Commission scolaire francophone, A.B., F.A., T.B., J.J. and E.S. v Minister of Education
2020 NWTSC 28

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

Applicants

and

Northwest Territories Minister of Education, Culture and Employment

Respondent

This document is an unofficial English translation of the Reasons for Decision of the Honourable Justice P. Rouleau filed on July 23,2020. This document is placed on the Court file for information only.

REASONS FOR DECISION

A. OVERVIEW

[1] These applications for judicial review relate to five applications for admission to the Francophone minority schools in the Northwest Territories ("NWT"). The applications for admission were made by non-rights holder parents within the meaning of s. 23 of the *Canadian Charter of Rights and Freedoms* with the support of the applicant, the Commission scolaire francophone des Territoires du Nord-Ouest (the "CSF"), which operates the minority schools. Since the parents

were not rights holders and did not qualify under the *Ministerial Directive on Enrolment of Students in French First Language Programs* issued in 2016 (the "*Directive*"), they requested that the former Minister of Education, Culture and Employment of the Northwest Territories (the "Minister") exercise her ministerial discretion to allow the six children concerned to be admitted.

[2] On August 30, 2019, the applications were refused. According to the Minister's reasons, the benefits to the children and to the Franco-ténoise community were less important than budgetary considerations and the need to limit the use of discretion to exceptional cases.

[3] The applicants argue that these decisions were unreasonable in that they were based on erroneous conclusions regarding the cost of student admission and the development of the Franco-ténoise community, and they do not give appropriate weight to the values underpinning s. 23 of the *Charter*. According to the applicants, by questioning whether the admission was [translation] "required" and whether the applications for admission were [translation] "unique", the Minister fettered her ministerial discretion. Moreover, they claim that the Minister breached the principles of procedural fairness.

[4] The applicants are asking this Court to set aside these decisions and to issue an order directing the respondent to admit the children to the CSF schools. In their view, such an order is justified because the Minister did not properly follow the court's instructions in *A.B. c. Territoires du Nord-Ouest (Éducation, Culture et Formation)*, 2019 NWTSC 25, 62 Admin. L.R. (6th) 300, the situation is urgent, and the order will avoid endless back-and-forth between the respondent and the court.

[5] In turn, the respondent maintains that the Minister's decisions were reasonable and fully justified. The reasons show that she not only analyzed and weighed s. 23 of the *Charter*, the interests of the students, their families, but also the additional costs and the interests of the general population.

[6] For the reasons that follow, the applications for judicial review must be allowed, the Minister's decisions must be set aside, and the applications for admission must be returned to the respondent for reconsideration.

[7] In summary, I find that the Minister's decisions were unreasonable. Her conclusions were largely based on considerations that are illogical or unsupported by the evidence before her. The result is that her decisions were based on an

irrational chain of analysis, and her reasons do not reflect a proportionate balancing of s. 23 of the *Charter*.

[8] That being said, the state of the law is such that there is no clear legal right of admission. It is for the Minister to weigh the various factors, including the values underpinning s. 23. While one of the applicants has now been successful on her second application for judicial review of the Minister's refusal to admit her child, and while it is desirable to avoid further back-and-forth between the respondent and the court, these facts do not outweigh the respect owed to the discretion conferred on the respondent.

B. BACKGROUND

(1) Legal framework

[9] S. 23 of the *Charter* grants NWT parents that are covered by this section the right to French-language education for their children.

[10] The schools in Yellowknife and Hay River that provide such education are operated by the CSF in accordance with the *French First Language Education Regulations*, NWT Reg. 166-96, and the *Commission Scolaire Francophone, Territoires du Nord-Ouest Regulations*, NWT Reg. 071-2000, made pursuant to the *Education Act*, S.N.W.T. 1995, c. 28. As I noted in *A.B.*, in the NWT, as in some other regions of Canada, the minority has suffered because of the historical absence of minority language schools and the phenomena of assimilation and exogamous marriages, which contribute to a low rate of language transmission: at para. 57, citing *Northwest Territories (Attorney General) v. Association des parents ayant droits de Yellowknife*, 2015 NWTCA 2, 593 A.R. 180, at para. 111, leave to appeal refused, [2015] S.C.C.A. No. 95.

[11] In 2008, the Minister at the time issued a ministerial directive limiting access to French first language education programs to children of s. 23 rights-holding parents and children of non-rights holder parents admitted at the discretion of the Minister. The CSF is obliged to follow ministerial directives: *Commission Scolaire Francophone Regulations*, s. 7(1)(u). The CSF challenged the directive and maintained that the admission of children of non-rights holder parents was a matter for the CSF and not for the Minister. The Court rejected this argument: *Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1, 78 Admin. L.R. (5th) 343, leave to appeal refused, [2015] S.C.C.A. No. 94.

[12] The Department subsequently undertook a review of the directive and prepared a report (the "*Final Report*"): 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). As I noted in *A.B.* at para. 59, observations made in the *Final Report* include the following:

> [Translation]
>
> 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".

[13] Following the *Final Report*, in 2016, the then Minister issued the *Directive*, in accordance with the *Education Act*, replacing the 2008 directive. The *Directive* establishes a process by which children of non-rights holder parents under s. 23 of the *Charter* may be admitted to CSF schools.

[14] In the "Rationale" section of the *Directive*, the following is explained:

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

[15] The *Directive* sets out a two-stage process by which children of non-rights holders can access French-language schools in the NWT. The application is assessed by the CSF, which then makes a recommendation. Based on this recommendation, the respondent decides whether the child will be admitted.

[16] The *Directive* describes three categories of non-rights holder parents whose children are eligible to attend CSF schools: (1) the parent would have been a rights holder but for his or her, or his or her parent's, lack of opportunity to attend a French first language school ("reacquisition"); (2) the parent is not a Canadian citizen but meets the criteria of s. 23 ("non-citizen francophone"); and (3) 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 ("new immigrant").

[17] Although not provided for in the *Directive*, the respondent still retains the discretion to admit children whose parents do not fall into these categories: *A.B.*, at para. 42.

(2) The applications for admission

[18] The applicants are challenging the Minister's refusal of five applications for admission concerning six children. The parents of these children do not fall into any of the three categories set out in the *Directive*. The applicants were therefore asking the Minister to exercise her residual discretion to admit the children of non-rights holder parents. The CSF had recommended the admission of each child.

(a) Child W.[1]

[19] W. was born in Canada to immigrant parents who speak Dutch and English. They have chosen to integrate into the Franco-ténoise community and are active in that community. W. learned French at the Garderie Plein Soleil, a French-speaking daycare centre that shares a building with the CSF school in Yellowknife. W. has a better command of French than English.

