Dr. Landry is qualified to testify as an expert. These topics are interrelated and to some extent difficult to dissociate from one another.

[336] In short, given his experience and the scope of his research, I find Dr. Landry's testimony to be credible and reliable. He qualified certain aspects of his testimony, which in my opinion, enhances his credibility and the probative value of his testimony.

m. Dr. Wilfrid Denis

[337] Dr. Wilfrid Denis is a sociologist specializing in ethnic studies. The Plaintiffs requested that the Court allow Dr. Denis to testify as an expert in these two fields. At the conclusion of the voir dire, I granted this request and qualified Dr. Denis an expert witness in the fields of sociology and ethnic studies. Dr. Denis's expert report was submitted as evidence (Exhibit 112).

[338] The Defendants objected to some excerpts of the report on the grounds that they amounted to opinions on legal matters. The report contains various references to section 23 of the Charter and to certain aspects of the related case law. I did not take these aspects of his report into account.

[339] Dr. Denis expressed reservations about the Census results while acknowledging that these data could be useful and that he used them regularly in the course of his work and research activities.

[340] He pointed out that the random rounding of the results had an adverse effect on the reliability of the results and that this was a more serious problem when smaller numbers were concerned.

[341] He also explained that the concepts of [TRANSLATION] "first language" and [TRANSLATION] "language still understood" were more subjective than one would initially think. He believed that, depending on the context, this could result in an under-identification of right holders, especially if the assimilation rate was high and the minority language community was inferiorized. He said that this could cause some members of the community to be less willing to be associated with it.

[342] Dr. Denis said that members of the Francophone minority outside Quebec had to deal with several demographic challenges, particularly assimilation, exogamy and a lower birth rate.

[343] He also talked about the effects that government policies could have on minorities. If these policies were restrictive, they could have a demoralizing and discouraging effect on minority communities. Counsel for the Defendants asked him to talk about the effect that he thought that a directive, such as the ministerial directive of July 2008, could have. Dr. Denis replied that the directive's actual effect would depend on how it was implemented, but there would be an immediate effect anyway on the operations of the schools because the school board would no longer be able to manage admissions. He explained that one of the impacts for the minority language community was that it would receive a negative message in regard to its management capacity.

[344] Counsel for the Plaintiffs then asked Dr. Denis to comment on the CSFTN-O's 2009 admission policy. He said that he was impressed by this policy because of the number of criteria that had to be taken into consideration in decisions on whether or not to admit the children of parents who did not have the right to send their children to minority language schools. He explained that in his opinion, the inclusion of persons with French-speaking ancestors was recognition

of the importance of making up for lost generations. The inclusion of immigrants was recognition of the increase in immigration to Canada and its demographic impact. The policy also recognized that some Anglophones might want to establish an authentic relationship with the Francophone community and contribute to its revitalization.

[345] He explained that this openness and broader concept of what might constitute the Francophone community could help to create what he called an [TRANSLATION] "upward funnel" whereby minority language community institutions become a means of increasing community numbers. He believed that without measures of this kind, there was often instead a [TRANSLATION] "downward funnel" effect consisting of assimilation, a falling birth rate and exogamy, the result being that the target community population decreased continually and finally disappeared.

[346] Dr. Denis was of the opinion that the assimilation rate in the town of Hay River was 68% to 69%. In the city of Yellowknife, it was 50%. He found these figures very troubling.

[347] Like Dr. Landry, he talked about the concept of institutional completeness. He said that the degree of institutional completeness in the Hay River Francophone community was low and had been for a very long time. He said that the key factor underlying this lack of community development was the absence of a school managed by the community.

[348] In a similar vein, Dr. Denis talked about the process of inferiorization of individuals and the fact that one of the resulting sociological impacts was the inability of people to organize and to claim their rights. This could eventually threaten the long-term survival of the community itself.

[349] Dr. Denis said that the two French-language schools in the NWT have become the focal point of the community and played a key role in encouraging and promoting the development and revitalization of the French language and culture. He said the following in his report:

[TRANSLATION]

> In the Northwest Territories, as everywhere else in Canada except Quebec, French-language schools are a highly visible symbol at the centre of minority Francophone communities. They play a necessary, instrumental role in the inter-generational transmission of language, culture and identity and are thus an

> indispensable institution for ensuring the long-term sustainability of Francophone communities.

[350] Further on, he talks about the dilemma that Francophone communities face with respect to their schools:

> [TRANSLATION]
>
> The Francophone community of the Northwest Territories and its schools face a harsh dilemma. Recognition of the rights of its members to have a French language instruction depends in large part on their numbers. It is critically important that a sufficient number of students be recruited to ensure that French schools stay in operation for current and future right holders. However, there is a risk that the admission of too great a number of non-right holders will transform these schools into immersion schools.

[351] Dr. Denis believes that the 2009 admission policy was a tool that could help the minority language community properly manage the risk cited in the preceding excerpt. In his view, the ministerial directive creates another potential obstacle to the community's expansion and revitalization, especially if applied restrictively and limited the recruiting of students for the school.

[352] Dr. Denis explained that because the minority Francophone community made a decision to welcome a target clientele that included persons who did not speak French, it was important for the community to properly manage the situation to ensure that resources were available to integrate them.

[353] On cross-examination, Dr. Denis acknowledged that the Census data were more reliable if the long form was used for the entire population of a given community. However, he explained that the sample changes nothing in terms of the subjective factors that could result in an under-identification of right holders. He also acknowledged that although the Census data were not perfect, they were nonetheless a basic tool for researchers.

[354] He acknowledged that NWT immigration rates were not as high as those in some other parts of Canada and that most immigrants chose to settle in urban areas. He also acknowledged that immigrants in other Canadian jurisdictions did not automatically have the right to enrol in a minority language school.

[355] He acknowledged that, contrary to what he had written in paragraph 34 of his report, the effect of the ministerial directive is not to prohibit persons with French-speaking ancestors from enrolling their children in French schools. Rather, it allows them to do so, but with the Minister's permission.

[356] He acknowledged that the admission of too great a number of non-French speakers into a minority language school could cause problems. Dr. Denis did not clearly state the specific percentages that should not be exceeded. He said that everything depended on the available francization programs.

[357] Counsel for the Defendants suggested to him that if the school had to francize an entire class, it became an immersion school. Dr. Denis did not agree. He explained that the distinction between an immersion school and a French school has more to do with their respective missions and the type of program they offered.

[358] Dr. Denis acknowledged that he had not seen the 2002 admission policy before he testified. After reading it, he acknowledged that it was less detailed and lent itself more to a by-the-book application than the 2009 policy.

[359] In my view, Dr. Denis' testimony is credible and reliable. He qualified several points in his testimony, and the opinions he expressed are well-grounded in and supported by a great deal of research. His conclusions about factors that contribute to the assimilation of minority language communities or that, conversely, help to revitalize them are closely akin to what Dr. Landry said on these topics.

n. Excerpts from the Examination for Discovery of Paul Devitt

[360] In accordance with the rules of civil procedure, the Defendants submitted as evidence excerpts from the Examination for Discovery of Paul Devitt. Mr. Devitt was called as a witness by the Defendants. There were no inconsistencies between his answers during his Examination for Discovery and in his testimony at trial. I deal with Mr. Devitt's testimony further on in paragraphs 463 to 497.

2. Admissibility issues

[361] Because the admissibility of several elements of the evidence adduced by the Plaintiffs is contested by the Defendants on the grounds that they are hearsay, it is useful to review the legal framework governing the admissibility of hearsay.

a. Legal framework governing the admissibility of hearsay

[362] Hearsay is defined as a statement that was made out of court and is presented in court through a witness who heard the statement to prove the truth of its contents.

[363] 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.

[364] 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.

[365] 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

[366] 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.

[367] 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 tests, it established guiding principles for ruling, in all cases, on the issue of whether or not hearsay 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.*

[368] The twin criteria that now govern the admissibility of hearsay are necessity and reliability. For hearsay to be admissible, the trial judge must believe 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 believe 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.

[369] 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.

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

[371] Necessity does not always mean that the witness is not available; it means 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 a variety of situations: *R.* v. *Smith*, *supra,* paragraph 36.

[372] 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.

[373] 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 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.

[374] 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.

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

b. Pupils' statements

i) Content of the evidence

[376] Ms. Boulanger gave testimony on conversations she had had with her daughters about their various reasons for wanting to change schools. There was one year (Ms. Boulanger did not specify the year) when her daughter D. asked her if she could change schools. She found it difficult to have to take her music classes at Diamond Jenness School, and during that same year, she also took two correspondence courses. Her school year had been difficult, and Ms. Boulanger was resigned to the fact that D. would leave École Boréale. But in the end, D. decided to stay.

[377] Ms. Boulanger also said that her other daughter K. sometimes asked why École Boréale did not have its own gymnasium, and she found it difficult to give her an answer.

[378] Ms. Call gave testimony on conversations she had had with two students in the summer of 2009. These students had completed Grade 10 at École Boréale the year before and were part of a group that attended classes at the Ptarmigan Inn.

[379] The two students decided to do Grade 11 at Diamond Jenness School. Ms. Call related what they had said to her about this decision. The first student was concerned about the choice of courses that would be available in Grade 11 and wanted to experience a [TRANSLATION] "real high school" with a greater number of students and activities. The second student explained to her that he wanted a real high school with a greater number of students and access to more sports teams.

[380] Ms. Call talked about four other students who left École Boréale at the end of the 2009–2010 school year. In particular, she talked about the parents of two of these students, who had talked about the extracurricular activities and greater selection of courses at Diamond Jenness School.

[381] Ms. Taillefer also testified about the loss of students that occurred when she was school principal. She said that the reason why several of the students had left was that they had moved, but that two students had left because of a lack of access to a gymnasium for extracurricular sports activities. Ms. Taillefer had met with the students' parents to discuss the reasons why these students had left.

[382] Mr. St John also testified that his eldest son was very active in sports and had asked to change schools. He did not ask to go to Diamond Jenness School, but rather to a school outside the NWT where there were better sports programs. Two of his other sons had also asked to change schools. Mr. St John said that the topic of gymnasiums came up often in the conversations.

ii) Analysis

[383] The Plaintiffs want me to rule this evidence admissible for the truth of its content, that is, to establish the reasons why these students wanted to leave or why they left École Boréale.

[384] The Plaintiffs have requested that similar evidence be ruled admissible in file CV2005000108. In that case, I concluded that the evidence was inadmissible under the principled exception to the hearsay rule. See *Association des Parents ayants droit de Yellowknife et al.* c. *Procureur Général des Territoires du Nord-Ouest et al*, 2012, CSFTN-0 43, paragraphs 327-51. The same principles apply here, and I come to the same conclusion, essentially for the same reasons.

[385] In my opinion, the necessity criterion has not been established. As in the case in file No. CV2005000108, a relatively small number of students are involved, and there is no evidence suggesting that it would not have been possible to have them testify themselves about the reasons why they left the school.

[386] As for reliability, the evidence concerning the circumstances of the conversations is fairly vague, except for Ms. Call's testimony, which is fairly specific. But I cannot assume that teenagers would necessarily say everything they are thinking to their parents or to their school principal, even assuming that they get along well with the principal, about their reasons for wanting to change schools. As for the conversations that the witnesses had with the parents of students about why the students were leaving, it is "double hearsay", which is even less reliable.

[387] For the purposes of these reasons, I adopt my analysis in the Reasons for Judgment referred to above at paragraph 384. I conclude that the evidence concerning the statements of the students and parents about the students' reasons for leaving, as reported by the witnesses during the trial, is not admissible.

c. Use that may be made of the *Vision 20-20* document (Exhibit 11)

[388] The *Vision 20-20* document that Mr. Lavigne and other witnesses talked about was submitted as evidence during the testimony of Ms. Montreuil, who was CSFTN-O's chairperson at the time of the trial. The parties do not agree on the use that may be made of the document in connection with this proceeding. As already mentioned, the document is a report prepared by a consultant hired by the CSFTN-O in 2003 to carry out a comprehensive analysis of the educational needs of the NWT Francophone community in order to help the CSFTN-O determine its priorities and develop a strategic plan. The final report includes information on consultations held with many people, a history of the development of the French first language program in the NWT and references to studies conducted by other researchers on topics related to French language instruction in the NWT. The Plaintiffs argue that this document is admissible for the truth of its contents.

[389] There are several reasons why I fail to see how this document can be used for the truth of its contents. The author of the report did not testify in the trial. The report is a synopsis of opinions and facts provided by a large number of people, some of whom, including Ms. Montreuil, testified at trial, but many others did not. The report also contains information taken from other sources, including studies conducted by people who also did not testify.

[390] I will not repeat here what I previously said in my analysis of the principles governing the principled exception to the hearsay rule. However, Exhibit 11 utterly fails to meet the criteria established in the case law. I acknowledge, given the scope of the topic and the number of persons consulted for this study, that practical considerations assist the Plaintiffs in establishing the necessity criterion. But in my view, it is clear that the threshold of reliability required to make this evidence admissible for the truth of its contents has not been established.

[391] It is true that Ms. Montreuil, Mr. Lavigne and other persons who testified in the trial are included among the persons 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 do not have personal knowledge on this issue.

[392] I therefore find that Exhibit 11 cannot, under our rules of evidence, be used to establish the truth of the 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 bases for the

CSFTN-O's claims. The CSFTN-O representatives referred to the document many times in their correspondence and discussions with GNWT representatives. The document is admissible for establishing that the Defendants were familiar with the Plaintiffs' claims, and that they knew on what factual and legal bases those claims were being made.

d. Exhibit H

[393] Exhibit H is a pamphlet prepared for the Association Franco-culturelle de Hay River on the occasion of its 20th anniversary in 2007. It provides some background on the Association's role in establishing the first francization program and setting up the French language instruction program. The pamphlet includes statements by people who were involved at the time. The Plaintiffs argue that this document can be used to establish the truth of its contents.

[394] In my opinion, this document is not admissible for the truth of its contents for the same reasons that the *Vision 20-20* document is not. In any case, with respect to setting up the francization program and the education program, the general history is established in other evidence, particularly the testimonies of Ms. Taillefer and Ms. Boulanger.

e. Exhibit K

[395] Exhibit K is entitled *Étude de besoins pour la mise sur pied d'une garderie francophone à Hay River, Territoires du Nord-Ouest* [needs study for setting up a French-language daycare centre in Hay River, Northwest Territories]. This study was sponsored by the Association franco-culturelle de Hay River and is dated September 2008.

[396] The Plaintiffs want this document used to establish the truth of its contents. The Defendants object on the grounds that it is hearsay.

[397] As for the principled exception to the hearsay rule, I find this document to be similar to the *Vision 20-20* report. I conclude that Exhibit K is not admissible under the principled exception for the same reasons that I concluded that *Vision 20-20* was not.

[398] The Plaintiffs also argue that the document is admissible pursuant to section 47 of the *Evidence Act*, R.S.N.W.T. 1988, c. E-8, which states as follows:

> 47. (1) In this section, "business" includes every kind of business, profession, occupation or calling, whether carried on for profit or not.

> (2) A record in a business of an act, condition or event, is, insofar as it is relevant, admissible in evidence if
>
> > (*a*) the custodian of the record or other qualified person testifies to its identity and the mode of its preparation, and to its having been made in the usual and ordinary course of business, at or near the time of the act, condition or event; and
> >
> > (*b*) in the opinion of the Court, the sources of information, mode and time of preparation of the record were such as to justify its admission.

[399] For a document to be admissible, the conditions set out in the two paragraphs must be met. The French version of the provision may be ambiguous in that respect, but the word "and" appears at the end of paragraph (*a*) in the English version, which is much clearer: In order to be admissible, the document must therefore have been prepared in the usual course of business. However, Ms. Boulanger's testimony is not to that effect. It is not part of the usual, regular activities of the Association franco-culturelle to order these types of studies. Therefore I cannot accept the Plaintiffs' argument that the study of daycare needs is admissible under section 47. In my opinion, this document is therefore inadmissible.

f. Exhibit L

i) Evidence concerning Exhibit L

[400] Exhibit L is a compilation of data obtained by the FNCSF from its members concerning their admission policy for the French instruction program and the proportion of their students that are children of non-right holders.

[401] The content of this document is clearly hearsay. The question is whether this evidence is still admissible under the principled exception.

[402] Mr. Paul explained the method used to produce the document. The FNCSF developed a detailed questionnaire and sent it to its members with precise instructions. The first part of the questionnaire provides an overall picture, and the second requests data for each of the schools.

[403] Prior to collecting the data, the FNCSF met with senior officials of its member school boards to ensure that they understood the questionnaire and the goal of the exercise. The questionnaire was sent to the person responsible for the

data at each school board. Individual data on the schools were to be validated by the school's management. The director general of each school board was responsible for signing the final product to be submitted to the FNCSF.

[404] The school boards sent their admissions policies to the FNCSF. According to Mr. Paul, all the policies are also available on Web sites.

[405] During cross-examination, Mr. Paul acknowledged that Exhibit L was not a final document. He explained that the data were not collected specifically for these proceedings, because this had already been a key issue for the FNCSF members for a while. Mr. Paul specified that the public will have access to the report once it has been finalized. The students' names will not appear in the version that is made public.

[406] Mr. Paul acknowledged that the information in the tables in Exhibit L is necessarily taken from other primary documents. He acknowledged that the FNCSF did not check the information against the primary sources. He stressed that it would have been difficult to do so because the school boards are autonomous and independent.

ii) Analysis

[407] As I mentioned earlier, the admissibility of this document has to be decided in light of the principles established by the Supreme Court of Canada regarding the principled exception to the inadmissibility of hearsay.

[408] The first criterion is necessity. In my opinion, it is clearly established in this case. This time, I agree completely with the Plaintiffs: it would have been impossible for them to have each director of each school under the 31 school boards that are members of the FNCSF testify about their student populations.

