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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Applicants

- and -

Minister of Education, Culture and Employment
of the Northwest Territories

Respondent

This document is an unofficial English translation of the
corrigendum filed on the Reasons for Decision of the
Honourable Justice P. Rouleau on August 20, 2019. This
document is placed on the Court file for information only.

REASONS FOR DECISION

OVERVIEW

[1] At the applicants' request and with the respondent's consent, I have omitted from my decision W.B.'s name and any other personal information that may identify him.

[2] On April 9, 2018, the parents of W.B., a child and Canadian citizen attending a Francophone daycare centre, applied to the Minister of Education, Culture and Employment of the Northwest Territories (the "Minister") for approval to enrol their son in École Allain St-Cyr for the following school year.

[3] The Minister determined that W.B. was ineligible based on the criteria set out in the Ministerial Directive—Enrolment of Students in the French First Language Education Programs (the “Directive”) dated August 11, 2016, and the French First Language School Non–Rights Holder Admission Policy (the “Policy”), which implements the Directive. The Minister therefore refused to approve W.B.’s application for admission.

[4] W.B.’s parents and the Commission scolaire francophone, Territoires du Nord-Ouest (CSFTNO) requested that the Minister reconsider her decision and exercise her discretion to allow W.B. to enrol in École Allain St-Cyr, even though his application did not meet the requirements of the Directive. The request for reconsideration was also rejected.

[5] The applicants applied for judicial review of the Minister’s refusal to allow W.B. to enrol in the French first language school.¹

THE FACTS

[6] Originally from the Netherlands, W.B.’s parents moved to Yellowknife on a temporary work permit in May 2014. Their son W.B. was born there a few months later.

[7] W.B.’s parents do not speak French; however, they decided to integrate W.B. and his younger sister into Yellowknife’s Francophone community. From the age of two, W.B. attended a daycare in the Francophone community.

[8] W.B. speaks Dutch, English and French. He is most fluent in French, and that is the language he uses to communicate with his sister.

[9] On April 9, 2018, W.B.’s parents submitted an application for admission to the Minister for W.B. to attend preschool at École Allain St-Cyr.

[10] The school principal prepared an evaluation report in which she recommended admitting W.B., given his command of the language, his integration into the French-speaking community, the fact that additional resources would not be required and

¹ I am using “French first language school” because that is the expression used in the Directive. According to the case law, “French language school,” “French school” or “minority language school” could also be used in this context.

the importance that his parents attached to the French language. The principal also pointed out that W.B., with his command of the language, would increase the presence of French in the classroom and have a positive impact on students learning the language. She further noted that there would also be cultural benefits in admitting a child from a non-Canadian family.

[11] In a separate report, the superintendent of CSFTNO also recommended admitting W.B. She noted that admitting him would benefit the Francophone community in the Northwest Territories because any new students are an asset to the small school. She stated that [translation] “there [would] be more students in the classes, making the student groups and learning more interesting”. In addition, admitting W.B. would enrich the school’s cultural diversity.

[12] On May 28, 2018, the Minister refused W.B.’s application for admission (the “initial decision”). The letter of refusal stated that, under the ministerial directive in effect, a child must be a recent immigrant to Canada to be eligible for a French first language education program. Since W.B. was born in Canada, he was ineligible under the Directive.

[13] On August 3, 2018, W.B.’s parents and CSFTNO requested that the Minister reconsider her decision and exercise her discretion to approve W.B.’s application for admission even though he was ineligible under the Directive.

[14] On August 29, 2018, the Minister upheld her decision (the “reconsideration”). In her letter, she reiterated that [translation] “the application failed to meet the requirements of the Directive and the Policy”. She also stated that [translation] “admission to École Allain St-Cyr is limited to rights holders under s. 23 of the *Canadian Charter of Rights and Freedoms* and to non-rights holders who meet the requirements set out in the Directive and the Policy”.