[20] On May 13, 2018, W.'s parents applied to the Minister on the recommendation of the CSF. On May 28, 2018, and August 29, 2018, the Minister refused W's admission. On July 2, 2019, this Court set aside both of the Minister's

[1] At the request of the applicants and with the consent of the respondent, I have not included the names of the children or personal information that would enable them to be identified in my decision.

refusals and the matter was referred back to the Minister for reconsideration, taking into account her ministerial discretion and the purpose of s. 23: *A.B.*, at para. 91. On August 25, the Minister filed a notice of appeal of this decision. She did not request a stay pending the outcome of the appeal.

[21] Following the judgment, A.B., W.'s parent, sent a letter to the Minister requesting that she admit W. He was not admitted for the 2018/2019 school year and attended a French immersion school. A.B. told the Minister that the immersion program in the majority school was unsuitable and led to a decrease in W.'s French language skills.

(b) Child A.

[22] A. was beginning preschool and attended the Garderie Plein Soleil. She is fluent in French. Both of her parents are bilingual and work in French to support the Franco-ténoise population in the health sector. They use French on a daily basis, on a par with English, and are rooted in the Franco-ténoise community in Yellowknife. One of the parents sat on the board of directors of the Garderie Plein Soleil.

[23] A.'s initial application was submitted to the Minister on March 26, 2019, under the "reacquisition" category and, alternatively, under the ministerial discretion category. On April 18, 2019, the Minister refused the application because the parents had not provided the evidence required to establish that they fell under the "reacquisition" category. On June 20, 2019, F.A., A.'s parent, again asked the Minister to exercise her discretion to admit A., even though neither parent fell under any of the three categories under the *Directive*.

(c) Child V.

[24] V., who was beginning preschool, speaks Vietnamese and very little English, as do her parents. The parents emigrated from Vietnam. V.'s maternal grandfather spoke French during his childhood. His parents want V. to integrate into the Franco-ténoise community in Yellowknife.

[25] V.'s initial application, on the recommendation of the CSF, was submitted on April 3, 2019, under the "new immigrant" category, and was refused on April 10, 2019. On August 1, 2019, her parent, T.B., sent a letter to the Minister asking her to reconsider her decision by exercising her ministerial discretion.

(d) Children T. and N.

[26] T. and N. were starting grades eight and nine. They are trilingual (English, French, and Spanish). They are originally from the United States and moved to Yellowknife in 2018. T. and N. each received the top student award in their NWT French immersion class and received private tutoring in French.

[27] Their parent, J.J., submitted their application on August 12, 2019, with the support of the CSF.

(e) Child E.

[28] E. was beginning kindergarten. His parents emigrated from the Philippines and speak Tagalog and English. E. was not fortunate enough to have access to a French-speaking daycare because there is none in Hay River. This is the only application submitted by immigrant parents in Hay River since the 2016 *Directive* was issued.

[29] E.'s initial application for admission was submitted to the Minister on March 27, 2019, under the "new immigrant" category and, alternatively, under the ministerial discretion category. On April 10, 2019, the Minister refused the initial application because E., being born in Canada, was ineligible under the "new immigrant" category.

[30] A table attached to these reasons provides a summary of the applications, the language abilities of the children and their parents, and the families' cultural ties to the linguistic minority.

(3) The Minister's decisions

[31] On July 26, 2019, the Minister invited the CSF and the parents who had submitted admission applications to provide, within 10 days, "additional information" to help her "make a decision on the basis of the elements ... mandated by the Court". The CSF filed its supplementary submissions on August 7, 2019.

[32] On August 30, 2019, the Minister refused the admission applications of W., A., V., T., N., and E. Although there were five separate refusals, the reasons for each decision are consistent.

[33] On the one hand, the Minister recognized that admission was to the children's advantage since they would learn and master a second language. In

addition, the CSF recommended the admission of each child, confirming that the children's enrolment would benefit the school and the Francophone community and would not require additional human or material resources.

[34] On the other hand, the Minister explained that the Francophone communities of Yellowknife and Hay River were thriving and that enrolment in French-language schools in these communities was on the rise, noting that the *Directive* was therefore fulfilling its purpose of "supporting language and culture revitalization … and population growth."

[35] More importantly, she explained that making an exception for one of the applications would render the *Directive* moot and would result in budgetary unpredictability, given that the average additional cost per student attending a French-language school is $2,280 per year.

[36] According to the Minister, a child of parents who do not fall under one of the categories set out in the *Directive* should not be admitted, unless there is a unique and distinctive reason for admitting the child. Otherwise, as she is required to exercise her discretion in accordance with her past decisions and in a fair manner, the admission of a child who does not have a unique and distinct characteristic would require her to admit a potentially large number of students with a similar profile in the future. This would have both budgetary and practical consequences and would amount to an open door policy, representing a failure to meet the government's obligation to protect minority language education. The Minister concluded that none of the applications for admission presented exceptional circumstances. The fact that a child already spoke French, that admission would promote the child's development, that a family was an immigrant, or that a child had attended a French-language daycare centre did not present any distinguishing feature that would justify the exercise of her discretion.

[37] The Minister's refusals were therefore supported by three main arguments:

1. there have been improvements in linguistic and cultural revitalization under the *Directive*;

2. the admission of the children would entail a cost to the government; and

3. the admission of the children would undermine the consistent and fair exercise of discretion.

C. ISSUES

[38] The following issues arise in the applications for judicial review:

1. Did the Minister violate the principles of procedural fairness?
2. What is the appropriate standard of review?
3. Were the Minister's decisions unreasonable?
4. What is the appropriate remedy?

D. ANALYSIS

(1) The Minister did not violate the principles of procedural fairness

[39] According to the applicants, the Minister failed to meet the requirements of procedural fairness. The *audi alteram partem* rule requires that a decision maker must indicate their intention to dismiss an application, explain the reasons for the dismissal, and allow a reasonable period of time to respond. According to the applicants, the context required that the Minister, in her July 26th letter requesting additional submissions, provide more detail regarding the factors she would consider in making her decision.

[40] According to the respondent, the admission process is an administrative process, not a judicial or quasi-judicial process. The purpose of the Minister's letter was to allow the applicants to complete their file, not to set up an adversarial process. In addition, other than a table indicating the additional costs of admitting children, all relevant information was either in the possession of the CSF or available to the public. In the respondent's view, the notice allowed the applicants to make meaningful representations.