[409] I am also satisfied that the reliability criterion has been met. Mr. Paul's testimony establishes that the FNCSF has taken measures to ensure that the senior officials of each school board understood the questionnaire and the process. The fact that the data compiled by the school boards had to be validated by the management of each school lends greater reliability to the data collected. The school board director's obligation to sign the compilation before it was sent to the

FNCSF also adds a level of control and reliability to the process. Moreover, there is nothing in the evidence suggesting that the FNCSF did a poor job compiling the information it received.

[410] The Defendants did not have access to the primary documents, nor did they have an opportunity to cross-examine the people who provided the information in the tables. However, the evidence shows that the information-gathering process was sufficiently thorough to meet the required threshold of reliability for the document to be received in evidence.

[411] For these reasons, I conclude that Exhibit L admissible.

g. Exhibit Q

[412] Exhibit Q is a memorandum dated December 1, 2009, sent to the Minister by the Deputy Minister of Education. This letter concerns Ms. Steinwand's request to the Minister to allow her daughter to enrol at École Boréale. The Minister had initially denied Ms. Steinwand's request. Ms. Steinwand sent additional information to the Department, including the fact that she spoke Michif French fluently as a child.

[413] In his memorandum, the Deputy Minister recommended that the child be granted permission to enrol, even though there was no legal obligation to do so. The Deputy Minister indicated that the decision was a matter of departmental policy, but that it could create certain expectations in parents with Francophone ancestors.

[414] The Defendants claim that this memorandum is not admissible as evidence because it contains a legal opinion and is subject to the privilege of deliberative secrecy.

[415] Deliberative secrecy privilege of is well established: a judge cannot be compelled to testify regarding his or her decision-making process. The courts have granted similar protection to members of administrative tribunals. Even if deliberative secrecy is not the same for administrative tribunals as for courts of law, secrecy remains the rule and can be lifted only when the party wishing to do so can present valid reasons for believing that the process followed did not comply with

the rules of natural justice. *Tremblay* v. *Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, p. 965.

[416] I am far from satisfied that the same reasoning is applicable in this case, but I do not need to make a decision either way in this case. In my opinion, the Defendants waived any privilege that could apply to this document. Many other documents of the same type were filed in evidence without any objection from the Defendants. Exhibit 204 includes many memoranda from the Deputy Minister to the Minister concerning requests for permission to enrol: the memorandum of June 30, 2009, concerning the Blackman, Cassidy, Low and Reinjes children; that of July 27, 2009, concerning the first request for the Steinwand child; and that of September 25, 2009, concerning the Levenson child.

[417] Exhibit Q is similar to those other documents. Obviously, the content of the memorandums varies depending on the situations, but they are essentially similar in nature: they are recommendations to the Minister on the decision to be made.

[418] It is true that the Deputy Minister's comments in Exhibit Q explain that the decision to allow the child to be admitted falls under departmental policy and not a principle of law. However, this comment does not turn the memorandum into a legal opinion. Moreover, the Defendants are not raising solicitor-client privilege here.

[419] I conclude that the nature of the document does not prevent it from being filed in evidence.

[420] Regardless of the issue of privilege, the document is admissible only if it is relevant. In my opinion, it is. This remedy is not an application for judicial review of the Minister's decisions in applying the directive, but rather of the Minister's authority to adopt it in the first place.

[421] However, the application of the directive, the circumstances that led to its implementation, the CSFTN-O's admission policy and the way it was implemented are all part of the context in which the substantive issue—who, from the government or the minority school board, has the right to decide on access to the minority-language education program—must be examined. Furthermore, the

application of the directive may be relevant to the issue of relief, should I conclude that its implementation is a violation of section 23.

[422] I therefore conclude that Exhibit Q is admissible.

h. Exhibits F and G

[423] Exhibit F is the survey questionnaire sent by the CSFTN-O to the parents and children of the two French schools. Exhibit G includes the answers to the survey.

[424] Very little evidence has been filed regarding these documents. They were brought up only during cross-examination by Yvonne Careen, the principal of École Allain St-Cyr, in connection with file CV2005000108. Ms. Careen had testified regarding a survey given to some of the students in the school, among other things. The Defendants objected to the admissibility of the survey results but asked Ms. Careen questions about Exhibits F and G to emphasize that the documents suggested that the answers to Ms. Careen's survey were not particularly reliable.

[425] In file CV2005000108, I decided that Ms. Careen's survey was not admissible. Since no other foundation was provided for introducing Exhibits F and G into evidence, I have not taken them into account in my deliberations.

B. The Defendants' evidence

1. Overview of the testimonies

a. Brian Nagel

[426] Mr. Nagel is a senior official in the Department of Public Works in the GNWT. He has more than 20 years' experience working in this department. In his current duties, he is responsible for a number of files concerning the management of GNWT capital asset infrastructure.

[427] He explained that the GNWT owns a considerable amount of infrastructure, including some 670 major facilities (hospitals, airports, schools, medical centres). As part of his duties, Mr. Nagel is responsible for financial planning related to the maintenance and repair of these buildings (the program is called the "Deferred

Maintenance Program"). Such a program is necessary because maintenance and repair needs far exceed the annual budget that can be allocated for this purpose. A regular evaluation is therefore necessary, as is a prioritization of these needs.

[428] Mr. Nagel is also responsible for managing the Capital Plan and is involved in its development. The Capital Plan is the document that identifies the budgets allocated by the government to capital projects. It is the result of a multi-step process.

[429] Mr. Nagel chairs a committee on which all the departments are represented. That committee's mandate is to review the projects proposed by the various departments. The departments provide supporting documentation for the projects they are proposing.

[430] 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, are used to prioritize the projects. Exhibit 78 lists and defines these criteria. Mr. Nagel explained them and gave examples of how they are applied.

[431] 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.

[432] 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.

[433] 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.

[434] Mr. Nagel explained that many projects submitted as part of the process that led to the 2011–2012 plan were not accepted. The total cost of projects reviewed by his committee was approximately $220 million, which far exceeded the government's capital project budget. Whether a project is included or not depends on the priority level that is attributed, based on the primary and secondary filters.

[435] Mr. Nagel gave examples of projects that were submitted for the 2011–2012 plan but were rejected. Among others, there were two projects concerning schools in Yellowknife, namely École Sissons and École Allain St-Cyr. No project was submitted for the expansion of École Boréale.

[436] During cross-examination, Mr. Nagel was questioned about the priority rating attributed to the project concerning École Allain St-Cyr when it was being reviewed by the committee. At the primary filter level, the project was in 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.

[437] Counsel for the Plaintiffs asked Mr. Nagel many questions about the priority ratings that his committee had attributed to various projects concerning schools in the NWT in past years. He also asked him about the budgets associated with these projects. Mr. Nagel was unable to answer these questions because he could not remember the details for each of these projects. In my opinion, this is not surprising.

[438] Counsel for the Plaintiffs presented excerpts of the GNWT's last three Capital Plans to Mr. Nagel. These excerpts include the list of projects under the Department of Education's jurisdiction for each plan (Exhibit 80). The total amount budgeted for education projects is much higher in the 2009–2010 and 2010–2011 plans than in the 2011–2012 plan.

[439] Mr. Nagel acknowledged that the primary and secondary filters do not contain any criteria that would increase the rating of a project concerning a minority-language education program.

[440] I consider Mr. Nagel's testimony to be reliable and trustworthy. I think that his inability to answer certain questions concerning the details of past projects is understandable, given the number of projects his committee has to review every year.

b. Margaret Melhorne

[441] 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 in the Department of Finance. She has worked there for over 20 years.

[442] Ms. Melhorne testified with respect to the GNWT's financial situation, particularly the impact of the 2008 economic crisis. At the beginning of the crisis, the government had anticipated a significant reduction in private sector economic activity in 2009 and, consequently, a reduction in government revenues from business taxes. This forecast turned out to be accurate.

[443] 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.

[444] 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.

[445] Ms. Melhorne also talked about the government's future plans regarding capital expenditures. 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, in the short term, to an annual capital budget of $75 million.

[446] Ms. Melhorne explained that the GNWT did not have much flexibility to increase spending because it did not anticipate an increase in revenues in the short term and estimated that, given the current economic context, an increase in taxes would be a poor 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.

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

[448] 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.

[449] She also confirmed that 80% of the GNWT budget comes from transfer payments from the federal government. Consequently, some of the fluctuations she spoke about, such as the decrease in corporate tax revenue, affect only 20% of the government's total budget.

[450] Counsel for the Plaintiffs also presented Ms. Melhorne with the transcript of a speech 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. He also mentioned that the global economy remained uncertain and that the government would have to exercise discipline in managing its expenditures. In my opinion, Ms. Melhorne's testimony is consistent with the Minister's remarks on these issues.

[451] I find Ms. Melhorne to be a credible, trustworthy witness.

c. David Dolson

[452] Mr. Dolson has been a Statistics Canada employee for 32 years. For the past 12 years, he has worked on the federal government census conducted every four years. 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.

[453] 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.

[454] Mr. Dolson said that in the 2006 Census, the long form was used for 100% of the residents in the town Hay River. According to him, this was the case in all NWT communities, except for Yellowknife and Inuvik.

[455] Exhibit 158 shows the results of the 1996, 2001 and 2006 censuses concerning the number of children who had at least one parent whose mother tongue is French. The document also identifies how many of these children are school-age. For the town of Hay River, the results are as follows: in 1996, a total of 65 children, 40 of whom are school-age; in 2001, a total of 30 children, 30 of whom are school-age; and in 2006, a total of 40 children, 25 of whom are school-age.

[456] Mr. Dolson explained that the census results are subjected to random rounding. That explains why the numbers in the reported results all end in 0 or 5, and why there are certain irregularities in the totals.

[457] Mr. Dolson's cross-examination was relatively brief, and neither the credibility nor the reliability of his testimony was called into question.

[458] In their closing brief, the Plaintiffs call into question Mr. Dolson's testimony to the effect that the long form was used for 100% of Hay River's households because Dr. Landry and Dr. Denis both expressed doubt and surprise when it was

suggested to them that this was the case. I acknowledge that Dr. Landry and Dr. Denis both regularly work with Statistics Canada data and are involved in Statistics Canada's post-census surveys. However, Mr. Dolson is a Statistics Canada employee and was called as a witness to present the results of the 2006 Census, and I have no reason to question the reliability of what he says under oath concerning the procedure followed for the 2006 Census.

[459] I conclude that he presented the Census results and explained the general methodology to the best of his knowledge.

d. Vishnu Perris

[460] 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, in the NWT, the percentage of people aged 18 and over who graduated from high school is lower than the Canadian average. 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).

[461] 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.

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

e. Paul Devitt

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

[464] Mr. Devitt spoke about the process that led to the construction of École Boréale. He stated 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 the construction of new buildings, his department usually counts on a new school fulfilling needs for at least 10 years. According to him, the usual construction practice for new buildings is to design them with a view to possible expansion in the future.

[465] According to Mr. Devitt, the government never made a commitment to expand École Boréale. It was a future possibility, if the numbers justified it. He stated that it was understood that the number of enrolments would determine whether or not they decided to expand.

[466] The school's capacity when it opened was 110 students. According to the Department's standards, a school accommodating that many students is not entitled to a gymnasium or other specialized spaces. It was therefore understood that École Boréale students would use the gymnasium and other infrastructure of neighbouring English schools. That is one of the reasons for the choice of location for the school, despite the DEA's opposition.

[467] Mr. Devitt spoke about the standards that provided the Department with guidelines on school spaces. New standards adopted in July 2005 (Exhibit 162) resulted in changes. According to the current standards, a school with 150 students is entitled to a gymnasium of 550 square metres.

[468] Mr. Devitt explained that École Boréale is bigger than the size stipulated in the standards in effect at the time of construction. Moreover, had it been built according to current standards, it would have been entitled to even less space, given the number of students it was designed to accommodate.

[469] According to Mr. Devitt, the CSFTN-O was closely consulted when École Boréale's construction plans were being made. The documentary evidence confirms this.

[470] Mr. Devitt spoke about the funding formula used by the government to establish the budget for school teachers. Exhibit 185 explains the teacher-student ratio for each of the school boards in the NWT. Mr. Devitt explained that the

CSFTN-O's teacher-student ratio was better than that of the other school boards because the federal government provides funding for minority-language education.

[471] Mr. Devitt explained that he was on very good terms with the Director of the CSFTN-O and expected that the latter would tell him about any problems concerning the use of gymnasiums in the English schools by École Boréale students. As far as he knew, the sharing of infrastructure worked well, and he had never received a complaint.

[472] Mr. Devitt stated that he was vaguely aware of the CSFTN-O's admission policy. His understanding was that the policy limited the number of students whose parents are non-right holders to 20% of the total school population. The Department never checked whether this policy was being enforced.

[473] Mr. Devitt confirmed that Mr. Kindt had been hired by the Department in fall 2007 to conduct a needs assessment at École Boréale. He stated that the reason Mr. Kindt had been hired was that the school's utilization rate was very high. He stated that when he explained to Mr. Kindt what the Department expected of his analysis, he specifically asked him to look at the issue of enrolments.

[474] In his report, Mr. Kindt indicated the number of students in the school whose parents were non-right holders. Mr. Devitt stated that the Department was concerned about this information regarding utilization of the school. The Department concluded that it had to establish a policy to regulate the issue of enrolment. That is what led to the development of the ministerial directive. Mr. Devitt stated that he was unaware of the DEA's pressure to adopt such a directive.

[475] Mr. Devitt stated that the Department had not made any proposals to expand École Boréale during the planning process for the government's Capital Plan. The Department of Education considers that the numbers do not justify expansion at present.

[476] He acknowledged that the basic standards used to allocate space for schools are based on numbers. Thus, entitlement to specialized spaces, such as a gymnasium, music room or industrial arts room, depends on projections of the number of students who will be attending the school. Mr. Davit confirmed that the

standards are guidelines and that the Minister of Education can decide to exceed them. However, he explained that to his knowledge, the Minister had had never granted such permission.

[477] Mr. Devitt was questioned about the process that led to the changes in the standards in 2005, in particular the increase in the required threshold, in terms of number of students, for a school to be entitled to 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.

[478] 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 several small NWT communities have a gymnasium that is often a community facility adjoining the school.

[479] 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.

[480] 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.

[481] In cross-examination, it was put to Mr. Devitt that the government has always known that children of non-right holders were being accepted at the Hay River Francophone school, since even the earliest documents on the project

mention the fact (Exhibit 97). Mr. Devitt said that he did not know if this matter had been discussed at the outset.

[482] Counsel for the Plaintiffs asked him on what the government based its assumption that the new school would meet needs for a period of 10 years. He replied that the Department generally decides the size of a building on the basis of enrolments and projected future enrolments and plans projects so that buildings will be adequate to needs for that time span.

[483] Mr. Devitt confirmed that the GNWT had not done any studies to determine the number of right holders either in the NWT or at Hay River.

[484] He was asked about a letter to the DEA from the Minister of Education (Exhibit 103) in October 1999. This letter followed from a resolution passed by the DEA to prevent the Francophone school from admitting children of non-right holders to its program. In the letter, the Minister mentions the right of the Commission scolaire francophone to determine who has access to its program. The letter refers to a legal opinion given to the Department on that issue. Mr. Devitt stated that he was not aware of this legal opinion at the time the ministerial directive was being drafted.

[485] Counsel for the Plaintiffs questioned Mr. Devitt on the circumstances that had led to the adoption of the directive. Mr. Devitt said that he did not remember all the conversations. He said that in the light of Mr. Kindt's report, his division had concluded that there was a "policy gap" which had to be filled. The situation was reviewed, and the directive was drafted and eventually sent to the Minister's office.

[486] Mr. Devitt said that the directive had been drafted by an employee in his division. As to the procedure followed in drafting it, Mr. Devitt said that the employee had done research and had consulted the Department of Justice. Mr. Devitt could give no further details of the type of research conducted. Counsel for the Plaintiffs asked him why he had not consulted CSFTN-O before concluding that there was a policy gap. Mr. Devitt replied that CSFTN-O was consulted "at appropriate times". He thought that he might have discussed it with Mr. Brûlot, but he was not sure.

[487] Mr. Devitt said that he knew that the CSFTN-O had an admission policy, but he had not read it before concluding that a directive was needed. He knew that the policy allowed for admission of children of non-right holders, but he did not know how many there were at École Boréale. He added that he was aware that the practice of admitting children of non-right holders exists elsewhere in Canada.

[488] Mr. Devitt said that he did not remember to whom he had sent the draft directive. He said that he did not remember if the South Slave school board had specifically asked the Minister to adopt a directive on enrolment in the French-language teaching program.

[489] Mr. Devitt admitted being aware that the DEA had, in the past, expressed disapproval of the CSFTN-O's policy allowing admission of the children on non-right holders to École Boréale.

[490] Mr. Devitt talked about the contractual relationship between his Department and Mr. Kindt. He confirmed that the Department regularly retains Mr. Kindt's services in preparing educational plans and has had a service agreement with him for several years. Mr. Kindt's services were also retained following the interlocutory injunction of July 2008 to assess options regarding its application.

[491] Mr. Devitt said that Mr. Kindt had not been involved in the discussions concerning development of the directive. Mr. Kindt's role had been to conduct a needs assessment and prepare an educational plan for École Boréale. Mr. Devitt had met with Mr. Kindt to discuss preparation of the educational plan. He does not remember if he spoke to him specifically about the CSFTN-O admission policy, but he said that it is possible that the issue was raised.

[492] Mr. Devitt's testimony seemed to me to be quite clear and to the point on most of the matters addressed in his examination-in-chief and cross-examination, in particular on the matter of the negotiating and planning process for construction of École Boréale, application of departmental standards and consultations with CSFTN-O. I find his testimony reliable on these issues.

[493] However, I have some reservations concerning his testimony on the circumstances surrounding adoption of the ministerial directive. On this score, Mr. Devitt's testimony was rather vague. Given that the directive's validity is one

of the points at issue in this case, I found it surprising that he was unable to be more precise.

[494] For example, he could give very few details of the steps followed in developing the directive. He is in charge of the division which developed it, yet he seemed to know very little about the research done during this process or the factors taken into account in its drafting.