[15] On August 31, 2018, W.B.’s parents enrolled their son in an English language school. The application for judicial review was made on September 2, 2018.

LEGAL BACKGROUND

(1) S. 23 of the *Canadian Charter of Rights and Freedoms*

[16] S. 23 of the Charter grants parents belonging to the linguistic minority population of their province or territory the right to have their children educated in their language.

[17] This constitutional guarantee “is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes” (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362). S. 23 has a remedial aspect and should not be given a narrow construction.

[18] In this case, W.B.’s parents are not rights holders under s. 23 of the Charter. Therefore, they do not have access to minority language schools under s. 23. However, there is nothing to prevent a province or territory from establishing a mechanism through which non–rights holders may be enrolled in minority language schools (see *Mahe*, at p. 379; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 70 [*YFSB*]).

(2) The right to education in French in the Northwest Territories

[19] On July 7, 2008, in the Northwest Territories (NWT), a ministerial directive was issued by the then Minister of Education, Culture and Employment. The directive limited access to French first language education programs to s. 23 rights holders and required that all admissions of non–rights holders be approved at the sole discretion of the Minister.

[20] In a court challenge, the 2008 directive was found to be constitutional (*Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1, 78 Admin. L.R. (5th) 343; leave to appeal to SCC refused, [2015] S.C.C.A. No. 94). This Court of Appeal decision overturned a trial decision that had found that the directive was unconstitutional and that the school board had the power to manage its admissions (*Commission Scolaire Francophone, Territoires du Nord-Ouest et al. c. Procureur Général des Territoires du Nord-Ouest*, 2012 NWTSC 44e).

[21] On August 11, 2016, the Minister issued a new directive replacing the 2008 directive. The Directive, issued under the *Education Act*, S.N.W.T. 1995, c. 28, established “admission requirements for children of eligible non-rights holder parents in French first language schools”. It was under this directive that the Minister found W.B. ineligible for a French first language education program.

[22] At the same time as the Directive, the Minister adopted the Policy. This admission policy “sets out how applications for admission of non-rights holders will be transmitted” to the department and “how the Minister’s decision will be communicated”.

[23] In addition to upholding the constitutional rights of s. 23 rights holder parents, the Government of the NWT, through the Directive, seeks to “[support] language and culture revitalization”, in particular by supporting “the growth of the French first language rights holder population in the NWT by allowing a limited number of children of non-rights holder parents to attend French first language schools in the NWT”.

[24] The Directive sets out three streams through which non-rights holder parents may apply for the admission of their child to a French first language school:

1. Reacquisition: The parent would have been a rights holder but for his or her lack of opportunity or his or her parent’s lack of opportunity to attend a French first language school;
2. Non-citizen Francophone: The parent meets the criteria of s. 23 but is not a Canadian citizen; and
3. New immigrant: The parent is an immigrant to Canada, whose child upon arrival, does not speak English or French and is enrolling in a Canadian school for the first time.

For a child to be admitted through one of these streams, enrolment at the school must not exceed 85% capacity.

[25] A parent wishing to enrol their child in a French first language education program must provide certain documentation to the school administration. First, CSFTNO assesses the language skills of the child to determine the impact of the admission of the child on the quality and delivery of the education program. It then

makes a determination on whether the application should be recommended to the Minister for approval.

[26] Where CSFTNO recommends the approval of the application, the application is further assessed by the Minister. The Directive states that the Minister's approval "will be based on whether the correct documentation has been provided in full, the assessment of CSFTNO with respect to language skills, the current capacity of the school and any other relevant considerations".

[27] Under the Directive and the Policy, the decision of the Minister "is final and cannot be appealed".

ISSUES

[28] The respondent does not dispute the admissibility of the application for judicial review and raises no objection to the timeliness of the filing of the application for judicial review of the original decision.

[29] The applicants informed me at the hearing that they were withdrawing their request that the Court issue the declaration sought at paragraph 2 of the originating notice of application for judicial review.