[41] In my view, the applicants have failed to establish that there was a breach of the principles of procedural fairness. The requirements of procedural fairness are inherently contextual: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 90. In general, they require the decision maker to disclose the information on which they base their decision: *May*, at para. 92. In the case at bar, the applicants had access to the *Final Report* that led to the adoption of the *Directive* and to the *Directive*. These provided certain parameters and objectives guiding the exercise of ministerial discretion. In addition, the *A.B.* case laid out a number of considerations that could be used to guide the exercise of the Minister's

discretion. It was sufficiently clear what factors would be considered by the Minister in making her decision. I also note that the applicants did not request additional information after being advised of the Minister's intention to reconsider the files in light of the decision in *A.B.*: see *Siad v. Canada (Secretary of State)*, [1997] 1 F.C. 608 (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 47.

[42] In a process that did not, and should not, resemble a judicial proceeding, the Minister was not required to disclose, before making a decision, every element that she was going to take into account in the exercise of her discretion. In the context of *A.B.* and the context set by the *Final Report* and the *Directive,* I have no problem concluding that the applicants had reasonable knowledge of the information on which the Minister would base her decision.

[43] In the absence of a procedural defect, I must consider the content of the decisions.

(2) The appropriate standard of review is reasonableness

[44] I accept the parties' position that the appropriate standard of review in this case is reasonableness. Following the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, reasonableness is presumed to be the applicable standard: at para. 16. No exception applies in the case at bar.

[45] Therefore, the onus is on the applicants to show that the Minister's decisions were unreasonable.

(3) The decisions were unreasonable

(a) The position of the parties

[46] The applicants maintain that the Minister's decisions were unreasonable because they suffer from fundamental flaws in reasoning, objectivity, rationality, and logic. In their view, the Minister fettered her discretion or exercised it unreasonably to reach a predetermined conclusion. In support of their argument, they cite various alleged errors in the Minister's reasons.

[47] The applicants argue that the Minister did not reasonably take s. 23 of the *Charter* into account. They point out that the purpose of s. 23 is to enhance the vitality of minority communities and that the *Directive* itself makes this an

objective. In their view, the Minister unreasonably concluded that the refusals did not infringe the purpose and spirit of s. 23.

[48] They disagree with the Minister's conclusions that the community is "continually growing" and that enrolment in CSF schools "has grown". The Minister relied on demographic data showing that the number of people who speak French was increasing to support her conclusion that the Francophone community was growing. However, according to the applicants, speaking French does not equate being part of the minority community. In her analysis of minority school enrolments, the Minister chose to compare enrolments at random times and ignored the fact that the figures were not comparable. In one case, the figures included junior kindergarten and in the other, junior kindergarten was not yet an option. In addition, the Minister considered that the *Directive* was working well given the number of children of non-rights holders admitted, but in reality, the vast majority of admissions of children of non-rights holders had taken place in Hay River and not in Yellowknife. Thus, according to the applicants, the Minister did not take into account the particular situations of the two communities.

[49] The applicants also dispute the alleged financial consequences of the admissions. In their view, the Minister's 14-year cost projection exaggerated the additional cost per student, a cost that is modest at best. They also suggest that it was unreasonable for the Minister to conclude that the admission of these children would force her to admit more children in the future. They argue that this is a false dilemma, given the relatively small number of applications that have been made under the *Directive* and the fact that the CSF screens applications and takes its role under s. 23 seriously. She was therefore wrong, in their view, to adopt a one-size-fits-all test in the exercise of her discretion.

[50] Counsel for the respondent submits that the Minister's decisions were reasonable. He submits that the Minister weighed the relevant s. 23 considerations and notes that s. 23 cannot be interpreted as giving the CSF unilateral authority to admit children of non-rights holder parents into their schools. According to the respondent, given that it was open to the Minister to conclude that the school program was not at risk, the refusal to admit children of non-rights holder parents does not violate s. 23.

[51] The respondent notes that the Minister made these decisions after weighing a number of factors and that no one factor was determinative on its own. Specifically, she recognized the benefit to the community and the students, the fact that the Francophone community and the school system were doing well, the cost

of each admission to the government, and the impact of her decisions on the consistent and fair exercise of her discretion. According to the respondent, it is not within the jurisdiction of this Court to intervene in the manner in which the Minister weighed these various factors.

(b) Legal principles governing judicial review on a reasonableness standard

[52] The review of a decision on the standard of reasonableness focuses on the reasoning followed by the decision maker: *Vavilov*, at para. 84. At the same time, the exercise must take into account the context, such as the evidence before the decision maker, the parties' submissions, the policies considered by the decision maker, and previous decisions: *Vavilov*, at para. 94. To conclude that a decision is unreasonable, the court must be satisfied that, because of the flaws or shortcomings relating to the merits of the decision, it does not meet the requirements of reasonableness, intelligibility, and transparency: *Vavilov*, at para. 100.

[53] According to *Vavilov*, there are two types of fundamental flaws: at para. 101. The first is a failure of rationality internal to the reasoning process. The court must be able to follow the decision maker's reasoning without encountering a decisive error in logic. The decision will be unreasonable if it is based on an irrational chain of analysis, if the conclusion reached cannot follow from the analysis undertaken, or if the reasons do not make it possible to understand the decision maker's reasoning on a critical point: *Vavilov*, at para. 103.

[54] The second flaw arises where the decision is unjustified in light of the relevant factual and legal constraints that bear on the decision. These constraints include the statutory scheme, the common law, the evidence presented, the submissions of the parties, past decisions, and the consequences for the individual: *Vavilov*, at para. 106.

[55] The *Charter* contains a significant part of the legal constraints in light of which the Minister's decisions must be justified. In fact, the Minister's discretion must be exercised "in light of constitutional guarantees and the values they reflect": *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 35, citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 152, per LeBel J. (concurring). This includes not only *Charter* rights but also the values that "underpin each right and give it meaning": *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32,

[2018] 2 S.C.R. 293, at para. 57, citing *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 36.

[56] In its submissions, the respondent relied on *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, to suggest that the onus was on the applicants to show that the Minister's approach "prevents" the realization of the purpose of s. 23. In that case, the Supreme Court of Canada concluded that, in the context of a regulation that expressly limited the admission of children to French-language schools, the school board in the Yukon did not have the authority to admit students who did not meet the prescribed eligibility criteria: at para. 74. The Supreme Court of Canada went on to note that this conclusion did not stop the school board "from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose".

[57] In my reading, "the Yukon's approach" refers to the regulation limiting the admission of children to minority schools, and the Supreme Court of Canada did not address the argument that the regulation might be unconstitutional. However, in the case at bar, the applicants did not challenge the constitutional validity of the statutory scheme or the *Directive*. Rather, the issue in this case concerns the Minister's exercise of an administrative power. Contrary to the respondent's argument, it is not necessary for the applicants to show that the Minister's decisions "prevent" the realization of s. 23 in order for the applicants to succeed. The case law clearly demonstrates, in my view, that in the administrative context, the issue is whether the decisions are unreasonable and reflect a proportionate balancing of *Charter* protections, according to the *Doré*/*Loyola* framework.