[495] I also find it surprising, to say the least, that Mr. Devitt does not remember to whom he sent the draft directive. Nor was he very precise about his consultations with the CSFTN-O. He said that he had consulted the CSFTN-O "at appropriate times" and believed that he had spoken to Mr. Brûlot but was not sure. Given the fact that the issue was bound to be controversial, I find it surprising that his recollection is so vague.

[496] The directive of July 2008 was no routine directive. It drastically altered the admission management regime for the French-language teaching program that had stood for seven years. It was part of a highly contentious context. At the time of its adoption, the CSFTN-O had already initiated its court action seeking expansion of École Boréale. The validity of the directive was immediately contested. In such circumstances, I would have expected Mr. Devitt's testimony to be much more detailed, especially as he was able to be very precise on several other matters.

[497] I find that, with regard to the circumstances surrounding adoption of the ministerial directive, the objective served and the considerations at play in its development, Mr. Devitt's testimony is not particularly reliable.

f. Janet Grinsted

[498] 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.

[499] She testified that the academic performance of students at École Boréale is very good, as is the case for those at the Francophone school in Yellowknife. They compare favourably in performance with students in other NWT schools.

[500] Ms. Grinsted talked about discussions that had taken place between her Department and the CSFTN-O in the fall of 2010 on the possibility of gathering certain information on students when they enrol. The Department proposed including on the form questions to establish whether the student belongs to one of the three categories listed in section 23 of the Charter.

[501] Exhibit 203 includes the questions that the Department had suggested, together with the CSFTN-O's response. In this response, Mr. Brûlot explains that the CSFTN-O considers the questions to be too limited, and the school board will not participate in a survey unless the scope of the questions is widened. Mr. Brûlot's email gives sample questions that the CSFTN-O would like to see included in the questionnaire.

[502] Ms. Grinsted was cross-examined about her role in developing and implementing the ministerial directive of July 2008. She was on leave from September 2007 to September 2008 and had no part in drafting the directive. She learned of its existence when she returned to work.

[503] Ms. Grinsted remembers having given a radio interview to the Canadian Broadcasting Corporation about the ministerial directive. This came after an interview given by Mr. Blackman on the same topic. Ms. Grinsted does not recall exactly what she did by way of preparation for the interview, but she thinks that she read the directive and discussed it with her colleagues.

[504] Counsel for the Plaintiffs referred Ms. Grinsted to a transcript of the interview and asked her if it properly reflected what she had said. Ms. Grinsted said that she could not remember exactly what she had said, but she saw no glaring errors in the transcript. According to the transcript, she had said that the directive had been put in place to limit access to the French-language teaching program to the children of right holders following complaints from the DEA about access to the program by the children of non-right holders and about the concomitant loss of students and funding for the DEA. The transcript was not entered in evidence.

[505] Counsel for the Plaintiffs asked Ms. Grinsted what her understanding was today of the rationale for the directive. She replied that she understood that the directive had been issued because of worries about the number of non-right holders opting for the French-language teaching program, which affected the integrity of the program ("the character of the program", as she put it in her testimony). She added that she knew that the DEA had expressed "concerns" about the situation because they were losing students, and thus funding.

[506] Ms. Grinsted was also questioned about her role in processing applications to the Minister under the directive for permission to enrol. She explained that applications for permission are sent to her division by the Deputy Minister's office, with a request for recommendation. She is sometimes the one who drafts proposed answers.

[507] Ms. Grinsted acknowledged that no criteria had been developed for enforcing the directive. Each application is studied case by case. Among the factors considered are a student's Francophone ancestry and the parents' knowledge of French. Ms. Grinsted further acknowledged that there is no specific appeal procedure.

[508] I find Ms. Grinsted's testimony trustworthy. There are details which she could not recall, but this is not surprising. In my view, she did her best to answer the questions and did not try to evade them.

g. Donald Kindt

[509] Mr. Kindt has lived in the NWT for over 30 years and has made a career in education. He first worked as a teacher and then went to the Department of Education as a curriculum coordinator; he subsequently became an assistant superintendent for one of the Anglophone school boards in Yellowknife.

[510] For over 10 years, he has been an educational consultant and has worked extensively on the planning of school infrastructure. In particular, he worked on the plans for St. Patrick School, a Yellowknife high school. Mr. Kindt has considerable experience in the planning of school infrastructure and the standards applicable in NWT.

[511] The Defendants asked the Court to qualify Mr. Kindt as an expert witness to give opinion evidence in four broad areas: (1) the adequacy of École Boréale's facilities in terms of needs for now and over the next four to five years; (2) a comparison, from the viewpoint of infrastructure and programs, between École Boréale and schools of a similar size elsewhere in NWT, as well as certain minority schools outside NWT; (3) the questions of how acceptable it is to merge of the primary and secondary schools into one, and how widespread this practice is, both in the NWT and elsewhere in Canada; and (4) the causes of student migration from minority Francophone schools to Anglophone institutions and the part that lack of infrastructure and programs plays in this phenomenon.

[512] In the course of the voir dire, Mr. Kindt was cross-examined on his contractual relationship with the GNWT. He confirmed that 50% to 70% of his contracts are with the government and that this represents roughly 50% of his income. He also acknowledged having been appointed by the GNWT to serve on certain administrative tribunals.

[513] The Plaintiffs objected to Mr. Kindt's qualification as an expert witness on several grounds. They argued that his contractual relations with the GNWT cast serious doubt on his objectivity. They further pointed out that Mr. Kindt's direct involvement in the study of the two schools to which these proceedings apply makes him a factual witness, so that it would be improper for him to testify also as an expert witness.

[514] With regard to the proposed testimony on the comparison of schools, the Plaintiffs argued that such testimony is not relevant, since comparison should be made with the schools with which École Boréale is in competition. As to his proposed testimony on the cause of student departures, the Plaintiffs argued that my reasons for now allowing Mr. Kubica to give opinion evidence on this topic in file CV2005000133 are equally applicable to Mr. Kindt.

[515] At the conclusion of the voir dire, I decided to allow Mr. Kindt to testify as an expert witness in the first three areas only. I concluded that the concerns raised by the Plaintiffs as to his objectivity were relevant to the weight of his testimony but were not an obstacle to qualifying him as an expert witness. The evidence

adduced in the course of the voir dire was applied to the trial, including his expert report (Exhibit 155).

[516] Mr. Kindt explained the nature of his work in the planning of school infrastructure. The government often retains his services to develop an "Educational Plan". He meets with parents, students, teachers and administrators to determine their aspirations and needs and then helps them to set priorities within the bounds of the infrastructure standards of the Department. In a process like this, though he is hired by the government, Mr. Kindt sees himself as a spokesman, a defender even (several times he used the term "advocate") of users of the school, helping them to put their point of view to the government.

[517] He explained that it is always a challenge to take the measure of what people want and to formulate a plan to match those wishes while remaining within the parameters set by government standards and available budgets.

[518] Mr. Kindt was hired as a consultant in late 2007 to study the needs of École Boréale. He had discussions with Mr. Devitt in preparing this process. He also contacted Ms. Call to organize their meetings.

[519] In examination-in-chief, Mr. Kindt explained that when educational plans were being prepared, the Department set him certain parameters. In the case of École Boréale he was asked to assess the situation and draw up an educational plan to equip the school for a capacity of 150 students.

[520] Mr. Kindt went to Hay River several times. He visited the school, met with students and talked to the administration. He drafted a detailed report, dated February 15, 2008 (Exhibit 156). This report contains the findings of his visit and the observations of the students and parents that he met. To it is appended the timetable for use of the atrium.

[521] The report includes the projections of the Department of Education. These projections assume an enrolment of 10 per year in kindergarten and use the "cohort survival" method to project to other levels. This method operates by using an average based on known data over a four-year period to compute the proportion of students who will continue in the school each year to the next level. Mr. Kindt found that according to these projections, the school would need to have a capacity

of 150 students. He stressed, though, that if the children of non-right holders were excluded from the school, the projections would need to be revised downward.

[522] Mr. Kindt's report also includes projections made by the CSFTN-O, which assume a yearly kindergarten enrolment of 15 rather than 10.

[523] Mr. Kindt said that in his discussions with Ms. Call, she talked about enrolment of the children of non-right holders and the CSFTN-O's admission policy. She gave him a table showing numbers of students who are children of right holders and those admitted to the school under other criteria provided for in the admission policy. Mr. Kindt does not recall whether Ms. Call said that the table was only a draft or preliminary document. He said that Ms. Call had been very open with him at the time of this conversation. He said that he had not been aware that the subject was controversial. He maintained that he referred to the subject in his report simply because it had emerged in his discussions with Ms. Call.

[524] Mr. Kindt went back to École Boréale in 2010 to prepare his expert report for the court proceedings. He noticed the changes made as a result of the interlocutory injunction.

[525] In his testimony, he talked about the Career and Technology Studies (CTS) courses. He explained that he generally recommends to small schools that they try to develop a specialized niche. In the case of École Boréale, he felt that the students have a good selection of courses. He said that for the so-called "dirty" CTS courses (carpentry, mechanics, welding), the best way for a small school to offer students this selection is to forge partnerships in the community or with other schools.

[526] In his expert report, Mr. Kindt describes and comments on the premises of École Boréale and how they are used. He concludes that from pedagogical viewpoint, the school needs better space for the teaching of Culinary Arts, which he sees as the most popular of the technical courses in the NWT. He feels that the small kitchen in the teachers' lounge is inadequate for delivery of these courses and that the teachers need space of their own in any case.

[527] Mr. Kindt takes the view that the room currently used as a science laboratory needs improvement, including storage space for equipment, a fume hood and better water supply facilities.

[528] Mr. Kindt explained that in his conversations with Ms. Call, she had expressed satisfaction with the use made of gymnasiums in the other schools, though École Boréale still does not have the flexibility she would like.

[529] He feels that the number of hours devoted to physical education needs to be increased, but he stressed that this does not necessarily mean that all the additional hours need be spent in a gym.

[530] With regard to the "dirty" CTS courses, Mr. Kindt suggested a partnership with Diamond Jenness School and using the new trades centre. He evoked the possibility of having École Boréale's students take these courses in English. He pointed out that in other provinces, the trend is to combine students from several schools to make CTS courses viable.

[531] Mr. Kindt raised the possibility of having École Boréale reconfigure its grade structure (by including Grade 7 in the primary level), given the enrolment numbers for each grade, the space available and class sizes.

[532] Mr. Kindt also talked about increasing the school's capacity, which may mean taking back space used for the pre-school program.

[533] Mr. Kindt drew up a comparison between École Boréale and certain other schools. In his view, the best comparator in NWT is Kalemi Dene School, since it has broadly the same number of students. He also analysed infrastructure availability in six schools outside the NWT (two schools in Alberta, two in Saskatchewan and two in Manitoba).

[534] On page 40 of his report, he presents a table of comparisons between École Boréale and these seven schools. He concludes that École Boréale's facilities match those of the other schools, in spite of certain differences. Five of the schools have their own gymnasium, and two others have access to a gymnasium; four schools have a computer laboratory, while two others have none; most lack a

workshop or equipment for teaching “dirty” CTS courses; most (five) lack space for teaching home economics, but most (five) have a science laboratory.

[535] Mr. Kindt also gave his opinion on combining primary and secondary levels in one school. In the NWT, 78% of schools house grades Kindergarten through 11 and 12.

[536] In British Columbia, Alberta, Saskatchewan and Manitoba, the percentage of schools where all grades are together exceeds that for separate primary- and secondary-level schools. This also applies to Francophone minority schools, except in British Columbia, where the percentage of separate secondary-levels is higher. Mr. Kindt thinks that the larger number of Francophone students in British Columbia probably explains why that province has more separate Francophone high schools.

[537] Mr. Kindt concludes that the fact of having a single school housing all grades from Kindergarten to Grade 12 is nothing unusual and is, in fact, the norm in the NWT and the western provinces for schools that have a student population comparable to that of École Boréale. Mr. Kindt therefore feels that it is not necessary to have a separate wing for the secondary level.

[538] Mr. Kindt was cross-examined on his discussions with Mr. Devitt when his services were retained to prepare the educational plan for École Boréale in 2008. He said that he never received written terms of reference from Mr. Devitt.

[539] Mr. Kindt said that he was aware of the CSFTN-O’s admission policy; he said that it was probably Mr. Devitt that had told him about it. Counsel for the Plaintiffs asked him if Mr. Devitt had told him that the admission policy was a bone of contention between the CSFTN-O and the DEA. Mr. Kindt replied, “Not in those words, but I was aware it was an issue. My bottom line was capacity.”

[540] Counsel asked him why he had included the information on the number of children of non-right holders in his report. He replied that he had not thought that it would be a controversial subject. He said that Mr. Devitt had not asked him to study this issue, but he included the information because it had been given to him. He maintained that there was no “agenda” in this matter.

[541] Counsel asked him if he had had discussions with the DEA. Mr. Kindt replied that he remembered talking to the principal of Diamond Jenness School about space availability, but he did not recall having spoken to the DEA. Counsel then drew his attention to page 65 of the report of February 2008, which mentions discussions with the DEA. Mr. Kindt acknowledged that if it was mentioned in his report, then the meeting had indeed taken place.

[542] This excerpt from the report details the DEA's position on the admission policy and indicates that the DEA would be open to partnerships if the CSFTN-O's admission policy is clarified, because that policy is perceived as putting École Boréale in competition with the DEA's schools. Mr. Kindt stated that he had taken these remarks "with a grain of salt"; he said that he regarded it as "political posturing". He acknowledged that if the DEA refused to commit to partnerships, it would make the situation difficult for people on the ground.

[543] Counsel asked Mr. Kindt if he had taken account of the constitutional grounds of the CSFTN-O's claims in drafting his 2008 report. Mr. Kindt reiterated that he had adhered to the parameters given him by Mr. Devitt (development of a plan for a school with a capacity of 150 students).

[544] Mr. Kindt explained that normally, after preparing an educational plan, he would circulate the draft report to gather feedback before finalizing it. This fact is alluded to in the process outlined in the documents sent to Ms. Call (Exhibit 206). However, Mr. Kindt did not send a copy of his report to École Boréale. He thought that people in the Department had told him that they would take care of that.

[545] He acknowledged that an employee of the Department had contacted him to ask whether the data included in his report on numbers of children of non-right holders were accurate. He checked his mathematical computations to tally the children enumerated in the various categories shown in the table given him by Ms. Call and confirmed the accuracy of the figures for the Department. He did not contact Ms. Call to confirm the accuracy of the numbers.

[546] Counsel for the Plaintiffs asked Mr. Kindt why he had written in his 2008 report that the issue of the admission policy needed to be settled. He replied that he had deemed it appropriate to "flag the issue" because, as he understood it, the

CSFTN-O's policy was to limit to 20% the proportion of children of non-right holders, yet the figures provided by Ms. Call suggested that the percentage was higher. He maintained that the comments in the report on this subject were not intended to be negative or derogatory, but he felt that the issue needed to be addressed because of its potential impact on numbers.

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

[548] However, Mr. Kindt clearly has extensive experience in the planning of school infrastructure in NWT. He has worked on the planning of a number of major projects. He is thoroughly familiar with the workings of the Department of Education and the standards applicable to the design and construction of schools.

[549] In weighing the credibility and reliability of his testimony, I have taken account of the professional and contractual bonds that he has with the Defendants. These cannot be ignored and need to be carefully examined to assess whether they may have influenced his testimony.

[550] 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 those of remote parts of the provinces, but all the same, it is the people who live and work there that have the most direct experience of those realities.

[551] It has to be recognized that in a jurisdiction like ours, it would be hard for a person to acquire the type of experience and knowledge that Mr. Kindt has in the field of educational infrastructure without ever having had dealings, in one way or another, with the government, whether as an employee or as a consultant.

[552] I conclude that Mr. Kindt's credibility is not necessarily tainted by his professional links with the government. My observations during his testimony lead me to conclude rather that the opinions he has expressed on the subject of infrastructure are genuine and have not been swayed by inappropriate motives.

[553] However, I have certain reservations as to the evidentiary weight of some of his opinions, primarily because his work experience, though extensive, does not include teaching or administration in a school operating in a Francophone minority context. He is thoroughly versed in the standards applied by the Department of Education, and I am in no way questioning his competence in the general field of school infrastructure planning, but it is clear that for him each school is unique, with specific needs, and the special needs of a Francophone minority school are but one example of special needs among many others which have to be accommodated within the standards and parameters established by the Department of Education.

[554] Certain aspects of his thinking demonstrate a lack of familiarity with the mission and specifics of a minority school. For example, he suggests that to make better use of space, the configuration of the primary and secondary levels at École Boréale could be rearranged. This overlooks the possibility that the CSFTN-O may have pedagogical reasons, specific to its program, for defining the primary and secondary programs the way it does.

[555] He also suggests the possibility of having École Boréale students take their CTS courses in English and explains that combining students from several schools is a strategy used in other provinces to make courses viable. In making these suggestions, Mr. Kindt does not seem to take account of the mission of a minority school, nor of the importance of having students learn in a homogeneous environment in French.

[556] There is one area where my reservations as to Mr. Kindt's testimony are sufficiently strong for me to discount it altogether. This concerns the controversy over his remarks in his 2008 report about the number of children on non-right holders at École Boréale.

[557] Mr. Kindt's testimony was rather vague on his discussions with Mr. Devitt about the CSFTN-O's admission policy, and the issue of numbers, when his services were retained. Yet he said that he was aware of the admission policy. He was also somewhat vague in describing the way in which the subject of numbers of children of non-right holders had come up in his conversations with Ms. Call.

[558] Mr. Kindt said that he did not know that the issue of the policy on admissions and numbers of non-right holders was controversial. I find this statement very surprising, given the evidence on this topic.

[559] As I said earlier, when he was cross-examined, Mr. Kindt first said that he did not think that he had met with a DEA representative when he had visited Hay River. It was only when his attention was drawn to that part of his report that he acknowledged having had that meeting. The report indicates that the DEA representative had talked about the CSFTN-O admission policy as being an obstacle to partnerships between the two school boards. Mr. Kindt said that he had not taken that comment particularly seriously.