[30] The following questions are raised by this dispute:

1. Is the Minister's interpretation of the Directive reasonable?
2. In refusing W.B.'s admission to École Allain St-Cyr, did the Minister fetter her discretion?

ANALYSIS

(1) Is the Minister's interpretation of the Directive reasonable?

[31] The parties agree that the standard of review for the Minister's interpretation of the Directive is reasonableness.

[32] As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process". It is also concerned with

“whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 47).

[33] The applicants do not dispute the validity of the Directive or the Policy. However, they submit that the Minister’s interpretation of them is unreasonable. The applicants consider the description of the “new immigrant” stream in the Directive to be ambiguous and unclear. The Minister had an obligation to interpret it in a reasonable way that would not make arbitrary distinctions.

[34] The Directive describes the stream as follows:

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

[35] The applicants maintain that the Directive must be applied in a manner that is consistent with s. 23 of the Charter and the other two streams of the Directive. The other streams in the Directive and s. 23 establish the eligibility of children based on the status of their parents. According to the Minister’s interpretation, the “new immigrant” stream requires that the child be an immigrant. By limiting its application in this way, the Minister has created an arbitrary distinction between the children of immigrant parents who were born in Canada and those who were born outside Canada.

[36] The applicants consider it illogical that the stream requires the children to be new immigrants who do not speak English or French, rather than focusing on the parents. The applicants maintain that such a requirement is absurd, disregards the Minister’s obligations under s. 23 and is an unreasonable interpretation of the Directive. Under this interpretation, a child who arrived in Canada a few days after birth would be eligible to attend a French first language school, while a child born a few days after the parents’ arrival in Canada would not be eligible. Therefore, the fact that W.B. was born approximately six months after his parents arrived in Yellowknife is supposedly the only reason that he cannot pursue his education in the language and culture of his choice. Had his parents waited a few months before immigrating, W.B. would suddenly be eligible, according to the Minister’s narrow reading of the Directive.

[37] I am of the opinion that the Minister’s interpretation of the Directive is reasonable. In the French version, the expression “*qui ne parle ni l’anglais ni*

français à son arrivée” [who speaks neither English nor French upon arrival] is enclosed in commas immediately following the word “*enfant*” [child]. The Minister’s interpretation that the expression describes the child and not the parents is reasonable. Consequently, children born in Canada or children who speak English or French upon arrival in Canada as immigrants would not be eligible for admission to a French first language school under the three streams of the Directive.

[38] I acknowledge that this is in a way arbitrary, in that children of immigrants are treated differently depending on whether they were born in Canada or born before their parents immigrated to Canada. This interpretation also creates a distinction between children who, upon arrival in Canada, speak either English or French, and those who speak neither of the country’s official languages.

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

[40] W.B.’s application for admission requested admission through the “new immigrant” stream of the Directive. The Minister’s decision in which she interprets the text and finds W.B. ineligible is reasonable.

(2) In refusing W.B.’s admission to École Allain St-Cyr, did the Minister fetter her discretion?

[41] The applicants submit that the Minister fettered her discretion when she refused to admit W.B. to a French first language school. The applicants state that the Minister considered the streams of the Directive as binding. There is nothing on the record to suggest that the Minister recognized that she could exercise her discretion to approve W.B.’s admission even though he did not fall into one of the three streams of non–rights holders set out in the Directive. In response to the request for reconsideration, the Minister merely reiterated that W.B. was not a new immigrant and was therefore ineligible under the Directive. She affirmed that her decision was

final. The applicants maintain that, had the Minister reconsidered her decision using her discretion and taking into account the underlying values of s. 23 of the Charter and the relevant factors pointed out to her in the request for reconsideration, she would have approved the application.