[58] The analysis is done in two stages: *TWU*, at para. 58. First, the court assesses whether the decision engages *Charter* rights or the values that underpin the *Charter*. Second, the court assesses whether the decision is a proportionate balancing of the rights at play, given the context.

[59] This analysis is intrinsically linked to the facts of each case and is done in the context of reviewing the reasonableness of the decision. As such, particular attention and deference must be given to the reasons provided by the Minister in this matter. Nevertheless, in order to ensure the protection of rights guaranteed under the *Charter*, the analysis must be "robust": *TWU*, at para. 80

(c) The decisions engaging s. 23 of the *Charter*

[60] This Court has already determined that the Minister must take s. 23 into account when exercising her discretion to admit children of non-rights holder parents to French-language schools in the NWT: *A.B.*, at para. 65. This discretion has a direct impact on the viability of CSF schools and the Francophone community and thus brings into play the protections conferred by s. 23.

[61] The purpose that underpins s. 23 of the *Charter* is "to preserve and promote the two official languages of Canada, and their respective cultures": *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362. This includes the objective of redressing past injustices and creating circumstances in which the minority community can flourish: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 15 ["*CSF*"]. The fact that s. 23 is intended to promote the preservation and development of this community gives it a collective dimension, even though it confers an individual right: *CSF* at para. 17.

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

[63] First, the enrolment rate is an important factor in the success of CSF schools. The *Final Report* prepared by the Department that led to the adoption of the *Directive* in 2016 emphasizes the importance of this factor:

> An inherent part of 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. . . . As such, it is in the interest of the [government] and the people of the NWT to ensure student populations are sustained in the existing French first language schools.

[64] A low enrolment rate could reduce funding for CSF schools and reduce the educational options that the schools would be able to offer. In this way, a low enrolment rate could logically jeopardize the viability of French-language schools and erode the quality of education provided in these schools.

[65] In this sense, the decision not to admit a child of non-rights holders has an impact on the rights conferred by s. 23 on the parents of those already in the French-language school system and on rights holders who will enrol their children in the future. In turn, a viable French-language school system promotes the viability and vitality of the Francophone community: *Mahe*, at pp. 362–363.

[66] Second, beyond the viability of schools, the decision to admit a child of non-rights holders can enrich the Franco-ténoise community by allowing non-rights holder families to fully integrate into that community. In contrast, refused admissions create an obstacle to the integration of families who wish to become part of the Franco-ténoise community by depriving the family of its membership in the school community.

[67] The link between the admission of children of non-rights holder parents and the revitalization of minority culture and language is recognized in the *Directive*, which states that the government "is also committed to supporting language and culture revitalization. An inherent part of revitalization is supporting population growth".

[68] Since the Minister's decisions will have an impact on the viability of CSF schools, the quality of the school programs offered there, and the full integration of new families into the Francophone community, they indirectly affect the rights conferred on NWT residents by s. 23 and the values that underpin those rights, which the government is required to respect.

(d) The *Directive* aims to circumscribe admissions of children of non-rights holder parents

[69] Although the *Directive* provides for the admission of children of non-rights holder parents in order to support the growth of the Franco-ténoise population, it also aims to limit the number of admissions by favouring three categories of non-rights holder parents.

[70] The purpose of this limit is to manage the costs of the school system in the NWT and ensure the viability of majority schools. This objective is expressed in the *Directive* and the *Final Report* that led to its adoption. The *Final Report* cautions that, without limiting the enrolment of children of non-rights holders, such growth "will eventually bring calls for the diversion of resources to French first language schools to the detriment of neighboring English and French immersion schools". The *Final Report* also notes that "such allowances must ensure that subsequent shifts in student numbers are not detrimental to the sustainability of

surrounding schools". As a result of these concerns, the *Directive* is intended to allow a "limited" number of children of non-rights holder parents to attend CSF schools.

[71] In order to comply with the objectives of the *Directive*, the Minister's discretion should therefore be exercised to allow admissions to support the CSF school system and the revitalization of the language and culture of the Francophone minority, while ensuring that such admissions are limited to control costs and to ensure the continued sustainability of majority schools.

(e) The Minister's decisions are flawed

[72] In performing her analysis, the Minister drew a number of conclusions that were not supported by the evidence before her. In determining whether she reached a reasonable decision, it is appropriate to consider the impact of these errors. However, the analysis should not become a treasure hunt for errors: *Vavilov*, at para. 102. Superficial, peripheral, or minor errors are not enough to render a decision unreasonable: *Vavilov*, at para. 100.

[73] In order to focus on the fundamental errors in the Minister's reasons, rather than the merely peripheral ones, I will return to the three main arguments on which the refusals rely: (1) there have been improvements in linguistic and cultural revitalization under the *Directive*; (2) admission of the children would entail a cost to the government; and (3) admission of the children would undermine the consistent and fair exercise of discretion.

[74] In the following paragraphs, I will explain that the Minister's analysis in support of the three main arguments of her decisions contains errors of fact and suffers from a failure of rationality internal to her reasoning process. These errors make the decisions unreasonable.

(i) The argument that there were improvements in linguistic and cultural revitalization under the *Directive* does not hold water

[75] The Minister's decisions were largely based on her conclusion that the minority community and minority schools were flourishing as a result of the implementation of the *Directive*. Among other things, she noted that (1) enrolments were increasing; and (2) the Franco-ténoise community was growing. However, the analysis performed by the Minister in support of this conclusion contains significant errors, and the statistics cited in support of the first point hardly support the conclusion drawn. Being based on premises that are false or

questionable, this argument in the Minister's reasoning is unreasonable and does not hold water.

[76] First, the conclusion that enrolment was increasing was not supported by the evidence before her.

[77] In her reasons, the Minister stated that "enrolment [at École Allain St-Cyr ("EASC") and École Boréale ("EB")] [had] grown", having increased since 2009. The Minister referred to the increase in enrolment at EB between 2009/2010 and 2012/2013, and at EASC between 2009/2010 and 2014/2015, and noted that the number was more or less the same in 2018/2019.

[78] However, the Minister's conclusion that enrolment in CSF schools was increasing is not supported by the data. For enrolment in the 2018/2019 school year, the Minister relied on data that included junior kindergarten enrolment, even though that grade did not exist until the 2017/2018 school year. This change had to be taken into account if she wanted to show a valid trend based on these data. Because she did not take it into account, the figures considered by the Minister were artificially overestimated for the last few years.