[560] I have great difficulty with these answers. Even allowing that perhaps Mr. Kindt did not know at the outset that the issue was controversial, I do not see how he could not have known that it was so after his conversation with the DEA representative.

[561] Obviously, he felt that the numbers in Ms. Call's table suggested that there were more children of non-right holders than the 20% ceiling specified in the admission policy. He judged the issue to be sufficiently important to include this information in his report. However, after making these observations, he does not seem to have tried to delve into or clarify the issue with Ms. Call. There is no evidence, either, that he tried to inquire more deeply into the matter with the CSFTN-O.

[562] Yet, Mr. Kindt clearly recognized in his report that the admissions issue had to be settled because of its impact on numbers and thus on the scale of the school's eventual expansion. I find it highly surprising, in this context, that he maintains that he did not consider the issue controversial, since he remarks several times in his report on its impact on projections and the school's future needs. I find it hard to believe that the importance of this matter completely eluded him.

[563] It should have become even more obvious that the issue was important when the Department asked Mr. Kindt to confirm the accuracy of the figures in his draft report regarding numbers of children of non-right holders in the school. Here again,

he did not feel any need to contact Ms. Call to make sure that the figures were accurate.

[564] For me, all these factors impact negatively on the reliability of Mr. Kindt's testimony on this issue. At best, his grasp, understanding and assessment of his conversations about this issue with both Ms. Call and the DEA representative were very poor.

[565] With regard to the discussions between Ms. Call and Mr. Kindt on this issue, I accept Ms. Call's testimony. I find that she did indeed tell Mr. Kindt that the information in the table she had given him was incomplete and that work remained to be done.

h. Excerpts from the examination for discovery of Philippe Brûlot

[566] Philippe Brûlot was the superintendent at the CSFTN-O at the time of the proceedings. He held the position in 2008 when this action was initiated and when the ministerial directive took effect. He was not called as a witness in the proceedings, but he is the signatory of several letters entered in evidence concerning implementation of the directive and applications for enrolment. The Defendants have entered as evidence excerpts from his examination for discovery (Exhibit 207).

[567] Various facts related in these excerpts are corroborated by other evidence with respect to the development of the Francophone school in Hay River, such as the move into portable classrooms, the selection of a site for the new school and the CSFTN-O's approval of the construction project.

[568] Mr. Brûlot confirmed that multi-grade classes are common practice in small schools. He also acknowledged that it is not just because of lack of space that grades are combined.

[569] He specified that to the extent that the CSFTN-O was asking for 13 classrooms and believed that these classrooms could be filled, they would be filled by children of right holders and children of non-right holders admitted with the CSFTN-O's permission.

[570] Mr. Brûlot also said that to protect the school's identity, the CSFTN-O strove to cap at 40% the proportion of students who, at the time of their admission, were children of non-right holders, and that of this number, at least 20% would be students of Francophone ancestry. This, however, was unofficial policy that was not enshrined in the written one.

[571] Mr. Brûlot also confirmed that following adoption of the ministerial directive, he held a public meeting with parents at which he clearly laid out the directive's parameters and the fact that completing the pre-kindergarten program would not give a child the automatic right to enrol in kindergarten. A majority of the parents attended the meeting.

2. Issues of admissibility

a. Exhibit "Z"

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

[573] Ms. Perris explained that the NWT Bureau of Statistics (the Bureau) regularly makes projections on different subjects, including fluctuations in the NWT's population. In so doing, the Bureau takes into account various factors, such as historical trends, mortality and fertility rates, and migration patterns.

[574] According to the results of the 2006 Census, the number of children between the ages of 5 and 17 in the NWT was 8,325. The number for Hay River was 735, of whom 25 had at least one parent identifying French as his or her mother tongue.

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

[576] Ms. Perris made these projections on a purely mathematical basis. The Bureau's figures predict that in 2014, the number of children between the ages of 5 and 17 will be 7,692 in the NWT and 608 in Hay River. For 2019, the outlook is for 8,082 children between the ages of 5 and 17 in the NWT and 552 in Hay River. Ms. Perris, assuming that the proportion of children with at least one parent whose

mother tongue is French would remain stable, used the percentage from the 2006 Census and applied it to the projections for the general population for 2014 and 2019. Using this percentage, she calculated that the number of children with at least one parent whose mother tongue is French would be 21 in 2014 and 19 in 2019.

[577] The Plaintiffs object to the admission of this document, claiming that it is opinion evidence.

[578] At the case management conferences held prior to the proceedings, counsel for the Defendants had raised the issue of the statistics he intended to present as evidence precisely to clarify whether the Plaintiffs would object to having this evidence presented by a lay witness rather than an expert witness. Discussions had turned specifically on the results of the 2006 Census. Counsel for the Plaintiffs had indicated at the time that he would not object to having the results elicited from a lay witness, but that he would contest the reliability of the figures themselves.

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

[580] I agree with the Plaintiffs that there is a distinction between purely statistical evidence, such as census results, and projections. I agree that projections were never specifically addressed in the case management conferences. I do not think that anyone was acting in bad faith. Rather, there was a misunderstanding about the scope of the evidence that the Defendants intended to present at the time when they raised the issue.

[581] On the other hand, a number of documents entered as evidence in the proceedings include projections, some submitted by the Defendants and others by the Plaintiffs. In all cases, these documents were introduced as evidence through lay witnesses.

[582] 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 see her testimony on this subject as being opinion testimony per se. 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 "AA"

[583] Exhibit "AA" is a document listing NWT schools, their capacities, their enrolments and their utilization rates. The Defendants sought to enter this document as evidence during Mr. Devitt's testimony. The Plaintiffs object to this document being entered as evidence on the grounds that it was not among the documents disclosed to them prior to the proceedings. Counsel for the Plaintiffs states that he saw this document for the first time on the very day of the testimony, when the Defendants tried to have it entered as evidence.

[584] Counsel for the Defendants retorted that a number of documents entered as evidence by the Plaintiffs had likewise been presented during the proceedings and not before, and that this is normal given the dynamic nature of court proceedings.

[585] 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 matter was addressed by other witnesses during the proceedings, in particular during Mr. Huculak's testimony, which was heard a few days before Mr. Devitt's. There is thus really no satisfactory explanation for the non-disclosure of this document.

[586] However, I recognize that certain documents entered as evidence by the Plaintiffs were also provided to the Defendants in the course of the proceedings. In a number of cases, these were updates of documents already disclosed, but the fact remains that it made it hard for the Defendants to verify the contents.

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

c. Exhibit “BB”

[588] Exhibit “BB” is a seven-page document which the Defendants also sought to enter as evidence during Mr. Devitt’s testimony. It contains descriptions of the schools in the communities of Colville Lake, Dettah, Jean Marie River, Kakisa, Nahanni Butte, Trout Lake and Wrigley. The documents include plans of the schools, student numbers by level, and general information about year of construction and utilization rates.

[589] The Plaintiffs again object to these documents being entered as evidence because they were not disclosed at the outset. 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 of comparable size to École Boréale in Hay River, yet he had received only a few plans in response. He therefore argued that it would be unfair to allow the Defendants to enter evidence that is more detailed than what was given to him in response to the undertaking.

[590] The documents that make up Exhibit “BB” are dated October 6. It seems to me to have been quite clear, since before proceedings began, that one of the points at issue, in both this proceeding and file CV2005000108, would be the comparator to be applied to determine whether the two NWT Francophone schools were offering their students substantive equality with students attending majority schools.

[591] Insofar as the Defendants intended to enter evidence relating to other NWT schools to substantiate their argument, such evidence should have been disclosed, especially as the Plaintiffs had explicitly asked for disclosure of 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 was expected to be entered into evidence.

[592] I agree with counsel for the Defendants that the parties to proceedings must be allowed some latitude, since the exercise is dynamic and sometimes complex. This was certainly so in the case at bar. Nonetheless, the rules of civil procedure are there to prevent either party being taken by surprise.

[593] In the circumstances, I find that Exhibit “BB” is not admissible.

d. Exhibit “CC”

[594] Exhibit “CC” is a report on education in NWT, prepared by the Office of the Auditor General of Canada. Counsel for the Defendants referred to this report during the testimony of Ms. James, the principal of Kalemi Dene School in N’Dilo. She confirmed that she was aware of the report. Her attention was drawn particularly to the graph on page 16 of the report, which shows that graduation rates in NWT are much higher for non-Aboriginal students than for Aboriginals. The rate for non-Aboriginals is distinctly higher than the territorial average, while for Aboriginal students it is clearly lower. This trend holds steady from the year 1994–1995 to 2007–2008. Ms. James confirmed that these data are consistent with what she has witnessed in the course of her career and that they reflect certain obstacles and challenges that still face Aboriginal students.

[595] Ms. Grinsted, for her part, testified that the Department of Education had given the Office of the Auditor General much of the information used in preparing this report. Ms. Grinsted also said that the table showing graduation rates for the NWT appeared to reflect the situation and the information in the Department’s possession.

[596] The Plaintiffs contest the admissibility of this report. In my view, this objection is unfounded, since the document was tabled in the Legislative Assembly, thus 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.

IV) ANALYSIS

[597] The Plaintiffs allege several violations of section 23. They say that École Boréale does not comply with the requirements of section 23 because it does not provide students that attend the school with substantive equality with the students who attend the majority schools in Hay River. They also submit that, in several respects, the GNWT is not respecting the CSFTN-O’s right of management.

[598] The Plaintiffs claim various forms of relief as a just and appropriate remedy for these violations under subsection 24(1) of the Charter, including a number of

declarations, compensatory and punitive damages and an order for solicitor-client costs.

[599] Before turning to the violations alleged by the Plaintiffs specifically, it is useful to review the general principles established in the case law regarding the implementation of section 23.

A. Section 23

[600] The legal foundation 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.

[601] 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: *Mahé* v. *Alberto,* [1990] 1 S.C.R. 324, paragraph 31.

[602] 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: *Mahé*, *supra*, paragraphs 36-37.

[603] 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: *Mahé*, *supra*, paragraph 38.

[604] 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. For the purposes of the present analysis, 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: *Mahé*, *supra*, paragraph 78; *Arsenault-Cameron* v. *Prince Edward Island*, [2000] 1 S.C.R. 3, paragraph 32.

[605] The "numbers warrant" justification 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: *Mahé*, *supra*, paragraphs 79-80.

[606] 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.

[607] Section 23 creates the right to a measure of management and control for the minority language group. 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.
>
> *Mahé*, *supra*, paragraphs 51-52.

[608] 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.

[609] 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: *Mahé*, *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.

[610] The provinces and the territories have a legitimate interest in the content of the qualitative standards of educational programs and can regulate the content of these programs as well as the size of establishments, transportation and assembly of students. But to the extent that these matters 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.

[611] 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 maximum limit: *Mahé*, *supra*, paragraph 65.

[612] In many ways, 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, since a school was built specifically to meet the needs of Hay River's French linguistic minority. The dispute between the parties concerns the adequacy of the facilities provided. Assessing this issue requires an analysis of what substantive equality is, in the circumstances that prevail in Hay River, based on the sliding scale principle.

[613] The proceeding also raises a fundamental, and new, question about the scope of the right of management, namely, who—the government or the CSFTN-O—has

the power to determine the admission criteria for the French language instruction program. In the context of Hay River, this question cannot be separated from the issue of the adequacy of the space.

[614] First, therefore, I will address the constitutional validity of the Minister's directive.

B. The ministerial directive

[615] The Defendants say that the Minister has the power to issue directives such as the one he issued in July 2008 since this power is essential to allow him to ensure that the resources allocated by the government to comply with its constitutional obligations to right holders are used for that purpose and not to provide non-right holders with services. They argue that such a power, far from being incompatible with section 23, is consistent with its purpose, namely, protecting the recognized rights of a defined and limited group of individuals.

[616] The Plaintiffs and the Intervener argue that the establishment of criteria for admission to the minority language instruction program falls within the exclusive power of the minority school board under its right of management.

[617] The validity of the ministerial directive is a question of law alone. It is similar to a question regarding the division of powers between two levels of government. In that respect, the reasons why the directive was adopted and the way it was enforced, even though they are part of the context and may have an impact on the relief that may be ordered, are not relevant factors in determining the directive's legal validity. The same is true of the scope of the CSFTN-O's admission policy and the manner in which it was enforced between 2001 and 2008.

[618] The tables prepared by Ms. Call show that the growth in the population of École Boréale, since the school opened in 2005, is not principally caused by an increase in the number of children of right holders attending the school; this number has remained stable. The student population increased as a result of the enrolment of several students whose parents are not covered by section 23.

[619] The admission criteria for a minority language instruction program clearly have an effect on government resources. If admission criteria are broader, the

government is likely to have to dedicate more resources to the program, while stricter criteria are likely to mean fewer resources will be needed.

[620] It is also clear that the government has a legitimate interest in how its resources are used. The fundamental issue regarding the establishment of admission criteria is therefore whether the CSFTN-O's right of management has precedence over the government's right to limit its spending. Since the case law recognizes that there are legitimate interests to be considered on both sides, I must turn to the purpose of section 23 to answer this question.

[621] In my view, the purpose of section 23, and in particular its remedial aspect, suggests that the power to determine the admission criteria to the minority language instruction program should be the minority community's.

[622] The right of management exists even when the numbers do not warrant the creation of an independent school board. In *Mahé*, the Supreme Court concluded that even though the Government of Alberta was not obliged to create an independent school board, the minority language parents were to have exclusive authority to make decisions relating to minority language instruction in schools: *Mahé*, *supra*, paragraph 99.

[623] The Supreme Court of Canada's recognition of the exclusiveness of powers is important. It signals that when a subject matter falls within the minority group's jurisdiction, governments cannot substitute their point of view. This protection is necessary to avoid the linguistic minority group being at the mercy of decisions made by the majority group which, sometimes, may not understand the linguistic and cultural concerns of the minority group.

[624] Regarding the scope of the right of management, the Supreme Court of Canada recognized that for the purpose of section 23 to be fulfilled, it is essential for the minority language group to have some control over those aspects of education which pertain to or have an effect upon their language and culture: *Mahé*, *supra*, paragraph 57.

[625] At issue therefore is whether the management of admissions to the minority language instruction program is an aspect of education which pertains to or has an

effect upon the language and culture of the minority language group. In my view, the answer is yes.

[626] The remedial aspect of section 23 is critical and does not merely require that the measures taken to ensure the enforcement of minority language rights maintain the status quo. The purpose is not restricted to avoid repeating the mistakes that led to the erosion of minority language communities. Governments must also do what needs to be done, where it is possible to do so, to correct these injustices. In my opinion, this includes reversing the effects of assimilation by revitalizing the minority community.

[627] An effective way of reversing the effects of assimilation can be to make minority language instruction available to students who are not strictly entitled to it. But it is crucial that this is done in a way that does not compromise the homogeneity of the program and that takes into account the school's capacity to integrate such students.

[628] In my opinion, it is the minority group's role, and not the government's, to decide to what extent the minority language instruction program can contribute to revitalizing the community while protecting the integrity of the program. This aspect of education clearly has an influence on language and culture and therefore falls under the exclusive jurisdiction of the school board. The school board is moreover in a much better position than the government to make decisions regarding the admission of individuals who wish to use the service even if they are not strictly entitled to it.

[629] In actual fact, the CSFTN-O's admission policy has contributed to the revitalization of the Francophone fact in Hay River. The evidence revealed that this community has a high assimilation rate. This is hardly surprising: until relatively recently, the community had neither a francization program for young children nor a French language instruction program.

[630] As Dr. Landry and Dr. Denis explained, the absence of institutional structures greatly reduces the possibility for a minority community to maintain its vitality. The higher the assimilation rate is, the more the number of section 23 right holders declines, the less often the rights are exercised and the more they continue

to erode. Such a cycle can be devastating for a small community: the right holder status can be lost within a single generation, which is what could have happened to Ms. Boulanger's daughters if École Boréale had not existed. Dr. Denis referred to this phenomenon as a [TRANSLATION] "downward funnel".

[631] One way of revitalizing a community is to provide a broader group of people with access to the French language instruction program so as to increase numbers and produce the opposite effect, an upward funnel, so to speak.

[632] This is what happened in Hay River. The revitalization of the minority community began with the creation of the Association franco-culturelle in 1987. The effect of the revitalization was gradual. The members of the minority community started requesting services. Their requests led to the creation of the francization program and, eventually, the education program.

[633] Even when it was still in the portable classrooms, École Boréale quickly became a driver for the revitalization of Hay River's Francophone community. The school had an impact not only on the children attending it but also on their parents. For example, Ms. Taillefer spoke of people in the community she had known for a long time and who had always spoken to her in English, but who, in the school context, started speaking to her in French.

[634] The pre-kindergarten francization program and the CSFTN-O admission policy have made the French language instruction program accessible to many children who would not otherwise have access to it. This has contributed to francizing not only the children, but also their parents. This, in turn, initiated the upward funnel phenomenon that can reverse the effects of assimilation.

[635] The existence of École Boréale and the CSFTN-O admission policy undoubtedly had the effect of creating new right holders. The school has grown quickly and been phenomenally successful. But this is far from being an abomination and far from being contrary to section 23: on the contrary, the school is rather an excellent example of revitalization and the achievement of the very purpose of section 23. By integrating new members and winning back lost generations (or generations that are about to be lost), the community is reviving,

thus reversing the effects of assimilation. From a practical perspective, this seems to be exactly what the correction of past wrongs can represent.

[636] It is not contrary to the purpose of section 23 that the CSFTN-O's decisions have the effect of potentially creating rights for people who, originally, were not members of the minority community. Subsection 23(2) specifically provides for this possibility, since the brothers and sisters of a child who attends a minority-language school eventually acquire the right to attend that school too. And it is trite law that the constitutional protection of section 23 is not limited to members of the minority language community: *Abbey* v. *Essex County Board of Education* (1989), 42 O.R. (3d) 490 (Ont. C.A.); *Nguyen* v. *Quebec (Education, Recreation and Sports)*, 2009 SCC 47, paragraph 27.