[42] During oral arguments, the Minister acknowledged that she enjoyed residual discretion outside the Directive. Based on this residual discretion, the Minister may approve the admission of non-rights holders who are not eligible under one of the three streams set out in the Directive. However, the Minister maintained that she had not fettered her discretion, but had considered all the relevant factors and had chosen not to use that discretion. She argued that the reasons put forward by the applicants to justify the exercise of her discretion amount to a desire on the part of W.B.'s parents for their son to be educated in French to give him an advantage in a globalized society.

[43] The Minister stated that many Anglophone parents in Yellowknife think the same way. Thus, if an exception were made for this reason, requests for exceptions would increase, rendering the Directive meaningless. The same is true of the suggestion that speaking French and having attended a Francophone daycare centre make W.B. a special case where it is in the best interests of the child that he be admitted to a French first language school. The Minister stated that these situations are hardly unique and cannot force her to use her discretion.

[44] The respondent also rejects the suggestion that, in exercising her discretion, she must take into account the values of s. 23. She states that s. 23 deals with rights holders only and is completely irrelevant to the admission of non-rights holders. In support of this statement, she refers to *Northwest Territories (Attorney General)*, where the Court stated that the power to control the admission of non-rights holders rests with the government (para. 23). The Court also stated that even a generous interpretation of s. 23 “cannot mean that the school board has the unilateral power to admit anyone to its schools without governmental oversight” (para. 21).

[45] The decision also recognized that the directive issued by the Minister in 2008 was constitutional. That directive gave the Minister absolute discretion to limit access to minority language schools to rights holders under s. 23. The Minister could therefore deny all non-rights holders access to minority language schools. In her view, s. 23 and its underlying values are completely irrelevant to the exercise of this discretion.

(a) The Minister must take s. 23 into account

[46] Before I proceed to analyze the Minister’s decisions, I will discuss the relevance of s. 23 to the exercise of her residual discretion. The Minister states that she may rule on the admission of non-rights holders without regard to s. 23 and the needs of the linguistic minority and that she could even impose a complete ban on the admission of non-rights holders. This principle allegedly results from *YFSB and Northwest Territories (Attorney General)*, which state that the criteria for admission of non-rights holders may be set by provincial and territorial governments.

[47] I am of the opinion that the Minister’s interpretation of these decisions is incorrect and contrary to the remedial nature of s. 23. This remedial purpose means that governments must take into account the needs of the minority in the exercise of their powers with respect to education. As stated in *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3:

[L]anguage rights cannot be separated from a concern for the culture associated with the language and . . . s. 23 was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education S. 23 therefore mandates that provincial governments do whatever is practically possible to preserve and promote minority language education [para. 26]

[48] Justices Major and Bastarache further state:

[T]he true purpose [of s. 23 is to redress] past injustices and [provide] the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced. [Emphasis added; para. 27]

[49] Although s. 23 grants individual rights, the exercise of these rights has “a unique collective aspect” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 28). S. 23 “is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing” (*Doucet-Boudreau*, at para. 27). Consequently, the application of this section “will of necessity affect the future of minority language communities” (*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 23).

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

[51] In confirming that the government may establish admission criteria for the admission of non-rights holders to minority language schools, the Supreme Court of Canada and the Court of Appeal of the Northwest Territories were not affirming that a government could, in establishing and administering such criteria, disregard s. 23 and its remedial purpose. The Court of Appeal decision stated merely that CSFTNO could not unilaterally create new categories of rights holders. In this case, it is rather a matter of allowing existing rights holders to have a community that has the opportunity to flourish and be revitalized, which is the purpose at the heart of s. 23. Moreover, in *Arsenault-Cameron*, the Supreme Court stated that a minister has a duty to exercise their discretion in accordance with the dictates of the Charter (para. 30). The central issue, in that case, was the building of a French first language school for the community of Summerside. The Court stated that, by refusing the linguistic minority’s request,

the Minister failed to give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations. [para. 30]