[79] The error was compounded by the fact that the Minister assessed the trend by comparing random school years. She reached her conclusion simply by noting the net change between the 2009/2010 and 2018/2019 school years. Given the fluctuations from one year to the next, on which the respondent relies, comparisons between two random years will logically be unrepresentative of long-term trends. The trend in enrolment in CSF schools is therefore much more nuanced than the Minister concluded in her decisions. For example, if we adjust the data to take into account the fact that junior kindergarten has only existed since September 2017, we see that enrolments were in decline from 2014 to 2017 and that, despite an increase in 2018, they are more than 10 per cent lower than in 2014.[2]

[80] The Minister also noted that at least 21 children had been admitted to the two CSF schools since the adoption of the *Directive*. This allowed the Minister to conclude that the *Directive* was fulfilling its purpose of "supporting language and culture revitalization … and population growth". However, the Minister's approach made no distinction between the nature and frequency of applications for admission in Yellowknife and Hay River. The Minister mentioned 21 admissions,

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[2] Excluding pre-kindergarten enrolments, the total number of students enrolled in CSF schools every year from 2014/2015 to 2018/2019 was, respectively, 224, 218, 201, 191, and 201 students.

but this disguises the fact that only five children were admitted in Yellowknife, despite the fact that the Francophone community and the French-language school are larger than those in Hay River.

[81] In addition, the Minister failed to mention that, since the implementation of the *Directive*, which is intended to support the growth of the Francophone community, enrolment in both schools has decreased. At EB, it decreased from 85 students in 2015/2016 to 81 in 2018/2019, and at EASC, from 133 students in 2015/2016 to 120 in 2018/2019, not counting enrolment in junior kindergarten. This does not represent "stability of school enrolment" as suggested by the Minister.

[82] The respondent argues that fluctuations between years mean that short-term trends are less reliable and that the Minister was therefore correct to consider long-term trends. I recognize that short-term trends are less reliable because of the variability in enrolment, but I must also keep in mind that "the likelihood of assimilation and of cultural erosion will increase with each passing school year if nothing is done to prevent them": *CSF*, at para. 16. Since the implementation of s. 23 requires vigilance, the Minister cannot simply ignore recent declines and wait for this trend to be confirmed in a decade.

[83] As part of these applications for judicial review, the respondent filed evidence showing that in 2019/2020, enrolment had increased significantly. According to the respondent, this evidence demonstrates that the Minister was correct in her belief that the addition of extra classrooms and a gymnasium at EASC would result in an increase in enrolment. The enrolment for the 2019/2020 school year was not known when the Minister made her decisions and therefore cannot be used to justify them. My role is to assess the reasonableness of her decisions on the basis of the record before her. The fact that she believed that enrolments would increase does not remedy the errors I have identified.

[84] At the hearing, the respondent suggested that my review of the enrolment rate was limited by the fact that the CSF did not make certain arguments in its submissions to the Minister before the decisions were made. The respondent relied primarily on the *Vavilov* decision, which explains that a reviewing court must interpret the decision maker's reasons in context, including the submissions made to the decision maker, to assess whether the decision is reasonable: at para. 94. While I recognize that the CSF's submissions are an important part of the context, as I have concluded above, the decision-making process was not, and nor should it have been, a formal, adversarial process. The fact that the CSF did not anticipate

and make representations with respect to all of the errors identified does not protect the decisions from flawed internal rationality. Taking the whole context into account, including the CSF's submissions requested by the Minister, it appears that her enrolment-based analysis is flawed.

[85] Second, one of the main conclusions drawn by the Minister was that the Francophone communities in Yellowknife and Hay River were "continually growing". This finding was based on a comparison of the 2006 and 2016 census results for two categories of people: (1) individuals who reported French as a mother tongue; and (2) individuals who reported a knowledge of French. I am not suggesting that this finding is wrong or unreasonable. However, the strength and importance of this finding are mitigated by the context.

[86] As argued by the applicants and noted by the Minister, there is a high rate of assimilation due, among other things, to exogamous marriages: *Association des parents ayants droit de Yellowknife*, at para. 111. The Minister noted an increase in the number of NWT residents who have French as their mother tongue. However, she did not recognize that the census allows several languages to be selected as mother tongues. Given the challenges that exogamy poses to the Francophone minority, it would probably be more useful to look at the increase in the number of people whose only mother tongue is French in order to assess the viability of the Francophone community in the long term.

[87] Moreover, as the applicants point out, there is no obvious logical link between the increase in the number of people who can speak French and the viability of the Francophone community. This reasoning ignores the fact that one can learn French, including in the majority school system, without necessarily being part of the minority community.

[88] More importantly, while the data shows that there was modest growth in the size of the Francophone community from 2006 to 2016, there is no information for 2016 to 2019, the period that coincides with the period since the implementation of the *Directive* and therefore the more relevant period.

[89] Therefore, while it was not unreasonable to conclude that the minority population was growing, the significance of this conclusion is limited, especially given the challenges of assimilation and exogamy threatening the viability of minority communities in the long term.

[90] These errors undermine this argument in the Minister's reasoning. The way she assessed the data concealed a decline in enrolment in CSF schools since 2014 and diminished the importance of the ongoing challenges to vitality faced by the minority community. Her assessment also erroneously suggested that the minority community and minority schools were making progress under the system established by the *Directive*.

(ii) The argument that the admission of children will entail a cost to the government is valid but is less important

[91] The second argument on which the Minister's decisions were based concerns the additional costs that would be generated by the admission of children to CSF schools. Despite some errors that caused the Minister to unreasonably overstate the overall cost of each admission to a CSF school, her conclusion that each admission would cost the government more money was reasonable in light of the records before her.

[92] The cost analysis presented by the Minister was based on the premise that each admission represented an average additional cost of $2,280 per year for 14 years, totalling $31,920. This calculation assumed that each student would be admitted to junior kindergarten and would remain in the CSF system until the end of high school.

[93] This assumption is flawed for at least two reasons. First, it is clear that not all children start in junior kindergarten. For example, children W., T., and N. have applied for higher grades. Even in the rejection letters the Minister sent concerning W., T., and N., the Minister cited the figure of $31,920, which clearly does not apply to these students.

[94] Second, the cost projection ignored the fact that a significant percentage of students leave the French-language school system when they enter high school. The size of the CSF Grade 9 classes for 2010/2011 to 2018/2019 was on average 28.7 percent smaller than the size of the Grade 8 classes feeding each of these Grade 9 classes.[3] It is therefore unlikely that every child admitted would remain in the French-language school system until the end of high school.