[637] In *Abbey*, the Court of Appeal for Ontario explained how giving rights to individuals who are not part of the minority community is consistent with the purpose of section 23 and benefits the minority community:

> Even though the overriding purpose of s. 23 is the protection of the language and culture of the linguistic minority through education, this does not preclude interpreting s. 23(2) according to its plain meaning, even if this means that rights accrue to persons who are not members of the linguistic minority. The more fluency there is in Canada's official languages, the more opportunity there is for minority language groups to flourish in the community.
> *Abbey*, *supra*, p.8

[638] The Defendants argue that governments must have control over admissions to be able to intervene when a school board mismanages admissions and disadvantages right holders. In my opinion, this argument does not hold water. The school board is the right holders' representative and, on their behalf, exercises powers of management. The Defendants' argument amounts to saying that the Minister must have the power to protect right holders against themselves. This, in my view, is contrary to the very nature of the power of management conferred on them: when it comes to issues that have an impact on language and culture, right holders have an exclusive power of management, and where there is a school board, this board exercises these powers on their behalf.

[639] Moreover, there is no evidence on the record that suggests that the school's linguistic integrity or the homogeneity of its program were threatened by the

presence of children of non-right holders at École Boréale. On the contrary, the witnesses explained that because of the high rate of exogamy in Hay River, most of the children of right holders were as much in need of being francized as the children of non-right holders and that, in fact, it was difficult to distinguish between the two groups at school.

[640] There is absolutely no evidence to suggest that the presence of children of non-right holders at École Boréale has compromised its Francophone character. The testimony of Mr. Paul regarding his observations in certain minority schools in Ontario that take children of non-right holders is to the same effect.

[641] There is also no evidence that even a single right holder in Hay River complained about the number of children of non-right holders at the school or disagreed with the CSFTN-O admission policy or the CSFTN-O's way of managing the policy. The only criticisms of the policy were expressed by outsiders, clearly because it has created competition for DEA schools.

[642] There is also no evidence that children of right holders were denied admission to the school because of a shortage of space.

[643] The evidence also established that it is of pedagogical benefit to have a critical mass of students. It is hard to imagine that it would have been more beneficial for the children of right holders, pedagogically speaking, to be in a school with much fewer students, split up into 13 grades, even if this would have meant having more space.

[644] Mr. Paul's testimony and Exhibit L also confirm that the Hay River situation is not unusual compared with the experience of minority French schools elsewhere in Canada. Most French school boards have admission policies that allow them to take children of non-right holders in their schools. The criteria and mechanisms vary from one jurisdiction to the next, but being able to accept children other than those covered by section 23 is the norm rather than the exception in the Canadian context.

[645] In addition, the data gathered by the FNCSF demonstrate that it is not unusual for the number of students who are not the children of right holders to account for a high proportion of the student population. Mr. Paul and Dr. Denis

both stated that the Francophone nature of a school is not determined by the percentage of right-holding children attending the school. Rather it has to do with the school's mission, its programs and its ability to integrate its students. I accept their testimony to this effect, which in fact is entirely consistent with what other witnesses described when speaking of École Boréale.

[646] The need for the Minister to be able to control admissions to protect right holders from themselves is therefore not, in my opinion, a convincing argument. As to the need to give the Minister a measure of control over the expansion of a school in order to control costs, even though expenditure control is a legitimate goal, it must, however, yield to the minority group's right to control, in regard to education, issues that have an impact on the group's language and culture.

[647] The Defendants rely on certain decisions of the Supreme Court of Canada, originating in the province of Quebec, to support their position on the ministerial directive. It is my view, these judgments do not support the Defendants' position, for two reasons: first, they do not concern the minority community's right of management; second, when they do concern government powers, these powers are examined in the very unique linguistic context that exists in Quebec.

[648] In *Gosselin (Tutor of)* v. *Quebec (Attorney General)*, 2005 SCC 15, some Francophone parents in Quebec claimed the right to send their children to the school of the English-speaking minority. The Supreme Court confirmed that the purpose of section 23 was not to introduce a system of free choice for all parents regarding the language in which their children are instructed but to guarantee access to certain services to the linguistic minority of each province and territory. The right of a majority community parent to send his or her child to a minority language school is a completely different issue from the minority community's right to decide who will have access to its schools. The Plaintiffs are not requesting that parents be free to choose the language of instruction for their children. They are simply stating that deciding whether or not to make the program available to non-right holders is the school board's role, not the Minister's.

[649] The judgment in *Solski (Tutor of)* v. *Quebec (Attorney General)*, 2005 SCC 14, deals with a provision of the *Charter of the French language* that required that, to be eligible to be educated in English under subsection 23(2) of the Charter, a

child must have completed the major part of his or her education in English. The Supreme Court concluded that the Government of Quebec had the right to draft legislation on this matter, but clarified that such legislation, and its interpretation, had to be consistent with section 23. The Court concluded that the child's educational experience had to undergo a qualitative assessment and that the Minister could not consider only the number of years the child had spent in French and English schools to decide whether he or she had acquired the right to go to school in English.

[650] Insofar as that judgment recognizes that the government has the power to establish criteria relating to the right to be admitted to the minority language instruction program, it must be borne in mind that the rights set out in section 23 are exercised in a completely different context in Quebec than they are in the rest of Canada. Indeed, the Supreme Court took pains to emphasize this:

> The application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communities of the territories and the other provinces. The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23. As noted by Lamer C.J. in *Reference re Public Schools Act (Man.)*, at p. 851, "different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province".

Solski (Tutor of) v. *Quebec (Attorney General)*, *supra*, paragraph 34.

[651] It goes without saying that in the context of the NWT, access to minority French schools by students who are not part of the French minority does not threaten the survival of the English language in any way.

[652] Moreover, in *Solski*, it was not the school board that was challenging the government's right to establish admission criteria for the minority language program, but the parents who did not agree with the Minister's position regarding the criterion and how it should be interpreted. The Court therefore did not have to consider the right holders' right of management in that particular context.

[653] *Nguyen* v. *Quebec (Education, Recreation and Sports)*, also, in my opinion, is not particularly useful in supporting the Defendants' position. Once again, the

issue was not a school board's right of management in relation to a government's powers. As in *Solski*, the issue was the manner in which a child's educational experience has to be assessed in order to determine whether the child is entitled to attend English school. The Supreme Court reiterated what it had already stated about the importance of a qualitative, rather than a simply quantitative, assessment of the child's educational experience. It also clarified that the government could not exclude certain teaching establishments (private schools) for the purposes of this assessment.

[654] The Defendants draw attention to the Court's warning against the creation of new categories of right holders:

> . . . the Court noted that this provision does not specify a minimum amount of time a child would have to spend in a minority language education program in order to benefit from the constitutional rights (*Solski*, at para. 41). However, a short period of attendance at a minority language school is not indicative of a genuine commitment and cannot on its own be enough for a child's parent to obtain the status of a rights holder under the Canadian Charter. In this regard, the Court warned against artificial educational pathways designed to circumvent the purposes of s. 23 and create new categories of rights holders at the sole discretion of the parents:
>
> > It cannot be enough, in light of the objectives of s. 23, for a child to be registered for a few weeks or a few months in a given program to conclude that he or she qualifies for admission, with his or her siblings, in the minority language programs of Quebec. [*Solski*, at para. 39.]
>
> *Nguyen* v. *Quebec (Education, Recreation and Sports)*, *supra*, paragraph 29.

[655] This warning regards the risks associated with creating new categories of right holders at the parents' discretion. This is not at issue in the present proceedings. The issue here concerns the power of the school board as the representative of all right-holding parents. Moreover, and more importantly, this warning was given in the context of a dispute that, as was the case in *Solski*, arose in the very particular linguistic situation that exists in Quebec, where it is recognized that the protection of the French language, spoken by the majority in that province but by the minority in the country and the continent as a whole, is a major concern for the government.

[656] I therefore find that these recent Supreme Court of Canada judgments have in no way modified the conclusions drawn in *Mahé* and *Arsenault-Cameron* regarding right holders' right of management. These judgments confirm that section 23 does not confer rights solely to members of the linguistic minority community and recognize the importance of considering the specific context of each jurisdiction when enforcing section 23.

[657] I conclude that, because the admission criteria to the French language instruction program have a significant impact on the language and culture of the minority community, establishing those criteria falls within the exclusive power of the school board. By prohibiting the CSFTN-O from implementing its admission policy, by restricting access to the program to right holders and by assuming the exclusive power to decide to what extent others can access the program, the Minister usurped a power exclusive to the CSFTN-O. In my view, the ministerial directive is contrary to section 23 and invalid.

C. The constitutional validity of the definition of "parent" in section 2 of the *Education Act*

[658] Subsection 2(2) of the *Education Act* provides a very broad definition of the term "parent". The term means not only the father or mother, but also a number of other people, including a person who has lawful custody of the child or a person who is responsible for the care of the child in the event that the child's parents are residing outside the NWT where either of those persons notifies the school board in writing of their responsibility for the child.

[659] This definition, however, does not apply for the purposes of section 72 of the *Act*, which deals with the right to receive instruction in French:

> 72. Students whose parents have a right under section 23 of the *Canadian Charter of Rights and Freedoms* to have their children receive instruction in French are entitled to receive that instruction in accordance with the regulations wherever in the Territories that right applies.

[660] The effect of the definition of the word "parent" and of section 72 is that a right holder parent may exercise his or her section 23 right in respect of his or her own children but cannot do so in respect of a child of whom he or she has lawful custody as the result of a guardianship. It is because of these provisions of the *Act*

that T. Blackman's enrolment at École Boréale by Ms. Coombs was deemed invalid. The Plaintiffs submit that the narrower definition of the term "parent", for the purposes of exercising section 23 rights, is unconstitutional.

[661] Ms. Coombs is not party to the present dispute, and I am not sitting in review of an application for judicial review of the Minister's decision to reject T.'s enrolment. At issue is simply whether the definition, as it is drafted in the *Act*, violates section 23.

[662] The guardianship mechanism can be used in several circumstances and for several reasons. A guardianship can extend over a very long or a very short period. Signing a guardianship agreement does not necessarily imply an intention to, in the long term, integrate the child in his or her guardian's social, cultural and language community, even though there are situations where this may be the case.

[663] As was mentioned in the evidence, on occasion, parents do appoint another adult guardian of their minor child when, for example, the child, for whatever reason, lives far from the family home for a certain time. Guardianship is therefore a means of ensuring that a responsible adult has the legal authority to make decisions regarding the child (if, for example, a quick decision must be made about a medical procedure). In other situations, the lawful custody of a minor is awarded to a guardian for a longer time.

[664] In my opinion, excluding guardians from the definition of "parent" for the application of section 23 is not contrary to the purpose of this provision. On the contrary, this restrictive definition can even help in promoting the goals and protecting the minority.

[665] In the preceding section of these reasons, I concluded that it falls under the right of management of the school board to determine the admission criteria to the French language instruction program since access to the program is an issue that affects language and culture. I also concluded that allowing right holders to make the education program available to people who were not strictly entitled to it, from a perspective of revitalizing the community and reversing the effects of assimilation, was consistent with the remedial purpose of section 23.

[666] To be able to implement these objectives, it is important, in my view, for the school board to have a maximum of discretion and control when it comes to deciding whether or not to admit a child who does not have the absolute right to be at the school. The school board must be able to assess its capacity to integrate the student, in light of all the circumstances, and make decisions regarding the admission of children of non-right holders on a case-by-case basis.

[667] In the present matter, the Blackman family and Ms. Coombs attempted to use the guardianship mechanism to circumvent the ministerial directive. The same strategy could be used to get around the CSFTN-O admission policy if the French-language school board denied admission to a child of a non-right holder. For example, a parent might have no intention of integrating into the French-speaking community but simply want to use École Boréale as a substitute for an immersion program. This parent could do what the Blackmans did and temporarily name a right holder guardian of his or her child. In that event, the CSFTN-O would have no discretion. The likelihood of this happening may be slight, but it is part of the context that must be considered when examining the constitutional validity of this provision.

[668] It is quite logical that for most purposes, in the context of the Act, the guardian of a child has the same rights and duties as the parent of that child. The same cannot be said of the application of section 23 rights. Given the scope of the right protected by this provision, the more restrictive definition of "parent", in this context, is justified. An adult can have lawful custody of a minor under a guardianship for so many reasons and in so many contexts that restricting the resulting consequences for the purposes of section 23 is not contrary to the purpose of the provision.

[669] The provision also does not contravene the CSFTN-O's right of management. Contrary to the ministerial directive, the definition does not have the effect of denying admission to the child of a non-right holder whose guardian is a right holder. It simply clarifies the circumstances in which the right to enrol is recognized. This does not limit the CSFTN-O's power to decide whether to allow an enrolment. It would be the CSFTN-O's role to decide whether a child with a guardian may be enrolled or not.

D. The Minister of Education's decision not to delegate powers under section 119 of the Act to the CSFTN-O

[670] 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). The Plaintiffs are seeking a number of declarations to confirm the scope of the CSFTN-O's right of management.

[671] For any education body established under the *Education 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.

[672] 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 events entailed the right to own the infrastructure and to manage it in a fully autonomous manner.

[673] 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.

[674] 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 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. And the evidence has also established that even these school boards are not fully autonomous as

regards their infrastructure, even though they own it. 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.

[675] None of the school boards in the NWT have the full autonomy over 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.

[676] 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.

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

[678] 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 is satisfied that the commission scolaire francophone 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.

[679] In the present case, the Minister availed himself of this opportunity. The number of students enrolled in the French language instruction 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.

[680] The decision to establish a school board is not without consequence. The *Education Act* requires the Minister to allocate a number of powers to the school board, which implies, in my opinion, recognition that numbers warrant some degree of management.

[681] 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 pro-active and go beyond its narrow constitutional obligations regarding the right of management.

[682] 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.

[683] According to the sliding scale principle, 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.

[684] 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.

[685] 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 other benefits that arise from having their own school board.

[686] 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.

[687] 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.

[688] 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 *Education Act*, as well as the other powers they are claiming. I am therefore not satisfied that the Minister's decision not to delegate to the CSFTN-O is a violation of section 23.

[689] 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: if it decides to create a minority language school board, it must accept its role in managing the French language instruction program, including identifying its needs.

[690] 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 the school board identifies. The case law recognizes that the school board is often in the best position to assess its pedagogical needs. When it makes decisions that do not meet the requests of the school board, the government must be able to justify why it is not doing so.

E. École Boréale's compliance with section 23 requirements

[691] The fundamental question the Court must answer about École Boréale'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 question raises several others.

1. The point of comparison to be used for the analysis

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

[693] 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 its represents, flourishes across the country.

[694] 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.

[695] The reality in Hay River is that students of the French linguistic minority have a choice between attending École Boréale or one of the English schools. The parents and their children cannot choose between École Boréale and Kalemi Dene School, or between École Boréale and the schools of Norman Wells, Inuvik, Paulatuk or Kakisa. Neither can they choose between École Boréale and a minority French school in Alberta or Saskatchewan. Any comparison with these schools would be completely divorced from reality and the options the members of the minority community actually have.

[696] Consequently, the main comparator in the substantive equality analysis must be the schools of Hay River's Anglophone majority, because they represent the French linguistic minority students' other option. Even without immersion programs, these schools are the parents' other option, which is why they, and not

other schools in the NWT or elsewhere, must serve as the comparator for the purposes of the analysis.

2. The parties' proposed approaches for assessing the differences between the majority and minority infrastructure

[697] As in file CV2005000108, the parties' positions in this dispute are highly polarized. The Plaintiffs submit that section 23 creates an obligation for the Defendants to expand École Boréale so that it has all the necessary specialized rooms and equipment, and even more than what Hay River's English schools have, without regard for the differences in the number of students and cost. In turn, the Defendants argue that, since École Boréale complies with the governmental standards that govern all schools in the NWT, it complies with section 23.

[698] In my view, neither one of these approaches respects the parameters of section 23. The Plaintiffs' approach to a large extent ignores the sliding scale principle. The Defendants' is based on a formal equality approach that does not meet the case law requirements for substantive equality.

a. The Plaintiffs' approach to substantive equality

[699] The Plaintiffs do not take into account that the rights protected by section 23 are not absolute. By submitting that École Boréale 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.
> *Mahé*, *supra*, paragraph 39

[700] 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 costs, 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. In the case of s. 23, however, such a consideration is mandated. 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.
>
> *Mahé*, *supra*, paragraph 80.

[701] The level of services to which Hay River'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. Building a minority language school and establishing a school board does not result in this school necessarily having to offer the same services as those offered by the majority language school, without regard for numbers. This all-or-nothing approach, which I rejected when analyzing the Plaintiffs' position on the right of management over buildings, is inconsistent with the flexible, highly fact-driven analysis required by case law.

b. The Defendants' approach

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

[703] When allocating educational space, the Department of Education uses standards that determine the area of the spaces to which schools are entitled. This applies to both classrooms and specialized spaces. These calculations take into account current and projected enrolments.

[704] 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, the number of students determining the school's entitlement to certain spaces, such as a gymnasium and other specialized facilities.

[705] The new standards are based on numbers, but the approach differs in some respects. For recreational spaces, such as gymnasia, the threshold number still applies: schools designed to accommodate between 150 and 300 students are entitled to a 500-square metre gymnasium, while those designed to accommodate between 300 and 600 students are entitled to an 850-square metre gymnasium.

Schools designed to accommodate between 50 and 150 students are not entitled to a gymnasium, but a 70-square metre recreation room.

[706] For other types of specialized spaces (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 specialized spaces. The standards allow for 0.5 square metres of space per student, plus one extra square meter per student for grades 7 to 12.

[707] According to the testimony of Mr. Devitt, when the standards were reviewed, 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.