[52] The Minister’s obligation to take s. 23 into account in the exercise of her powers with respect to education is, in my view, what Justice Abella implied in *YFSB*. After affirming that, in the absence of delegation by the territory, the school board did not have the power to set admission criteria for non-rights holders, she further stated:

This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon’s approach to admissions prevents the realization of s. 23’s purpose But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*. [para. 74]

[53] However, the exercise of the Minister’s powers depends on the specific situation in a given region. As stated in *Solski*, the provincial and territorial legislatures are required to play a role in implementing s. 23 based on “the unique historical and social context [of the linguistic minority] of each province” to ensure the exercise of its discretion in a consistent, fair and respectful manner in accordance

with s. 23 (*Solski*, at para. 21). Therefore, the impact of s. 23 on ministerial discretion differs between regions because it depends on their specific situation.

[54] For example, *Solski* refers to “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” (para. 34). The application of s. 23 in Quebec must therefore take into account its particular circumstances (para. 44). Similarly, each province and territory must examine the context in which its minorities live to meet the requirements of s. 23.

[55] In short, the court affirmed in *YFSB* that the provinces and territories must ensure compliance with s. 23 and not prevent the realization of its purpose. Its purpose includes the flourishing of official language communities and the development of the community. Depending on the circumstances, this purpose may not be achieved unless there are active efforts to counter, in the words of the Supreme Court, “the progressive erosion of minority official language cultures” (*Doucet-Boudreau*, at para. 27). In some cases, it may not be possible to achieve this purpose without admitting students who are not directly covered by s. 23.

[56] Therefore, to determine the Minister’s obligations in this case, it is necessary to examine the situation of the linguistic minority in the NWT.

[57] The linguistic minority in the NWT, like that in many parts of the country, has suffered because of the historical absence of minority language schools. In addition, assimilation and exogamous marriages (that is, composed of one member from each of the majority and minority language communities) are reducing the number of children enrolling in minority language schools. As noted in *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2, at para. 111, the transmission of French as a mother tongue to children is only 29% in the NWT when only one of the two parents is Francophone. Since 90% of school-age children in the NWT who has a right holders as a parent are born to exogamous parents, the transmission of French as a mother tongue is declining sharply.

[58] It is therefore likely that, without the addition of non-rights holders to its ranks, the Francophone community in the NWT would steadily erode, almost inevitably resulting in its schools becoming unsustainable. This would clearly be contrary to s. 23’s purpose of “redressing past injustices” and providing the Francophone community in the NWT with “equal access to high quality education

in its own language, in circumstances where community development will be enhanced” (*Arsenault-Cameron*, at para. 27).

[59] There is no dispute that, without government support and the addition of non-rights holders, the number of schools in the Francophone community of the NWT would decline. Indeed, this was noted in the final report on the 2008 directive prepared by the Government of the Northwest Territories (Government of the Northwest Territories, Department of Education, Culture and Employment, *Final Report: Review of the Ministerial Directive—Enrolment of Students in French First Language Education Programs*, June 30, 2016 (the “Report”)). The following observations were made in the Report:

- The strict enforcement of s. 23 admission criteria “prevents the cultural diversity in French first language schools”;
- Since majority language schools may admit as many linguistic minority children as they wish, equality between minority language schools and majority language schools “means that French first language schools should also have the opportunity to draw some non-rights holders into their schools”;
- It is reasonable for minority language schools “to allow the admission of a proportionally small number of non-Right Holders as a means of maintaining the feasibility of existing programming”;
- An important part of minority language revitalization “is allowing for population growth. Natural growth of the NWT rights holder population and the migration of rights holders from other communities may not be sufficient to maintain a level of population sufficient for supporting French first language schools”.