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[3] The size of CSF Grade 9 classes for 2010/2011 to 2018/2019 was, respectively, 8, 8, 15, 17, 14, 14, 8, 13, and 10 students. The size of CSF Grade 8 classes for 2009/2010 to 2017/2018 was, respectively, 13, 9, 18, 19, 21, 20, 20, 18, and 12 students.

[95] That said, the data confirms that the government has to pay a higher amount each year for each child who is admitted to the French first language system. In addition, although not noted by the Minister, each admission can result in siblings of admitted children having to be admitted under s. 23(2) of the *Charter*. More specifically, the estimated additional cost of $2,280 per student per year was supported by historical funding data available to the Minister. The Minister acknowledged in her reasons that a single admission would not result in infrastructure costs, but she explained that the territorial funding formula allocated more per pupil to small schools, resulting in additional costs. On average, the government has to pay a higher amount when a student attends one of the CSF schools, since these are generally smaller than majority schools. It is therefore likely that each admission would increase the total amount of education funding provided by the government, according to its formula. On the other hand, since enrolment had decreased since the implementation of the *Directive*, even if all applications for admission were granted, the government was paying this additional cost for fewer students than in 2015/2016, regardless of its decision to offer junior kindergarten starting in the 2017/2018 school year.

[96] Therefore, while it was unreasonable to expect a total cost of $31,920 per student, the Minister reasonably concluded that each admission would result in an additional cost of $2,280 per student, per year.

(iii) The argument that the admission of children would undermine the consistent and fair exercise of discretion does not hold water

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

> [T]here must be a distinctive and unique reason why [the applicant] would be admitted, one that is not normally present in other cases. Otherwise, I would have to admit most students seeking admission under my discretion which would give rise to budgetary unpredictability.

[98] This concern was reiterated repeatedly in the Minister's various decisions. The following are a few examples:

> The admission of any student on the basis of knowledge of French would likewise bring unpredictability to the Government's budget

> in minority education (and could open access to non-rights holders who first attended an immersion program in Yellowknife or elsewhere thereby increasing the impact on the unpredictability of the Government's budget in education).
>
> …
>
> [A]n admission in this case makes the admission process for non-rights holders as well as budget implications unpredictable.
>
> …
>
> Unfortunately, admission under that basis would result in the admission of too many children outside the 2016 Directive, which in turn would lead to unforeseen and unpredictable financial budgetary consequences for the Government.

[99] I recognize that the Minister must exercise her "discretion … in a fair and consistent manner to all current applicants, but also to future ones", despite the fact that she is not bound by a strict application of *stare decisis*: *Vavilov*, at para. 129.

[100] However, as illustrated by the table in the Appendix, several factors distinguished each application. The needs and circumstances of the two schools and communities were not the same. More importantly, each admission granted changes the circumstances in which she is required to exercise her discretion on the next application. The more enrolments increase as a result of the exercise of her discretion, the less need there is to exercise it on the next application. Similarly, each admission creates an additional cost and thus reduces the government's ability to fund the next admission. In addition, the government's enrolment and fiscal capacity changes every year, and the viability of schools and the community, which the Minister must take into account, most likely changes. In addition, the *Directive* provides for a cap in that the admission of children of non-rights holders is limited when enrolment exceeds 85 per cent of the school's capacity.

[101] As a result, the Minister's concern that she might be compelled to exercise her discretion in future cases was greatly exaggerated. Given the legal and factual context, it was unreasonable for the Minister to give such weight to this concern in her reasoning process.

[102] Having identified the above problems in the Minister's reasons, and applied the principles set out in *Vavilov*, I conclude, based solely on the errors identified, that her decisions were unreasonable. The identified errors created

fundamental flaws in the rationality internal to the Minister's reasoning process, raising the real possibility that she might have reached a different conclusion had it not been for those errors. In particular, as I have explained, overestimating the impact of her decisions on the future exercise of her discretion was at the very heart of the reasoning behind her decisions.

(f) The Minister's decisions do not reflect a proportionate balancing of the *Charter* protections and the government's interests

[103] The failure of rationality internal to the reasoning process is sufficient on its own to make the Minister's decisions unreasonable. However, as I noted above, the decisions bring into play the protections afforded by s. 23 of the *Charter*, and must therefore stand up to the "robust" analysis of *TWU*: at para. 79. Thus, the reasons must reflect a proportionate balancing of the *Charter* and the government's interests: *Doré*, at para. 7.

[104] I conclude that the reasons do not demonstrate a proportionate balancing of the protections afforded by s. 23 of the *Charter*. In the analysis above, I have shown that the Minister erred in her assessment of the viability of CSF schools and the community. This error is intimately linked to the protections guaranteed by s. 23 of the *Charter*. As I will explain in this section, in addition to making this error, the Minister failed to demonstrate that she gave due consideration to the CSF's recommendation and the individual characteristics of each admission application as they relate to the protections afforded by s. 23. These errors have a significant impact on the balancing aspect of the exercise of discretion. Accordingly, I conclude that the reasons do not reflect a proportionate balancing of the *Charter* protections at play. This is another reason why I conclude that the decisions were unreasonable.

[105] As a starting point in her analysis, the Minister acknowledged that the admission of the children would be consistent with the values underpinning s. 23 of the *Charter*, to the extent that it would strengthen the French-language school system and the Franco-ténoise community. Admitting the children would therefore be consistent with the objective of this provision to promote the development of the minority official language: *CSF*, at para. 15. Moreover, it is not disputed that the Franco-ténoise community has suffered historically from policies that have threatened its viability as a linguistic community: *A.B.*, at para. 57.

[106] It is also significant that the CSF had agreed to the students being admitted. The CSF's perspective plays a key role in assessing the impact of admission

decisions on the minority community in relation to the values underpinning s. 23. Admittedly, Francophone school boards cannot unilaterally set criteria for admission to their schools where the legislature has passed legislation denying them that power: *Yukon Francophone School Board*, at para. 74. However, the Supreme Court of Canada has recognized the importance of taking into account the views of representative bodies such as the CSF, which manage and control s. 23 protections on behalf of rights holders, when a government makes decisions regarding the provision of education under s. 23: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at paras. 51, 62; *CSF*, at para. 86.

[107] Where, as in the case at bar, the CSF makes a recommendation in accordance with the *Directive*, there is strong evidence that, in giving effect to that recommendation, the decision maker is applying the values underpinning s. 23. In her reasons, the Minister stated that she had taken into account this recommendation and the assessment that the admission of the children would benefit the minority community and the children concerned. However, as I have explained, the reasons for the Minister's decisions, which explain her refusal to accept the recommendations of the CSF, are inconsistent and contain fundamental flaws regarding the state of the school system and the community. Moreover, the reasons suggest that the Minister did not give due weight to the CSF's recommendation and to the particular circumstances of each application. Two examples are sufficient.