[708] In my opinion, minority language school are necessarily disadvantaged by these standards. First, by definition, they will always be smaller than the majority language schools. They are therefore likely not to have the numbers required to be eligible for specialized spaces. They will be limited to multi-purpose rooms. This solution, often adopted for small schools, is a partial, incomplete solution, especially at the secondary level, where the level of specialization of the various spaces is higher. The situation is even worse when multi-purpose spaces are used by both primary and secondary students, since their needs are very different. For example, a science laboratory used at the primary level is very different from what is required in high school.

[709] Beyond the total number of students, another factor with an enormous impact on the allocation of space under the standards is the percentage of the number of secondary-level students. For specialized spaces, the standards provide three times more space for a secondary school student than for a primary school student. This approach has a serious impact on minority language schools since these schools tend to lose part of their students when they reach high school.

[710] École Boréale has not existed for very long, but a review of the tables prepared by Ms. Call reveals that, despite its great popularity and rapid growth, the school has trouble retaining its secondary-level students.

[711] This phenomenon is not unusual. It also exists at École Allain St-Cyr, and Dr. Landry explained that it is a very common occurrence at French minority schools. Regardless of what causes this migratory phenomenon, it is established that the phenomenon exists. The result, as we have seen in the case of École Boréale, is that a large proportion of the minority school student population is concentrated at the primary school level.

[712] The cohort survival method of calculation is essentially based on the theory that the past guarantees the future. The projected number of secondary-level students for a minority language school is highly likely to be low, which in turn has an impact on the space that will be allocated to that school.

[713] Another big difference in the impact of the standards, and the most significant one in my view, concerns the fact that, for small schools, it is presumed that some spaces outside the schools will be used to make up for the shortcomings resulting from the schools' small size or the absence of specialized rooms. The evidence revealed that, in Yellowknife, for example, the specialized rooms at William McDonald Middle School are used by students of other schools that do not have such facilities. The school board concerned therefore maximizes the use of these spaces.

[714] 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. It is a legitimate means of using resources efficiently.

[715] The use of off-site spaces has drawbacks (loss of time, logistical challenges and other disadvantages) that affect the majority and minority schools in the same way. But there is one significant impact that affects only the minority language school: the erosion of the linguistic homogeneity of the school environment.

[716] 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.

[717] The impact of a minority French language school having to send its students into an English-speaking milieu to use certain services cannot be compared to the impact such an approach would have on the students of an English school using the rooms and equipment of another English school.

[718] Lastly, it must be understood that, in the NWT, in most cases, the schools with a population comparable to that of École Boréale 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 Hay River, where students and parents do have a choice.

[719] There was much discussion of student retention at the trial, particularly at the secondary level. The Plaintiffs argue that there is a direct causal link between the infrastructure shortcomings and École Boréale's difficulty in retaining secondary-level students. They argue the same is true of École Allain St-Cyr.

[720] I am not satisfied that the evidence has established the causal link alleged by the Plaintiffs, namely, that the secondary-level student losses are mainly attributable to the inadequacy of the infrastructure. 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 also recognized that, to his knowledge, there were no studies that have examined the link between student retention and infrastructure.

[721] He did say, however, that the infrastructure and programs available were among the factors that affected retention and recruitment. I accept his opinion in that respect. There is moreover some circumstantial evidence that supports this opinion in the present proceeding. Enrolments at École Boréale increased after the school's move to the new building in 2005. In the case of École Allain St-Cyr, enrolments increased when the school moved into its current building, and secondary school numbers stabilized following expansion work in 2008.

[722] I therefore conclude that infrastructure is one of the factors that can influence student recruitment and migration. I now return to what I was saying earlier: most small schools in the NWT that have to make do with spatial limitations and program shortcomings have no competition within the community. Parents have no other school to choose from in the community; the option of changing schools, unless the family moves, is simply not available. École Boréale is not in the same situation as those other small schools: Hay River's parents have another option.

[723] For all of these reasons, it is my view that the mechanical application of the Department's standards is not sufficient to provide the members of the minority linguistic community with substantive equality in education. Section 23 creates an obligation for the Defendants to perform a more nuanced analysis and to make certain adjustments to provide the minority language students with substantive equality with the majority language students.

[724] Indeed, the standards allow such adjustments: they stipulate that the Minister may approve higher space allowances than established by the standards. Mr. Devitt stated that, to his knowledge, such permission has never been granted by the

Minister. In my view, allocating space to a minority language school is one of the situations where the Minster should exercise this option and not analyze spatial needs strictly on the basis of the standards.

[725] The Defendants' approach, which is to treat minority language schools in the same way as majority language schools, is also apparent from 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.

[726] 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 main tool for prioritizing investment ignores the specific considerations that arise from the government's obligation to implement 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.

[727] I recognize that the Defendants have established that, in some respects, École Boréale benefits from certain advantage compared to other schools, in terms of the student–teacher ratio for example. 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.

[728] 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.

[729] 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. 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 *Mahé*, *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

[730] 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 fulfill their obligations under section 23.

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

a. Capacity of the school

[731] According to Mr. Kindt, the current capacity of École Boréale is 126 students. The Plaintiffs argue that, in order for the current and future needs of École Boréale to be met, its capacity should be increased to 195 students.

[732] The required intake capacity of a minority school must be based on a "numbers warrant" analysis. This analysis must take into account the actual needs of the school and its potential for expansion in respect of the known demand at the time of the analysis. In *Mahé*, 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.
>
> *Mahé*, *supra*, paragraph 78.

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

> As Dickson C.J. pointed out in *Mahé*, 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.

[734] These comments were made in a context where the issue was, in *Mahé*, 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. In my opinion, this analysis also applies when it is a matter of determining, as is the case here, whether a government has the obligation to expand existing infrastructure.

[735] The Defendants state that the 2006 Census results are what should be used to determine the target enrolment in the French first language instruction program at Hay River. According to those results, at the time of the census, there were a total of 40 children at Hay River having at least one parent whose first language was French, and 25 of those children were school aged.

[736] It is clear that if those numbers are used for the analysis, École Boréale as it currently exists is amply sufficient to meet the needs of the children covered by section 23.

[737] In my view, however, there are good reasons not to use the census results to establish the capacity that École Boréale should have.

[738] First, I am satisfied, from the evidence, that there are good reasons to doubt the reliability of those results. Even if I accept Mr. Dolson's testimony that the long form was used in the 2006 Census for all Hay River households, Dr. Landry and Dr. Denis spoke of a number of factors that render the results unreliable.

[739] The random rounding of the figures, for example, manifestly skews the results. This is seen clearly in the data for 2006, where the total number of children in Hay River (40) does not match the total of the two figures that supposedly represent the number of children under five years old (10) and the number of school-aged children (25). The census results from other years also contain similar anomalies.

[740] Dr. Landry also called attention to the fact that 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.

[741] 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. He 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. This factor is significant in a community such as Hay River where there is a high rate of exogamy.

[742] In addition, Dr. Denis spoke of sociological factors that can lead to the under-identification of right holders. He explained that in communities where there is a high rate of assimilation, some persons who are speakers of French as a first language will potentially not identify themselves as such. Ms. Boulanger's testimony corroborates Dr. Denis' opinion on this subject. Her first language is French, but the 2006 Census is the first in which she identified herself in that regard.

[743] Therefore, the evidence satisfies me that there is good reason to believe that the census results do not provide a reliable picture of the number of right holders living in Hay River.

[744] The second reason why I have concluded that the census figures should not be relied upon exclusively pertains to the special situation of Hay River, the high level of assimilation and the measurable impact that the French language instruction program has already had in this community. It is clear that, to date, École Boréale has played an important role in revitalizing the minority community in Hay River. I do not see why the assessment of the community's future needs would not take into account the fact that the school will continue to play this role and have this effect.

[745] The evidence shows that the rate of assimilation in Hay River is high. It also shows that the opening of École Boréale has already contributed substantially to revitalizing the community. Everything suggests that this revitalization will continue, if given the chance. This revitalization necessarily has the effect of creating new right holders.

[746] The Defendants' position seems to presume that the creation of new right holders, to the extent that it results in forcing the governments to incur additional expenditures, is contrary to section 23 because this provision applies to carefully defined categories of persons. In my view, that is an excessively narrow approach that completely ignores the remedial nature of the provision. As I stated in my analysis of the validity of the ministerial directive, the language of the provision and the case law are to the effect that one of the consequences of section 23 is that it creates new right holders and grants minority language education rights to persons who are not members of the linguistic minority population.

[747] The creation of a certain number of new right holders is not contrary to the purpose of section 23, particularly in a community where the level of assimilation is high. To the contrary, it is a mechanism through which the effects of assimilation may be reversed and the wrongs of the past repaired in part. Assimilation reduces the number of right holders. It is logical for a reversal of the phenomenon to result in an increase in the number of right holders.

[748] Under the 2009 enrolment policy, which becomes operative as a result of my decision about the ministerial directive, the CSFTN-O is again able, in certain cases, to enrol non-right holders' children in its program in accordance with the detailed criteria it has established for itself to assess the applications. Considering

the interest that the preschool program continued to receive, even after the directive came into effect, it is reasonable to anticipate that the number of enrolments in the kindergarten program, which went down for obvious reasons after the directive was adopted, will again start to rise.

[749] In some cases, and in some communities, it is perfectly reasonable and appropriate to measure the target school population by taking into account only the number of right holders in the community. However, in a small community that has never had educational services in French, where the rate of assimilation is high and where, as established by the evidence, the presence of a school has indeed contributed to an incipient reversal of the effects of assimilation, it is reasonable to take into account the potential for revitalization when deciding what the school infrastructure should be to meet future needs. As I see it, such an approach is compatible with the excerpt quoted above from *Arsenault-Cameron*, in which the Supreme Court stated that the numbers standard has to "be worked out by examining the particular facts of each case that comes before the courts".

[750] In his expert report, Mr. Kindt concludes that, given the capacity of École Boréale and its current enrolment, there is enough space, mathematically, for some expansion, although he does not specify to what extent. His conclusion is mathematically accurate (the school has a capacity of 120 students and, at the time of the trial, a total of 85 were enrolled from kindergarten to grade 12), but is of limited use for determining whether an expansion is necessary to meet the school's needs in the long term.

[751] In the past, the Defendants conducted no studies to try to establish the number of right holders in the town of Hay River. They also did not conduct studies to determine how many persons have grandparents or great-grandparents who were Francophones but who lost their language. They took no other steps to try to measure the potential for revitalization of the Francophone community in Hay River. That being so, they cannot use the lack of specific information as a weapon against the Plaintiffs' claims.

[752] The Plaintiffs have the burden of proving the facts they rely on to make their claim, but in terms of language rights, it is acknowledged in the case law that there

are limits to what the courts should require from persons who seek recognition of their 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.

[753] In my opinion, the most reliable and useful information for assessing future needs must be based on what has happened at Hay River since the French language instruction program came into existence. This experience shows that there is great interest in the program, not only from parents to whom section 23 applies, but also from other persons who, for various reasons, wish to integrate into the Francophone community and have shown a genuine commitment to doing so. Past events are a good starting point for assessing what is likely to happen in the future.

[754] In his 2008 report, Mr. Kindt examined the predictions of the GNWT and the CSFTN-O. On the basis of the GNWT's predictions, he concluded that a capacity of 150 students would be appropriate to meet École Boréale's long-term needs. He pointed out that, to go by the CSFTN-O's predictions, the school's student population could be even larger, going up to 195 students from kindergarten to Grade 12.

[755] The two main differences between the GNWT's the CSFTN-O's predictions are that the GNWT predicts 10 kindergarten enrolments every year and treats the remaining numbers using the cohort survival method, whereas the CSFTN-O assumes 15 kindergarten enrolments every year and, according to the table shown at page 87 of Mr. Kindt's 2008 report (Exhibit 156), seems to assume a 100 percent student retention rate.

[756] In my opinion, the CSFTN-O's predictions are overly optimistic. The predicted intake of 15 new enrolments in kindergarten each year is too high. Kindergarten enrolment has never been that high since the school opened (it has ranged between 5 and 12). Furthermore, a certain number of new enrolments will

necessarily continue to be enrolments by permission from the CSFTN-O (as opposed to enrolments of right holders' children). The 2009 enrolment policy is more restrictive than the 2002 policy, and that will have an impact on the number of children of non-right holders who will be able to be admitted to the school. In the 2002 policy, enrolment permission from the school board was only required for children who enrolled after having completed the francization program, whereas under the 2009 policy, this permission is required for all children who do not have a parent covered by one of the section 23 categories. In addition, the maximum percentage of children of Anglophone parents accepted on the basis of participation in the francization program has been cut in half, decreasing from 20 percent to 10 percent. This will have an impact on kindergarten enrolment levels.

[757] The other reason that leads me to conclude that the CSFTN-O's predictions are overly optimistic is that, even if retention is improved, it is highly improbable that the school will manage to retain all of its students, taking into account various factors that have an impact on student retention, particularly at the secondary level. Predictions made on the basis of a 100 percent retention rate are quite simply unrealistic.

[758] However, in my view, the GNWT's predictions must be revised upwards because they do not take into account the fact that the retention rate could be improved, particularly at the secondary level.

[759] As I mentioned previously, Mr. Kindt expressed the opinion in his 2008 report that, to go by the GNWT's predictions, a school with a 150-student capacity was warranted. The members of the minority population with whom Mr. Kindt met had told Mr. Kindt, on the basis of their own predictions, that the school's capacity could be 195 students, and that is what the Plaintiffs are seeking to obtain in this proceeding.

[760] For the reasons I have just set out, I find that École Boréale's capacity should in fact be between those two figures. As Dr. Landry explained, determining the target student body of a school is no simple matter. My finding is far from the product of an exact science; however, in light of the evidence and the predictions, I

find that it has been established that École Boréale should have an intake capacity of 160 students.

b. Special-use areas

[761] The Plaintiffs argue that École Boréale 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.

[762] There is no debate that there are clear differences between the special-use areas available in the English schools in Hay River and those available at École Boréale. However, it has also been established that the English schools serve a much larger target population and take in many more students. For the reasons set out above, I disagree with the Defendants' contention that École Boréale should be equipped with facilities identical to those in schools for the majority population. However, neither do I agree with the approach used by the Defendants, who are relying on the general standards to assert that the current facilities comply with the section 23 requirements.

[763] The question is not whether École Boréale complies with the Department's standards, but, rather, whether, in the circumstances, it ensures substantive equality for students from the minority population. The answer to this question must come from a nuanced analysis that takes into account the infrastructure available to the majority population, using the basis for comparison that I have identified (schools with which École Boréale competes in Hay River), 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.

[764] In my findings on the capacity that the school should have, I arrived at a different conclusion than did Mr. Kindt, largely because he does not seem to have taken into account the potential for the target population to increase as a result of the school's revitalizing effect. This is not particularly surprising, since the field of education in a minority setting is not Mr. Kindt's area of expertise. As a result, he simply addressed the question of space as he would have done for any other school.

[765] His opinion on the special-use areas also reflects that approach, in the sense that the solutions he advocates often involve using areas outside the school and even, for the so-called "dirty" CTS courses, the possibility that École Boréale students take their classes in English.

[766] For this reason, my view is that his opinion is not highly probative for finding solutions to the existing shortcomings, but I do believe that his opinions on special-use areas are very useful for identifying the shortcomings. For example, he concluded that the time allotted to physical education should be increased; found that it was inappropriate for the kitchenette in the teachers' lounge to be used to teach home economics, especially since cooking courses are among the most popular technical courses in the NWT; concluded that École Boréale should have a room dedicated to teaching English; and identified certain shortcomings in the room used as a science laboratory.

[767] To the extent that Mr. Kindt is of the opinion that reorganizing the current space and increasing the use of areas outside the school could compensate for the existing shortcomings, I disagree with him. However, I do agree with his opinions where they identify the shortcomings themselves. In my view, his opinions also corroborate what the persons who are at the school on a daily basis had to say about the difficulties they face.

[768] That said, the Plaintiffs are asking the Court to order that a great many spaces be constructed. For the reasons I have just set out, my opinion is that, using the sliding scale approach, not all of these requests are warranted. However, some of them are.

i) Gymnasium

[769] In my opinion, the evidence establishes that, over the years, the lack of a gymnasium at École Boréale has had a significant impact on the physical education program and on the extracurricular activities for students.

[770] It is clear that the situation has been particularly problematic because of tensions between the CSFTN-O and the DEA. It goes without saying that if the official position of one school board is non-partnership with another, that presents an obstacle to the theory of space sharing.

[771] I accept that, more recently, matters have improved. Ms. Call has succeeded in building bridges with some of her counterparts in the English schools to improve the sharing of facilities. Ms. Call still stated that, despite this improvement, she would like to have greater flexibility in setting schedules.

[772] A gymnasium is a highly important component in the infrastructure of any school. It is used by all of the school's students. It can easily be used every day during school hours and after school hours as well. There is no doubt of the importance of regular physical activity and its integration into the school program outside the strict requirements of the curriculum.

[773] Since École Boréale 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 view, the degree of erosion is 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 agree with his opinion in that regard. Moreover, this opinion is consistent with the case law on educational language rights.

[774] 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 special activities. Currently, École Boréale is forced to either use its atrium or rent community spaces to hold those types of activities.

[775] Since École Boréale does not have its own gymnasium, it does not have the leeway to change its schedules and organize activities or special programs without first having to negotiate with other schools whose management, understandably, is concerned primarily with the needs of their own students.

[776] It is easy to say that CSFTN-O need only complain to the Department if it is dissatisfied with the arrangements. However, Ms. Call explained that she preferred to try to resolve the problems locally, without involving the school boards, to preserve the best possible co-operation on the ground. Her reticence to engage in

official complaint mechanisms is well understandable, given the context and the history of strained relations between the CSFTN-O and the DEA. I understand completely that, for the best interests of the students and the teachers, the management of École Boréale prefers to avoid official complaints and confrontations.

[777] The Defendants argue that the evidence shows that the situation at Hay River has improved from the point of view of inter-school relations. Everyone seems to be in agreement in that regard. It should not be forgotten, however, that, ever since the ministerial directive has been in place, the very source of the controversy has largely been eliminated because the CSFTN-O has been unable to apply its own enrolment policy. It is difficult to know what kind of reaction will be provoked by the Court's decision setting the ministerial directive aside, but it is not impossible that it will, to some extent, spark this controversy anew.