[60] In these circumstances, it is clear that s. 23 and the needs of the linguistic minority must be factors that the Minister must take into account in the exercise of her power over the admission of non-rights holders to French first language schools in the NWT. To do otherwise would be contrary to s. 23’s purpose of halting the progressive erosion of the minority culture and language and actively promoting their flourishing (see *Doucet-Boudreau*, at para. 27; *Mahe*, at p. 362). Clearly, a total refusal to approve admissions of non-rights holders would violate s. 23 since, according to her own report, without the addition of non-rights holders, schools would lose programs to the detriment of the minority language community.

[61] Indeed, it was following this report that the Minister decided to act and that the Directive was issued. It attempts to address the concerns identified in the Report that are specific to the situation in the NWT.

[62] In the section on its rationale, the Directive states that the Government of the Northwest Territories is “committed to supporting language and culture revitalization”. It further states the following:

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

[63] The collective aspect of s. 23 is therefore clearly part of the Directive’s rationale. It addresses the concerns set out in the Report by targeting three streams of non–rights holders who are eligible to attend minority language schools if an application is submitted.

[64] In accordance with s. 23 and the linguistic minority’s right to manage, the Directive requires that CSFTNO first recommend that a non–rights holder’s application for admission be approved and that the Minister then assess the application.²

[65] I therefore conclude that, in the exercise of her power over the admission of children of non–rights holder parents to French first language schools in the NWT, the Minister must strike a balance between her discretion and the broad purpose of s. 23. She must consider Charter rights, including the needs of the linguistic minority and the need to foster the preservation and development of this community, in the exercise of her power over the admission of non–rights holders to minority language schools. In exercising her discretion, the Minister must consider not only the interests of the NWT, including the cost of French first language education, and the best interests of the child,³ but also the purposes of s. 23 and the rights it grants to the linguistic minority.

² Under the Directive, the parent may submit an appeal to the Minister where CSFTNO does not recommend approval of an application. Since this right of appeal has not been raised by the parties and is not relevant to the issues I must decide, I will not deal with it further in these reasons.

³ The Minister did consider the interest of the child in another case involving a discretionary decision to admit a non–rights holder child to a French first language school.

(b) Did the Minister fetter her discretion?

[66] I will now analyze the Minister's decisions.

[67] The applicants submit that a decision must be set aside where it has been shown that the decision-maker's discretion was fettered, regardless of the standard of review chosen. Moreover, a decision resulting from a fettering of discretion is automatically unreasonable. The respondent, meanwhile, does not distinguish between the review of the merits of the decision and the issue of fettering. She argues that the decision is subject to review on the standard of reasonableness.

[68] The rationale for fettering of discretion as a ground for judicial review is explained by Justice Stratas in *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710:

Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law. [para. 22]

[69] In other words, decision-makers may adopt general guidelines or policies to assist them in their decision-making processes, but "they are not free to adopt mandatory policies that leave no room" for the exercise of their discretion (*Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, 236 D.L.R. (4th) 485, at para. 71).

[70] A decision-maker who fetters their discretion is therefore committing a jurisdictional error, since they are not using the power conferred on them by law (see David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed., Toronto, Carswell, 2014, at p. 207). For a long time now, such fettering has been an automatic ground for setting aside administrative decisions (see *Stemijon*, at para. 22). The Supreme Court did not specify how these automatic or nominate grounds should be taken into account in its latest review of the regime regarding standards of review.

[71] The Federal Court of Appeal briefly mentioned the possibility that automatic or nominate grounds now be considered in the reasonableness analysis. However, Justice Statas stated that differences of opinion on this matter are of no moment, since the result is the same: a decision that is the product of a fettered discretion is *per se* unreasonable, since the decision-maker has failed to exercise the discretion

conferred on them by Parliament (*Stemijon*, at paras. 23 and 24). The result would therefore be the same on a standard of correctness. Ultimately, the standard of review is irrelevant, since the mere act of fettering one's discretion is a reviewable error (see *Austin v. Canada (Citizenship and Immigration)*, 2018 FC 1277, at para. 16).