[108] In her analysis of the application concerning children T. and N., the Minister explained the following:

> [T]he distinctive elements favouring admission in this case are that you, as parents, would hope for admission to support your children's development, and that T. and N. have already begun to learn the language. Unfortunately, admission under that basis would result in the admission of too many children outside the 2016 Directive, which in turn would lead to unforeseen and unpredictable financial budgetary consequences for the Government.

[109] The Minister made no mention of the fact that T. and N. were seeking admission to Grades 8 and 9. They were the only ones applying and, as I noted earlier, minority schools suffer a significant loss of students in the transition to high school, 28.7 per cent on average. It is highly likely that the loss of students in Grade 9 benefits the majority system. It seems to me that allowing two children to transfer from the majority school system to a minority school would be of

significant benefit to the CSF school since it would reduce attrition in the high school system and would not in any way threaten the viability of the majority schools that the *Directive* seeks to protect. In addition, such admissions would not bind the Minister in any way with respect to applications for the admission of children to kindergarten or Grade 1.

[110] The second example is A. As in the case of children T. and N., the Minister refused the application because she felt that there was nothing distinctive about his application for admission. According to the Minister, admitting A. simply because he speaks French and because his admission would promote his development would open the door to many additional admissions, with "unforeseen and unpredictable financial budgetary consequences".

[111] Yet, A.'s application described a special situation. As I note in the attached table, A.'s family is already well established in the Franco-ténoise community. The parents and their child speak French. The parents work by serving the Franco-ténoise population in the health sector. One of A.'s parents sits on the board of directors of the Francophone daycare.

[112] A.'s family has therefore already integrated into the minority community. The refusal means that the parents cannot share the same school community environment as the other members of the minority community now that their child has reached school age. As a result, A.'s family would likely have to integrate into the majority school community. This situation is different from those where the parents are not integrated into the community. For A.'s family, admission to the minority school would be a logical continuation of the steps they have taken in recent years to integrate into the minority community. One of the main purposes of the *Directive* is the revitalization of the minority language and culture by supporting the demographic growth of the minority community. Refusing admission to children from a family that is already integrated into the community limits this integration in an important area, the education of their children.

[113] Because the reasons show that the Minister does not appear to have taken into account the particular benefits of each admission for the school, the families concerned, and the community, the reasons do not give due weight to the CSF's recommendation and the balancing of the protections conferred by s. 23.

[114] This error is compounded by the fact that the Minister erred in her assessment of the factors relating to the government's interests. As I described in the previous section, she overestimated the additional cost of each admission and,

more importantly, misunderstood how the admission of one or more of these children would affect the fairness and consistency of the admissions process in the future.

[115] For these reasons, I conclude that the reasons do not demonstrate that the Minister carried out the proportionate balancing instructed in *Doré*. This is another reason why the Minister's decisions are unreasonable.

[116] To be clear, I do not conclude that a rejected admission will always necessarily result in a disproportionate balancing of the values underpinning s. 23 and the government's interests. Rather, the reasons provided by the Minister do not allow me to conclude that, in this case at bar, the Minister properly weighed the values underpinning s. 23 of the *Charter* when she refused the admission applications that are the subject of the applications for judicial review before me.

(4) In the case at bar, the decisions should be set aside and the case referred back to the respondent

[117] The applicants are asking this Court: (1) to set aside the decisions; (2) to make certain declarations; and (3) to make an order directing the Minister to grant the applications for admission.

[118] The applicants cite *Vavilov* in support of their argument that an endless back-and-forth between the decision maker and the court must be avoided. In their view, the factors that can weigh in favour of *mandamus*, including the need for a speedy solution, the urgent need to resolve the conflict, fairness, and the efficient use of public resources, apply to the proceeding. They maintain that the systemic nature of the refusals is apparent and that there is no likelihood that individual applications would be granted.

[119] Counsel for the respondent submits that if the Minister failed to consider the factors properly, her decisions must be referred back for reconsideration. An order directing the Minister to exercise her discretion in a certain manner would not, in his view, be appropriate in this case. An order of this nature is only appropriate where the applicant has a clear right to obtain the permission sought. The applicants in this case have no rights under s. 23. Moreover, such an order would be contrary to the constitutional principle of the division of powers.

[120] For the following reasons, I set aside the decisions, but I refuse to make the declarations requested and order the Minister to exercise her discretion in a certain manner. Instead, I refer the matter back to the respondent for reconsideration.

[121] Where the reviewing court finds that a decision is unreasonable, it will usually be appropriate to set aside the decision and refer the matter back for reconsideration: *Vavilov*, at para. 141. The court may refuse to remit the case and decide in the decision maker's place only where the remittal "would stymie the timely and effective resolution of matters in a manner that no legislature could have intended": *Vavilov*, at para. 142. The following factors may influence this determination: "[e]lements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources": *Vavilov*, at para. 142. For example, where there is only one unavoidable outcome, there would be no need to refer the matter back to the decision maker: *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 54–56. As well, if the delay in referring the matter back to the decision maker threatens to bring the administration of justice into disrepute, the case law recognizes an exception to the general rule: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at para. 16.

[122] In my view, in this case, it is not possible to conclude that a single outcome is a foregone conclusion. The decisions in question are discretionary decisions, and the record does not necessarily support the conclusion that there is only one possible outcome. A year has passed since these decisions were made, and the factual context may well have changed. In the circumstances, the respondent should be given the opportunity to reconsider her decisions in light of that context.

[123] Furthermore, I find that the delay caused by the reconsideration of these decisions does not threaten to bring the administration of justice into disrepute. I take into account the fact that this is the second time that W.'s parent, A.B., has been successful in overturning a decision of the Minister denying admission of her child. I also take into consideration that, according to the recent decision of the Supreme Court of Canada in *CSF*, because of the nature of the applications, the risk of assimilation and cultural erosion of the minority communities increases with each year of inaction: *CSF*, at para. 16. However, I am of the opinion that the prejudice resulting from the delay is not sufficient to call into question the administration of justice or to justify the exercise by this Court of a discretion that rightly belongs to the respondent. The respondent will be in a position to render new decisions before the beginning of the next school year.

[124] With respect to the declarations, the applicants request that I declare that the Minister:

1. fettered her ministerial discretion;

2. breached the principles of procedural fairness;

3. was not reasonably open to persuasion and did not fairly assess the application files in an impartial manner;

4. did not reasonably consider the best interests of the child;

5. did not reasonably exercise her discretion to take into account the purpose of s. 23 of the *Charter* and the interests of the rights holders contrary to the decision in *A.B.*;

6. by her *Directive* and the refusal to exercise her ministerial discretion, adopted an approach to applications for admission of children of Francophile and non-Francophone immigrant families that prevents the realization of s. 23 of the *Charter* and its remedial purpose in Yellowknife and Hay River; and

7. that the systemic approach of the Department and the Minister justifies this Court's intervention to decide the five application files for the six children involved.