[778] 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. On the basis of my decision regarding the intake capacity that École Boréale should have, it is not out of the ordinary for it to have a gymnasium. Even according to the parameters that the Department gave Mr. Kindt when his services were retained in 2008 (that the potential capacity of École Boréale be increased to 150 students), the school would have been entitled to a gymnasium.

ii) Culinary arts classes

[779] In my view, École Boréale needs an adequate space for teaching cooking and home economics classes. This class is very popular, and it is unacceptable for it to be currently taught in what is supposed to be the teachers' lounge. First, the kitchen in this space is inadequate for teaching this type of course; second, the teachers need a space of their own that is not also used for teaching.

iii) Science laboratory

[780] Mr. Kindt identified shortcomings in the room that is used as a science laboratory. This space will have to be fitted out so that it can be used as a true laboratory for teaching science at the secondary level.

iv) Room dedicated to teaching English as a second language

[781] I also agree with Mr. Kindt's conclusions on the importance of having a room dedicated exclusively to teaching English.

v) Music and visual arts

[782] In my opinion, École Boréale should have a multi-purpose room that can be used for teaching music and visual arts. As I see it, the numbers do not warrant a room dedicated exclusively to music and another to arts, but the addition of a multi-purpose room would give the school's management some of the flexibility it needs to improve its programs. This would also help spare the students from having to take their music classes outside the school.

vi) Career and Technology Studies

[783] Regarding the so-called "dirty" Career and Technology Studies courses, the numbers do not warrant requiring the Defendants to duplicate the facilities that have just been built for Diamond Jenness School. Even assuming improved retention at the secondary level, it would not be financially responsible to force the government to build a second trades centre for the exclusive use of École Boréale. The costs would be out of proportion with the number of students who would use those spaces, since they would only be used by some secondary-level students. For classes of this type, École Boréale will have to use the existing trades centre.

[784] This solution is not ideal because it does compromise the school's homogeneity to some extent, but in my opinion it is the necessary solution, in light of the purposes of the sliding scale principle. It is not possible for all schools to be able to offer the full range of technical classes to the secondary students within their walls. This is a reality, not only for minority schools but also sometimes for those serving the majority population.

[785] However, École Boréale 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. In my opinion, the default approach should not be to have the students take this class in English. Ultimately, of course, it will be up to the school's management to decide how to proceed. However, 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.

[786] École Boréale will, of course, have to be given fair access to the trades centre. The Defendants will have to ensure that this happens.

vii) Other spaces

[787] In my view, the Plaintiffs' other specific claims are not warranted in accordance with the sliding scale principle. Without a doubt, a perfect or ideal school would have all of these spaces, but section 23 does not create the right to a perfect school.

[788] For example, I do not believe that it is warranted to order that the school have a classroom for each grade.

[789] The evidence shows that multi-grade classes are the norm in small schools. Moreover, the Association des Parents Ayants Droit de Yellowknife has identified some of the advantages of those classes in a promotional document that it prepared for parents in Yellowknife. Even the Plaintiffs' witnesses acknowledge that multi-grade classes are commonplace, and are acceptable at the primary level.

[790] The evidence does not establish that it is necessary for a school, regardless of numbers, to have one class per grade. The majority schools in Hay River have single-grade classes because of the size of their student populations. The numbers at École Boréale do not warrant that. Furthermore, 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.

[791] I am also taking into account the fact that, according to the evidence, the academic performance of the students at École Boréale is excellent, and above the territorial average. It is possible that this is a result of the more advantageous ratio of students to teachers and the personalized attention that the students receive. To go by the students' performance, however, it seems clear that the challenges created by having multiple-grade classes at the secondary level are counterbalanced by other factors.

[792] The Plaintiffs argue that the School 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. However, I do not think that this is a requirement flowing from section 23. It will be up to the persons involved in planning the new spaces, and then to the school's management, to make the decisions as to how those spaces will be organized.

c. Defendants' duty to be vigilant

[793] As I noted above, the Defendants will have the duty to be vigilant to ensure that École Boréale has fair access to the spaces in the other schools, both as regards the spaces that will be used on an interim basis during the expansion work and those that will be used on a more long-term basis, such as the trades centre.

[794] The evidence very clearly shows that relations between the DEA and the CSFTN-O have sometimes been problematic. There have been periods during which not only was there an absence of active co-operation, but the DEA had an official policy under which it had resolved to have the least possible contact with École Boréale.

[795] The DEA reacted quite strongly when the Court granted the first interlocutory injunction in July 2008, as evidenced by the press release distributed by the DEA to every mailbox in Hay River in 2008. I acknowledge that this reaction was certainly attributable, in part, to the fact that the first order required that the DEA to make classrooms in its secondary school available for use by École Boréale's students.

[796] Beyond that, the correspondence filed in evidence shows the DEA's strong opposition to the fact that the children of non-right holders could attend École Boréale. It is possible that the DEA will react negatively to the ministerial directive being rendered invalid, thus restoring the CSFTN-O's right to enrol children of non-right holders in its schools. It is to be hoped that, in the best interests of all students, everyone will try to adjust to the new reality and work together as well as possible, despite any differences of opinion. However, the Defendants are ultimately responsible for ensuring that the facilities and equipment they own are shared equitably, especially since they have argued that space sharing is a viable and adequate solution.

d. Evidence on the economic and social context in the NWT

[797] As I have already stated several times, the rights guaranteed by section 23 are not absolute. Costs must be considered when those rights are implemented, and I have taken that factor into account in the previous section, in deciding to what extent it was appropriate to grant the Plaintiffs' claims. However, I wish to add a few comments about costs and the particular context of the NWT, given some of the submissions that have been made on the subject.

[798] The Defendants, through Ms. Melhorne, presented evidence about 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.

[799] 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.

[800] 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 on the amount to be allocated to infrastructure.

[801] 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.

[802] 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.

[803] I am well aware of the fact that the social context of the NWT is very unique. 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. In absolute numbers in the Canadian context, and to an even greater extent on the global scale, Aboriginal languages are spoken by very few persons. There are significant differences between the situation of the Francophone minority in the NWT and that of the Aboriginal communities, but some parallels do also exist in terms of the challenges related to language preservation and cultural erosion. Those needs and aspirations exist in both of these communities. The legitimacy of one community's aspirations in no way diminishes the legitimacy of the aspirations of the other.

[804] It must first be understood that, in legal terms, the French language receives constitutional protection that the territory's other official languages do not. It must also be remembered that, in terms of investments, the GNWT has not been alone in bearing the financial responsibility of constructing school infrastructure for the Francophone minority to this day, unlike what is the case for the rest of the school infrastructure in the NWT.

[805] 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). The cost analysis is a difficult one. 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.

[806] 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 the services than it is 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.

e. Constitutional status of the daycare and the pre-kindergarten program

[807] Besides the additional spaces for educational purposes, the Plaintiffs are seeking declarations from the Court regarding the spaces that they want to see set aside, within École Boréale, for a daycare and the pre-kindergarten program.

[808] For the kindergarten, they are seeking a declaration that the CSFTN-O has the right to allocate spaces to a daycare that could take in up to 30 children in community spaces. In CV2005000108, I dismissed the plaintiffs' contention that Garderie Plein-Soleil, located in École Allain St-Cyr, benefits from constitutional protection. Section 23 creates a right to receive education at the primary and secondary school 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.

[809] Regarding the pre-kindergarten program, the Plaintiffs state that, because the CSFTN-O includes pre-kindergarten in its primary program, the pre-kindergarten program is included in section 23 and the Plaintiffs have a duty to provide space for this program. This position was also argued in CV2005000108, and I rejected it.

[810] The CSFTN-O has the right to set up a pre-kindergarten 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.

[811] Therefore, in my opinion, the only legal basis available to the Plaintiffs for requesting an order from the Court regarding the spaces for preschool programs in this proceeding is to establish that this constitutes an appropriate and just remedy within the meaning of subsection 24(1) of the Charter.

V) RELIEF

[812] Having found that the Defendants have failed to comply with section 23, I must decide what relief is appropriate in the circumstances.

[813] The Plaintiffs claim various forms of relief. First, they request an order requiring the Defendants to expand École Boréale. They ask that space within the school be specifically designated for a daycare and for the pre-kindergarten program. They claim compensatory and punitive damages, in addition to solicitor and client costs, since they assert that the Defendants demonstrated bad faith. Last, they ask that Court retain jurisdiction over this case to ensure that its orders are carried out.

[814] 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.

[815] 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.

[816] Having found that, in certain respects, École Boréale fails to meet the requirements of section 23, I will grant the Plaintiffs a detailed declaration regarding the spaces that will have to be created at the school. I must also decide whether other relief is also warranted in the circumstances.

A. Relief concerning the daycare and the pre-kindergarten program

[817] For the reasons set out above, I am not of the opinion that the preschool programs benefit from constitutional protection under section 23. In my view, as a starting point, the Defendants do not have a duty to use public funds to provide the minority population with spaces for those programs. It remains to be determined whether it is appropriate to order that they do so, as relief, in the special circumstances of this case.

[818] The building that houses École Boréale has always been intended for both educational and community use. This is the basis for the federal government's financial contribution to its construction, as the federal government is not responsible for funding educational spaces.

[819] First, the Plaintiffs ask that the space used for kindergarten not be counted in calculating the school's capacity. Since kindergarten is part of the school program, I do not see why the space used for this grade would not be counted in calculating the school's capacity, since the intended educational use of the building that houses École Boréale is to offer a program from kindergarten to Grade 12.

[820] As for the granting of specific spaces for preschool programs, it is necessary to recall the context of the school's construction and the ensuing consequences. The federal government put up a considerable sum to construct the building that houses École Boréale. 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. This is one way of creating an institution for the minority population that truly functions as a school and community centre, with all of the attendant benefits.

[821] 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 intended. That being said, the building's community purpose must be acknowledged. Removing the preschool program from École Boréale's premises to compensate for the lack of space would be entirely inappropriate. The government owns the building, despite the federal government's considerable contribution, but it must respect the building's intended

community use: it cannot allow educational needs to continually encroach on the spaces that are supposed to be available for community purposes.

[822] The process used by the governments to negotiate the funding details 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 it is clear that École Boréale is first and foremost a school, and yet the federal government covered over half of its construction costs.

[823] The evidence shows that, at École Boréale, the community spaces were so encroached upon for educational purposes. Part of the atrium has had to be set up as a classroom since the 2007–2008 school year. The CSFTN-O drew the Minister's attention to this fact. The Defendants did not take steps on their own initiative to provide the school with additional spaces. They only did so once they were forced by order of the Court.

[824] The atrium, a large open space that can quickly become very noisy, is not an adequate educational space. It was not designed for that purpose. All of the classrooms open onto this space, which generates movement, traffic and noise every time a group of students leaves its classroom.

[825] In my view, the fact that the Defendants knowingly allowed this situation to continue (educational spaces encroaching on the spaces intended for community use) is one reason why it is appropriate and just for the relief ordered to include an order requiring the Defendants to equip the school with certain community spaces.

[826] The other reason why I am of the opinion that it is appropriate and just to order that the Defendants provide additional space for preschool purposes is as reparation, to a certain extent, for the wrongs caused by the ministerial directive. I address this issue in greater detail in my analysis of the damages and costs, but it is clear that many children who had completed the preschool program offered by the CSFTN-O did not receive permission to enrol at École Boréale once the directive took effect.

[827] Those children, their parents, the school and the members of the minority community had invested a considerable amount of time and energy into integrating those children and their families into the Francophone community. Those efforts

were reduced to nothing by the Minister's refusal to give them permission to enrol. It is far from clear whether those students and their families could still be integrated today. In my opinion, it is therefore just that my order contribute to helping remedy these lost enrolments by requiring the Defendants to make a specific contribution to the preschool program by providing spaces for this purpose. This is one way for the Defendants to contribute to the revitalization process that they seriously impeded by usurping the CSFTN-O's management powers by means of the ministerial directive.

[828] In my view, in the circumstances, relief concerning the spaces designated for the pre-kindergarten program is entirely appropriate. This program has a direct link with the school and can contribute significantly to fulfilling the purposes of section 23, particularly by revitalizing the community through francization. As the Court of Appeal for Ontario noted in *Abbey* in the excerpt quoted above at paragraph 637, the minority Francophone community stands to benefit from an increase in the number of persons who speak French.

[829] I have more trouble with the declaration sought by the Plaintiffs concerning space for a daycare, for a set number of children. The evidence affords an insufficient basis to grant this relief. There is very little evidence on the issue of the daycare in the town of Hay River. The Plaintiffs wanted to file in evidence a report setting out a needs assessment prepared for the Association franco-culturelle de Hay River, but since I declared that evidence inadmissible, I obviously cannot take it into account.

[830] A great deal of evidence was presented at trial on the beneficial effects of the Garderie Plein-Soleil for the minority community in Yellowknife. There was also expert evidence regarding the importance of daycare in minority contexts generally. In CV2005000108, I ordered that the building's expansion include additional spaces for the Garderie Plein-Soleil, but the evidence in that matter was much different. The Garderie already existed, had been within the school for a number of years, and the plaintiffs were able to provide evidence of its patronage and waiting lists.

[831] In this proceeding, however, I do not have the same type of evidence on the situation and needs at Hay River. In my view, there is no basis to grant the

Plaintiffs relief in the form of a potential daycare at École Boréale. The power vested in the Court by subsection 24(1) is broad and discretionary, but it must nonetheless be exercised by taking into account the facts that have been established in the litigation.

[832] In any event, the CSFTN-O does not need a court order to decide on the use that will be made of the community spaces within École Boréale. At Yellowknife, spaces had been assigned to the Garderie Plein-Soleil in École Allain St-Cyr since the beginning, and this space grew following the expansion of the school in 2008. The CSFTN-O did so of its own accord, without any order by the Court.

[833] It is quite possible that the atrium is not an adequate space for a daycare, given that this is an open space where sound carries. However, it is up to the CSFTN-O and the school's management to make such decisions.

B. Damages and costs

[834] The Plaintiffs claim compensatory and punitive damages, in addition to solicitor and client costs. They claim this relief because they state that the Defendants have shown bad faith. The Defendants' interpretation of the facts is entirely different. Before analyzing the principles applicable in such matters, I will sett out my findings of fact regarding the conduct of the Defendants.

1. Defendants' conduct

[835] First of all, I acknowledge that this proceeding and the proceeding in CV2005000108 raise certain innovative issues, particularly concerning the constitutional status of preschool programs and the scope of the right of management, particularly as regards the power to manage enrolment in a minority language education program.

[836] The Plaintiffs were not successful on all of the legal issues raised in this dispute. And although I did find in their favour in concluding that École Boréale does not meet the requirements of section 23, I will not grant them all of the additional spaces that they claimed.

[837] I also conclude that, in general, the Defendants did initially respond appropriately to the request for a French language instruction program. They

proposed a plan, created a minority-language school board, made arrangements to have a separate school built in consultation with the minority and supported the CSFTN-O despite some opposition from the DEA, for example regarding the location of the new school. Therefore, unlike the facts in some disputes involving section 23, the Defendants in this case did not deny the minority community its right to services.

[838] However, in my opinion, the evidence shows that the Defendants applied a concept of equality that has long been rejected, specifically since the Supreme Court of Canada's ruling in *Arsenault-Cameron*. As I noted at paragraph 729, the Defendant's approach to applying the same standards to the minority schools as those that apply to the majority schools runs counter to a long-established principle on the meaning of substantive equality.

[839] But the aspect of the Defendants' conduct that I find to be the most problematic relates to the creation of the ministerial directive and some aspects of its implementation. I acknowledge that the legal issue raised by the directive is innovative in the context of interpreting the right of management, but I am of the opinion that the circumstances of its implementation raise troubling questions.

[840] In their submissions, the Defendants argued that the directive was rendered necessary by École Boréale's overly swift growth. They asserted that it was not normal for a completely new school to develop space problems so quickly. They asserted that the CSFTN-O, by irresponsibly applying its enrolment policy, had made it necessary for the Minister to intervene. The Defendants argued that the purpose of the directive was to protect right holders.

[841] But the evidence they presented does not support those contentions. In fact, the evidence on the directive's development is very nebulous. Mr. Devitt, the person who gave the instructions to develop it, was able to provide very few details on the research that was conducted, the considerations examined and, generally, the process followed to develop the directive.

[842] The Defendants were surprised by École Boréale's rapid growth. Mr. Devitt stated that the Department generally expects a new building to be sufficient to meet needs for 10 years. Although enrolment at École Boréale quickly increased, I am of

the view that it was unrealistic for the Defendants to expect the building to suffice to meet the minority population's needs for 10 years.

[843] First, the initial project was to construct a larger school. The CSFTN-O agreed to have the building's floor area reduced on account of budget constraints and because it was anxious for the project to go ahead, but continuously communicated to the GNWT the importance of planning an expansion in the short term. Mr. Lavigne spoke of it in his letters even before the school's construction was complete. The Defendants never indicated that the school would not be expanded before 10 years had passed. They never told the CSFTN- O that they disagreed with its forecasts as to its student population and needs.

[844] In the special circumstances of the Hay River community, it was entirely foreseeable that this new school, which offered, for the first time, a French language instruction program in a community that had experienced assimilation, would incite interest and grow quickly. This was even more so because when it opened, it was to receive students into grades from kindergarten to Grade 8. It was to be expected that, with the addition of one grade per year over four consecutive years, there would soon be a lack of space. Beyond the theoretical capacity based on the number of students that can fit into a classroom, the number of grades that the school has to accommodate must also be taken into account. The school would quickly have to meet the needs of kindergarten to Grade 12 students, which would necessarily have an impact on its space. The CSFTN-O pointed this out many times in its communications with the Department.

[845] The Defendants therefore should not have been surprised that there was a need for space so soon after the school opened. The CSFTN-O had always stated that this would be so.