[72] In this case, the finding that the Minister had fettered her discretion would automatically result in the setting aside of her decision, since it would therefore be unreasonable.

[73] The respondent acknowledges that she has the discretion to depart from the streams set out in the Directive. She stated that W.B. initially applied for admission through the "new immigrant" stream. This initial application was refused because W.B., who was born in Canada, was not eligible under the Directive. The request for reconsideration, however, asked that the Minister exercise her discretion to admit W.B. even though he was not eligible for admission through one of the streams set out in the Directive. The Minister maintains that she was aware that she had residual discretion but simply decided not to use it to allow W.B. to attend a French first language school.

[74] The Minister acknowledges that her letter of refusal makes no mention of the fact that she had discretion but decided not to use it in this case. The applicants therefore received no explanation as to why she refused to use her discretion to admit W.B. to École Allain St-Cyr. However, the Minister maintains that detailed reasons are not necessary. To explain her decision, she refers to the file provided to her when she made her decision. The file contains an initial internal briefing note, dated May 23, 2018, informing the Minister that W.B. is not eligible under the Directive. A second internal briefing note, dated August 20, 2018, states that, since the Minister's initial decision, W.B.'s parents and CSFTNO have not submitted any additional information to show that W.B. would be eligible under the Directive. The Minister submits that the second internal briefing note supports the inference that she considered and refused the request to use her discretion to admit W.B. to École Allain St-Cyr.

[75] The request for reconsideration made by W.B.'s parents and CSFTNO clearly asks that the Minister exercise her residual discretion. The internal briefing note provided to the Minister following the request for reconsideration makes no mention of the Minister's discretion. The note does not give any reason for or against the exercise of discretion. In my opinion, there is nothing in the documentation to

suggest that, in this case, the Minister considered the request that she use her discretion to admit W.B. and decided not to do so.

[76] After noting that the parents and CSFTNO believed that the Minister had fettered her discretion in refusing W.B.'s application for admission, the internal briefing note states only that the Minister determined that the application for admission did not meet the requirements of the Directive: "The Minister duly considered the application and determined that it did not meet the eligibility requirements".

[77] The fact that W.B. was not eligible for admission through one of the three streams set out in the Directive is reiterated in the letter from the Minister to the president of CSFTNO dated August 29, 2018. In that letter, the Minister explains that admission to École Allain St-Cyr is limited to rights holders and non-rights holders who meet the requirements set out in the Directive.

[78] In other words, the request for reconsideration was rejected for the same reason as the initial application, namely that W.B. was not eligible for admission through one of the three streams set out in the Directive. The Minister treats the Directive as binding when it is not. There is no indication that the Minister decided not to use her discretion to admit W.B. following the request to that effect. Moreover, no explanation for the refusal is given to W.B. or CSFTNO.

[79] Thus, the only conclusion that can be drawn from the documentation is that the Minister limited herself to assessing whether the application for admission fell into one of the streams set out in the Directive. She never considered whether W.B.'s case presented factors and circumstances that might lead her to exercise her residual discretion.

[80] The balance that must be struck between the uniformity ensured by a directive and the flexibility that is central to the exercise of discretion has been lost in this case. The Minister should have assessed whether it was appropriate to apply the Directive in the case of W.B. or whether she should have instead exercised her discretion and approved W.B.'s admission (see Sara Blake, *Administrative Law in Canada*, 6th ed., Toronto, Lexis Nexis, 2017, at p. 109).

[81] I therefore find that the Minister fettered her discretion when she refused to admit W.B. to École Allain St-Cyr because he did not fall into one of the streams in the Directive.

[82] The Minister also argued that there were no circumstances or factors that would justify a request for reconsideration from W.B.'s parents and CSFTNO. In her view, W.B.'s application was the same as any other application that might be made by parents trying to give their child an advantage by enrolling them in a school where the child could learn a second language.

[83] In my opinion, this argument shows that the Minister lacks a proper understanding of her s. 23 obligations and the rationale for her own directive.