[125] The applicants have failed to establish that these declarations are necessary in the circumstances. In fact, some of the declarations requested are inconsistent with my findings. As I have explained, there is no breach of the principles of procedural fairness, and I have concluded that the matter should be referred back to the respondent for reconsideration. I have not found that the Minister acted in bad faith. Rather, I explained that her reasons for decision were fundamentally flawed and therefore the decisions were unreasonable. In light of these deficiencies, it is difficult, if not impossible, to determine whether she reasonably considered and weighed the various relevant factors, such as the interests of the children.

[126] In any event, the applicants have not shown how the declarations would be helpful. A declaration can only be granted if it will have practical utility: *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11. I see no point in making declarations that relate to decisions that will, in any event, be set aside as a result of this decision. Specifically, I reject

the applicants' argument that the declarations are necessary to ensure that the reconsideration will be carried out in accordance with the legal constraints imposed on the respondent. I am satisfied that the respondent will continue to act in good faith and to endeavour to exercise the respondent's discretion within the imposed legal constraints.

[127] For these reasons, the appropriate remedy is simply to set aside the decisions and refer the matter back to the respondent for reconsideration.

[128] Notwithstanding my conclusion on the appropriate remedy, I offer a few brief comments to guide the respondent's reconsideration.

[129] The Minister at the time put in place a *Directive* that established an organized and predictable mechanism for the admission of children of non-rights holder parents to minority language schools. The applicants do not contest this *Directive*. The discretion to make an exception and admit a child of non-rights holder parents who does not fall into one of the categories set out in the *Directive* and who has received the recommendation of the CSF resides with the respondent.

[130] Neither the steps to be taken in asking the respondent to exercise this discretion nor the decision-making process should be unduly complex or require extensive analysis and detailed reasons. On the other hand, such decisions are important for the parents and children involved, as well as for the rights holder community. Although the respondent's reasons need not be lengthy and detailed, they must be logical and consistent. In making a decision, the respondent must take into account s. 23, one of the objectives of which is to counter the assimilation of the NWT Francophone minority community, a vulnerable community: *CSF*, at para. 156.

[131] It is up to the parents and the CSF to demonstrate to the respondent that the exercise of the respondent's discretion is beneficial and necessary in the circumstances. In this way, the respondent will be well-equipped to make an informed decision.

[132] The respondent could use the CSF's recommendation as a starting point when considering exceptional applications for admission, given the role the CSF plays in representing the minority community. The CSF is well-placed to assess the language and cultural aptitudes of children and their parents. The CSF is also able to reflect the needs of the community and determine the impact of enrolment on

their schools. Thus, the respondent should give appropriate weight to the CSF's recommendations.

[133] The CSF should strive to provide recommendations that are useful and that can guide the respondent in the exercise of the respondent's discretion. The particular benefits of each exceptional application should be documented. The adoption of phrases such as [translation] "every extra student is an asset" does little to serve this purpose. It would be more useful to specify the particular advantages or disadvantages that an admission would bring to the minority community. Discretion is vested in the respondent, so the value of the CSF's recommendation is linked to its ability to effectively and reliably communicate to the respondent the impact that an admission would have on the school and the Francophone community.

[134] Notwithstanding a recommendation of the CSF, the respondent may decide to refuse admission if the respondent believes that, in weighing all relevant factors, including the *Directive* and its objectives and the values underpinning s. 23, an application should be refused. This will necessarily be a specific factual determination that will vary depending on, for example, the particular circumstances of the child and his or her family, the grade to which the child is applying, and year-to-year variations in enrolment. Factors such as school capacity and the impact on the territorial budget may also be taken into consideration.

E. CONCLUSION

[135] For these reasons, the applications for judicial review are allowed. The Minister's decisions dated August 30, 2019, refusing W., A., V., T., N., and E. admission to the CSF schools are set aside, and the decisions are referred back to the respondent for reconsideration.

[136] The successful applicants are entitled to their own costs.

"SIGNED"

P. Rouleau J.S.C.

Francis Poulin, for the Applicants

Guy Régimbald, for the Respondent

Heard on: June 17, 2020, by videoconference

Appendix: Table of Applications

Child	City	Grade	French language ability	French language ability of parents	Cultural ties
W.	Yellowknife	Kindergarten	W. has a better command of French than English, and French is the language he uses spontaneously at home. He attended a Francophone daycare centre.	The mother takes courses in French and has beginner's level French.	The parents are immigrants who have chosen to integrate into the Franco-ténoise community. The mother sat on the board of directors of the Francophone daycare.
A.	Yellowknife	Junior kindergarten	A. is fluent in French and attended a Francophone daycare. She uses both French and English at home.	The parents speak French and work in French while serving the Franco-ténoise population in the health sector.	The parents work by serving the Franco-ténoise population in the health sector. One parent sits on the board of directors of the Francophone daycare centre.
V.	Yellowknife	Junior kindergarten	V. does not speak French. She speaks Vietnamese and some English.	The parents do not speak French. They speak Vietnamese and some English.	V.'s maternal grandfather spoke French during his childhood in Vietnam. The parents want to integrate

					into the Franco-ténoise community.
T.	Yellowknife	Grade 8	T. performed better in immersion. He won the award for best student in French class.	The mother has greatly improved her French proficiency since her arrival in Canada.	The parents are immigrants who have chosen to integrate into the Franco-ténoise community. They are members of Canadian Parents for French and French-language radio.
N.	Yellowknife	Grade 9	N. performed better in immersion. She won the award for best student in French. She won a French public speaking competition.	The mother has greatly improved her French proficiency since her arrival in Canada.	The parents are immigrants who have chosen to integrate into the Franco-ténoise community. They are members of Canadian Parents for French and French-language radio.
E.	Hay River	Junior kindergarten	E. does not speak French.	The parents do not speak French.	The parents want to integrate into the Franco-ténoise community.

DOCKETS: S-1-CV-2019-000355
S-1-CV-2019-000356
S-1-CV-2019-000357
S-1-CV-2019-000358
S-1-CV-2019-000359

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

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

Applicants

and

Northwest Territories Minister of Education, Culture and Employment

Respondent

This document is an unofficial English translation of the Reasons for Decision of the Honourable Justice P. Rouleau filed on July 23,2020. This document is placed on the Court file for information only.

REASONS FOR DECISION OF
THE HONOURABLE JUSTICE P. ROULEAU