[846] Then, in 2006 and 2007, the CSFTN-O continued to advise the government, with increasing urgency, of the issues of space that were arising at École Boréale. The Defendants failed to take swift action in response to these complaints. It was only at the end of 2007 that they arranged to retain Mr. Kindt's services.

[847] The CSFTN-O's enrolment policy that allowed the children of non-right holders to enrol was certainly no secret. It seems that the Department's

representatives were not overly concerned about it; Mr. Devitt does not think he read it before 2008. The Department's representatives had clearly misunderstood to which categories the 20 percent enrolment cap applied, but they were aware that the children of non-right holders could register at the school. The Defendants have no excuse for not having been aware of and not having understood the enrolment policy, especially since the DEA had complained to the Minister about it.

[848] The Defendants seemed to acknowledge, for a number of years, that the matter of enrolment was for the CSFTN-O to decide, not the government. The Defendants never asked the CSFTN-O for information on its enrolment policy. Even after having received Mr. Kindt's report, there is no evidence suggesting that they gave the CSFTN-O an opportunity to provide an explanation, or that they undertook discussions regarding the rationale for the enrolment policy or its impact on the Francophone nature of the school.

[849] As I have already mentioned in these reasons, I have some reservations regarding Mr. Kindt's and Mr. Devitt's testimonies on the discussions they had before Mr. Kindt went to Hay River, especially about the enrolment policy and the numbers. If the Department was concerned by the school's rapid growth and aware of the enrolment policy, it seems logical that it would have asked Mr. Kindt to examine that issue. However, Mr. Devitt and Mr. Kindt did not seem to recall having discussed this issue, except very briefly. I find that very curious.

[850] Evidently, the issue was in fact addressed during Mr. Kindt's stay in Hay River. Despite the fact that it took up very little time in his discussions with Ms. Call, the Department's attention became focused on this aspect of his report.

[851] The Defendants' reaction to Mr. Kindt's report is very revealing. The report identifies various shortcomings in the spaces of École Boréale and makes a number of recommendations. However, the Defendants seem to have focused all of their attention on one aspect of the report in particular, that is, the number of non-right holders' children who were at the school. This is the subject addressed by the Minister in his letter to Mr. Légaré in February 2008, before the CSFTN-O had even seen the draft of the report.

[852] There is very little evidence suggesting any consultation or dialogue between the Department and the CSFTN-O on the issue of enrolment after the report was prepared. Mr. Devitt stated that consultations had been held while the directive was being developed but was unable to provide any details. As I already mentioned, although the directive was developed in his division, he was not particularly aware of the research that had been done or the factors that had been considered in the directive's development.

[853] The June 2008 letter, which announces the intention to implement the directive, speaks of [TRANSLATION] "problems with enrolment at École Boréale", although there is no evidence of complaints from right holders to the Minister on this subject. However, this letter was sent a few weeks after the CSFTN-O had instituted legal proceedings. I find it difficult to believe that this is a coincidence.

[854] In his testimony, Mr. Devitt stated that the ministerial directive was made in response to a "policy gap". In my opinion, on the contrary, there was no policy gap when the ministerial directive was adopted. Quite the opposite: there was a policy in place, which had existed for a number of years, and the Minister simply decided to do away with it. It was replaced, not by an enrolment policy, but by an exclusion policy paired with the absolute discretion of the Minister to derogate from it.

[855] As I see it, the irresistible conclusion stemming from this series of events is that the purpose of the ministerial directive was to curb the growth of École Boréale immediately, mainly to spare the Defendants from having to commit funds to expand it, in response to the legal proceedings instituted by the Plaintiffs.

[856] The Defendants contended that this was done to protect the right holders. I do not accept that allegation. There is no evidence that parent right holders had complained about the children of non-right holders attending the school. There is no evidence suggesting that their presence was harmful to the school's homogeneity. Rather, I believe that the true purpose of the directive was to curb the growth of the school's student population to reduce the likelihood that the Defendants would be required to expand it. I conclude that the directive was simply a strong-arm response to the legal proceedings instituted by the Plaintiffs.

[857] This conclusion is borne out by the fact that there is no evidence suggesting that the Minister showed any openness whatsoever when the CSFTN-O sent him its new enrolment policy in 2009. If the Minister's concern had been the protection of right holders, the new, much more developed criteria and the lowering of the cap on the number of non-right holders allowed to attend the school should have reassured him or, at least, served as a starting point for dialogue. However, two years later, when the trial was held, the directive was still in place, and the CSFTN-O still had not been able to implement its new enrolment policy.

[858] The way in which the directive was applied also leads me to believe that its purpose was not to protect right holders, but rather to limit student enrolment as much as possible. The contents of some of the Minister's letters concerning exemption requests reveals principles of application that are at times confusing, inconsistent and contradictory.

[859] For example, in some cases, the explanation given for the refusal is simply that the parent is not a right holder. With respect, this is completely circular reasoning. Telling people "you must request permission to enrol if you are not a right holder" and, when they ask, replying "you cannot receive permission to enrol because you are not a right holder" is Kafkaesque to say the least.

[860] In another letter, this one sent by the Minister to Paul Delorey, a member of the Legislative Assembly who had intervened to ask the Minister to reconsider his decision concerning T. Blackman, the Minister states that the criteria he uses to decide whether to give permission under the directive is the best interests of the child. He writes the following:

> It might be seen as a good thing and relatively inconsequential to allow non-right holders access to École Boréale, but in fact there are negative consequences that need to be considered. For that reason I have directed that enrolments at École Boréale be restricted to the children of "right holders" and any exemptions to this rule are made only under situations where it is clearly in the best interest of the child to attend École Boréale

[861] It is ironic to say the least that the Minister refers to this criterion of the "best interest of the child" in refusing permission for the Blackman child. In her letter to the Minister requesting permission for this child and the Cassidy child to enrol in June 2010, Ms. Montreuil, the chairperson of the CSFTN-O, highlighted

that the situation of these two children was exceptional. After having noted what had happened after the Minister refused to allow them to enrol in kindergarten in September 2009 (the parents had preferred to re-enrol the children in preschool rather than enrol them in kindergarten at the English school), Ms. Montreuil implores the Minister to take their best interests into consideration:

> When [A.C. and T.B.] finished their second "francization" year, an application was submitted for them to be admitted to the kindergarten program at École Boréale, and a request for exemption was sent to you. That request was refused. The little girls were very upset at having to leave their friends, because they had been at the school for two years and had now become Francophones.
>
> The parents made the decision to have their children repeat prekindergarten, so that they could further improve their French and continue to see their friends.
>
> These little girls, who have become Francophones, have now been at our school for almost three years. In September 2010 they will have to enter grade 1. The prospect of leaving the school that they have been attending for almost three years, and leaving their friends, is becoming really traumatic for them. They are only children!
>
> The honourable Jackson Lafferty has the power, through his directive, to grant an exemption. We are asking him to kindly consider these two cases from a humanitarian perspective, because it is clear that, for the girls' well-being, we adults must see to their needs. These children must not fall victim to our differences of opinion.
>
> The admission criteria of our policy are concerned, above all, with the well-being of the child. We are asking the honorable Minister to kindly also consider only the well-being of these children, who would be very upset to lose their friends, lose the French that they have learned so well, and leave their familiar surroundings to go to a different school.

[862] The Minister's reply seems to be based entirely on the fact that the parents are not right holders and on the concern to avoid creating a precedent:

> As you know, both students are not children of French First Language education right-holders. To allow them to enroll because their friends are enrolled in École Boréale or because of their attendance at a French language preschool would set a precedent that could cause challenges, both for the Department of Education, Culture and Employment and for the Commission scolaire francophone. It is unfortunate that these students will have to change schools, but that is not an uncommon transition. As you indicate in your letter, the parents were aware of this situation two years ago and chose to continue to have their children participate in the "francization" program at École Boréale.

[863] Clearly, therefore, the “best interests of the child” were not what guided the Minister’s decision in this case, contrary to what he stated in his letter to Ms. Delorey.

[864] In my opinion, there were also inconsistencies in dealing with the requests made on the basis of Francophone family ties or the existence of Francophone ancestors. The Minister sometimes allowed himself to be swayed by these arguments, but at other times did not. Ms. Steinwand’s arguments regarding her culture, ancestors and ties with Mitchif French did convince the Minister to reconsider his decision and give her permission to enrol her daughter.

[865] Conversely, Barbara Low, also a Metis, explained in her request for permission that she has Francophone ancestors from Nova Scotia. She speaks of her grandson’s very positive experience at École Boréale and the fact that this experience enabled him to re-establish contact with the Francophone part of his culture. In his reply to Ms. Low, the Minister merely relies on the fact that Ms. Low is not a right holder:

> Although I understand your desire to have your grandson attend École Boréale, admission is restricted to the children of the French First Language education right holders, as defined by section 23 of the *Canadian Charter of Rights and Freedoms.*
>
> As [R.]’s only connection to the French First Language that you mention is through one of his great grandparents, it is clear he does not meet the requirements of section 23.

[866] There is very little evidence of the considerations that were weighed before the directive was issued and no evidence suggesting that the CSFTN-O’s right of management or the purposes of section 23 were even taken into account in the analysis. The parents received no information from the Minister regarding the information that they should provide in support of their enrolment permission request, which criteria would be considered by the Minister or what procedure they had to follow if they wanted to appeal the Minister’s decision.

[867] Essentially, the procedure and criteria that had been in place for a number of years were replaced overnight by an absolute prohibition on the enrolment of non-right holders’ children with the possibility for an exemption devoid of

application criteria and for which no clear procedure was established. The directive did not fill a "policy gap"; it created one.

[868] It has been suggested that the directive was put in place because of political pressure from the DEA. There is some evidence that could support this theory, such as the letters of support sent to the Minister by the DEA before the directive was adopted, even if no one seems to know how the DEA had been made aware of the draft directive. Despite all of this, I hesitate to conclude that the directive was implemented to appease the DEA. The DEA had voiced its disagreement with the CSFTN-O's enrolment policy long before 2008. In my view, it was rather the prospect of having to expand the school—a prospect made more real by the instituting of legal proceedings—which precipitated the decision to adopt the directive.

[869] The Defendants' argument that the directive is aimed at protecting right holders against the negative effects of the lack of space would be more convincing if the Defendants had taken steps to compensate for this lack of space in addition to implementing the directive. However, they submitted that there was no space issue when the motion for an interlocutory injunction was made, and they maintained that submission at trial.

[870] The evidence shows the immediate effect that the directive had on École Boréale. Since it has been in place, kindergarten enrolment has declined considerably. It will be difficult to make up for these lost students. Unfortunately, the directive abruptly reined in a revitalization process that had taken years to develop and was in full stride at Hay River.

[871] These conclusions will have to guide the analysis of the damages and costs claimed by the Plaintiffs.

2. Damages

[872] The discretion given to the courts under subsection 24(1) of the Charter does not exclude making an award of damages, in addition to declaratory relief, when it has been established that a constitutional right has been infringed.

[873] 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 award of compensatory damages (paragraphs 902–908) and punitive damages (paragraphs 937–938) was endorsed by the Court of Appeal (*Procureur général des Territoires du Nord-Ouest* c. *Fédération Franco-Ténoise*, 2008 NWTCA 5, pages 93–94). Those are the principles that I will apply in this case.

[874] 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, governments enjoy limited immunity, as long as they act in good faith: *Mackin* v. *New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405.

[875] This principle applies when government action, as opposed to a statute, is deemed unconstitutional: *Wynberg* v. *Ontario*, 269 D.L.R. (4th) 435 (Ont. C.A.).

[876] As I stated previously, the legal issue raised by the ministerial directive has never before been considered by the courts. That is a factor to take into account in determining whether damages are appropriate.

[877] I also note that there are many examples in the case law where the courts found that section 23 was blatantly infringed, made declaratory judgments and directed the governments to take action to correct the situation but did not go so far as to award damages: *Arsenault-Cameron*, *supra*; *Doucet-Boudreau*, *supra*.

[878] Clearly, the infringement of a constitutional right is something serious in itself. However, the violations in this case are neither more blatant nor more serious than those found to exist by the courts in those other cases. I conclude that damages are not appropriate.

3. Costs

[879] In general, 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.

[880] 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; *Procureur général des Territoires du Nord-Ouest* c. *Fédération Franco-Ténoise*, 2008 NWTCA 05, page 83.

[881] Such is the case here. I am not prepared to conclude that the Defendants acted in bad faith, considering that the legal issue regarding the validity of the ministerial directive was a new issue in the interpretation of the scope of the right of management protected by section 23. However, I find that the Defendants' primary motivation for implementing that directive was not legitimate. They reacted drastically to the requests for space without taking into account the purpose of section 23. They abruptly divested the CSFTN-O of a power it had exercised for many years and showed very little flexibility in minimizing directive's the impact on people who, before it was adopted, had shown a genuine desire to integrate into Hay River's minority Francophone community and participate in its revitalization process.

[882] In my opinion, the Defendants' approach was utterly incompatible with the purpose of section 23 and its remedial nature. That approach seems to have been based on the principle that it was inappropriate for the CSFTN-O admission policy to have the effects of creating new right holders—whereas it is clearly established in the case law that section 23 may have precisely that effect—and of giving rights to parents who are not members of the linguistic minority population.

[883] In my view, the Defendants' aggressive response, which was aimed at avoiding costs at the expense of the remedial purposes of section 23 and failed to take into account the overall context of Hay River, must be penalized by the Court. An order granting the Plaintiffs solicitor and client costs is one means of doing so.

C. Request that the Court retain jurisdiction in the case

[884] The Plaintiffs insist that the Court retain jurisdiction in this case and ensure that the relief ordered is monitored and supervised. The Supreme Court of Canada has recognized that the Court has this tool at its disposal as part of its broad discretion under subsection 24(1) of the Charter: *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[885] I acknowledge that this power exists, but in my view, 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.

[886] The Plaintiffs submit that the Court must retain jurisdiction in this file on the basis of the same interpretation of events as that on which their claim for damages is made, that is, that the Defendants have shown bad faith towards the minority Francophone community of the NWT for a number of decades.

[887] As I already stated, I do not agree with this description of the Defendants' actions. In my opinion, they were in the wrong in the way they responded to the CSFTN-O's requests regarding École Boréale, and the solution they advocated was ill advised. In my view, they also took the wrong track in how they applied the concept of substantive equality.

[888] However, unlike the situations which have led to many disputes involving section 23, the Defendants still took steps, and incurred considerable expenses, to implement section 23 in the NWT. They constructed two schools. They created a French-language school board. They did not deny or ignore their constitutional obligations arising under section 23. As I see it, they simply gave them an unduly narrow interpretation.

[889] Above all, the Defendants complied with the orders of the Court. Regarding École Allain St-Cyr, the work resulting from the Court's order was completed behind schedule, but the evidence shows that these delays were not the result of bad faith. Regarding École Boréale, the Defendants complied with the interlocutory order to provide additional space and opted for a permanent facility rather than a temporary one.

[890] In *Fédération Franco-Ténoise* v. *Canada (Attorney General)*, 2006 NWTSC 20, Justice Moreau refused to retain jurisdiction over the matter, despite the complexity of her orders, and stated 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.
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> *Fédération Franco-Ténoise* v. *Canada (Attorney General)*, *supra*, paragraph 978.

[891] I also have no reason to believe that the Defendants will not comply with my orders, especially since they did comply with the interlocutory orders made in this proceeding and in the proceeding concerning École Allain St-Cyr.

[892] Paragraph 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.

[893] 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

[894] For all of these reasons, I order the following relief under subsection 24(1) of the Charter :

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

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

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

        (i) a gymnasium of 500 square metres or more, with locker rooms, showers, bleachers and an office for the staff member in charge of the gymnasium;

        (ii) a space adequately equipped for teaching cooking and home economics classes;

        (iii) a multi-purpose room for teaching music and art;

        (iv) a laboratory for teaching science at the secondary level with equipment meeting the applicable standards (including a storage cabinet for the products, access to water, and a fume hood);

        (v) a designated room for teaching English as a second language; and

(vi) a closed room for individual work to meet the needs of students with special needs.

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

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

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 des 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 Boréale has fair access to the trades centre of Diamond Jenness School for Career and Technology Studies classes and will provide the necessary funding, at the CSFTN-O's request, to retain the services of a Francophone teacher to teach those classes.

8. From now until the expansion work is complete, the Defendants will ensure that École Boréale has qualitatively and quantitatively fair access to the following spaces:

    a. a gymnasium for educational and extra-curricular activities;

    b. the spaces required for teaching home economics;

c. the spaces required for teaching plastic and visual arts;

d. the spaces required for teaching performing arts and music; and

e. additional classrooms, as needed.

9. The Plaintiffs are entitled to their costs on a solicitor-client basis.

[895] Under subsection 24(1) of the Charter, I declare the ministerial directive dated July 7, 2008, to be of no force or effect because it is contrary to section 23 of the Charter.

Dated at Yellowknife, NWT,
this 1st day of June 2012.

"L.A. Charbonneau"
L.A. Charbonneau
J.S.C.

Counsel for the Plaintiffs:	Roger J.F. Lepage Francis Poulin
Counsel for the Defendants:	Maxime Faille François Baril Guy Régimbald
Counsel for the Intervener:	Mark C. Power Christian Paquette

Corrigendum of the Reasons for Judgment

of

The Honourable Justice L.A. Charbonneau

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1. The following correction has been made to this judgment:

[28] As a result of the interlocutory injunction granted by the Court in 1998 …

Should read

[28] As a result of the interlocutory injunction granted by the Court in 2008…

2. The citation is modified to read:

Commission Scolaire Francophone, Territoires du Nord-Ouest et al. c. *Procureur Général des Territoires du Nord-Ouest*, 2012 CSTN-O 44.cor 1

S-0001-CV-2008000133

IN THE
SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Plaintiffs

-and-

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

Defendants

-and-

FÉDÉRATION NATIONALE DES CONSEILS SCOLAIRES FRANCOPHONES DU CANADA

Intervener

Corrected judgment: A corrigendum was issued on December 19, 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