[84] The Directive requires that the Minister consider “whether the correct documentation has been provided in full, the assessment of CSFTNO with respect to language skills, the current capacity of the school and any other relevant considerations” when she assesses an application.

[85] In deciding whether to exercise her discretion and grant W.B.'s application for admission, the Minister should have therefore, at a minimum, considered the contribution that an additional student joining the Francophone community in the NWT would make to the vitality and flourishing of that linguistic minority. Although W.B.'s parents are not rights holders under s. 23, the rights holders under that section would benefit from increasing the number of students attending French first language schools in the NWT. Indeed, the Directive points out the importance of the admission of non-rights holders to the development of the Francophone community.

[86] In fact, the Directive requires that CSFTNO inform the Minister of the impact that an admission requested by non-rights holder parents would have. In this case, CSFTNO stated that admitting W.B. would be anything but negative. Indeed, it would be beneficial for a number of reasons, in particular because W.B. would increase the presence of the language in the classroom and there would be positive cultural benefits.

[87] In her oral submissions, the Minister also acknowledged that it might be to W.B.'s advantage to attend École Allain St-Cyr, since he is fluent in French. In fact, according to the information provided to her, it is the language in which he is the most fluent. However, the Minister finds W.B.'s situation to be no different from any Anglophone child in Yellowknife seeking to master a second language.

[88] Yet, an analysis of the file shows that, contrary to the Minister's contention, there are a number of elements of W.B.'s application that set it apart. I will mention but two of them. First, were it not for the fact that W.B. was born six months after

his parents arrived in Canada instead of before their arrival, the application for admission could have been approved through the “new immigrant” stream of the Directive. W.B. would have been an immigrant to Canada who spoke neither French nor English on arriving in Canada. Second, W.B. is not seeking to learn French, since the commitment of his parents has made it so that he already speaks the language. This distinguishes W.B.’s situation from many applications submitted by parents seeking to have their child admitted to a French first language school as a kind of immersion program. The best interests of the child are a factor and, in this case, they favour the exercise of the Minister’s discretion to admit W.B. to École Allain St-Cyr.

[89] Another factor favouring the exercise of discretion by the Minister is that, as the applicants point out, the text describing the third stream in the Directive is far from clear. Moreover, it seems that the purpose of this stream, namely to admit new immigrants, is not being achieved. As of the date of the application, no admissions had been made through that stream. The Report notes that the strict enforcement of s. 23 admission criteria “prevents the cultural diversity in French first language schools” and that admitting non-rights holder immigrants, such as W.B., would address that concern.

[90] That said, it is not for me to rule on how the Minister should ultimately exercise her discretion and whether she should admit W.B. to the French first language school. However, the Minister’s decision and reasons must demonstrate that, in making her decision, she considered the relevant factors, including s. 23 of the Charter.

CONCLUSION

[91] For these reasons, the motion is granted. The initial decision of the Minister of Education, Culture and Employment dated May 28, 2018, to refuse W.B.'s application for admission to École Allain St-Cyr and her decision dated August 29, 2018, to refuse the request to reconsider her refusal are set aside. W.B.'s application for admission is referred back to the Minister for reconsideration in accordance with the reasons for this decision. The applicants, having succeeded, are entitled to their costs.

Dated at Yellowknife, NWT,
this 2nd day of July 2019.

“Signed”

P. Rouleau
J.S.C.

Francis Poulin, for the Applicants
Guy Régimbald, for the Respondent
Heard on: May 16, 2019

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

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

Applicants

- and -

Minister of Education, Culture and Employment
of the Northwest Territories

Respondent

This document is an unofficial English translation of the corrigendum filed on the Reasons for Decision of the Honourable Justice P. Rouleau on August 20, 2019. This document is placed on the Court file for information only.

REASONS FOR DECISION OF
THE HONOURABLE JUSTICE P. ROULEAU