SUPREME COURT OF YUKON

Citation: *AB v Yukon (Government of)*, 2022 YKSC 69

Date: 20221208
S.C. No. 21-A0024
Registry: Whitehorse

BETWEEN:

A.B.
C.D., BY THEIR LITIGATION GUARDIAN A.B.

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON (DEPARTMENT OF EDUCATION)

DEFENDANT

It is prohibited to publish any information that could disclose the identity of either of the plaintiffs, or any information relating to C.D.'s gender, age, medical diagnosis or symptoms related thereto.

Before Justice E.M. Campbell

Counsel for the Plaintiffs — Vincent Larochelle

Counsel for the Defendant — Amy Porteous

REASONS FOR DECISION

Introduction

[1] C.D. is a student with disabilities who has special educational needs. A.B. is C.D.'s parent and acts as C.D.'s litigation guardian. A.B. and C.D. reside in a Yukon community where C.D. attends public school.

[2] The plaintiffs claim that various government of Yukon policies, practices, guidelines, actions, inaction, or conduct related to the provision of, and access to, education in the Yukon for children with disabilities violate s. 7 and/or s. 15 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*"), and/or certain provisions of the *Education Act*, RSY 2002, c 63 (the "*Act*").

They claim the *Charter* violations are not saved by s. 1 of the *Charter.* They seek declaratory and injunctive relief against the defendant, the Government of Yukon ("Yukon").

[3] The defendant applies to strike the plaintiffs' claims on numerous grounds based on Rule 20(26)(a), (b), (c) and (d) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules of Court*")[1].

[4] More specifically, Yukon applies to have the plaintiff's claims struck on the basis, among other things, that:

- the *Rules of Court* direct that applications for judicial review of administrative decisions seeking relief in the nature of declarations, injunctions or *mandamus* are to be brought by way of a petition not a statement of claim;
- the declarations sought have no practical utility;
- the plaintiffs lack public interest standing to bring claims pertaining to the unwritten policy; other unnamed Yukon students, as well as the funding and allocation of Learning Assistant Teachers (''LAT'');
- some of the claims and/or pleadings are incoherent or lack justiciable standard; and
- pleading evidence or argument is not permitted.

[1] The *Rules of Court* of the Supreme Court of Yukon were amended effective October 31, 2022. Considering this application was heard before that date, this decision refers to and applies the *Rules of Court* that were in effect prior to the amendments.

Application to Strike

[5] The defendant brings this application pursuant to Rule 20(26) of the *Rules of Court*, which states:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that:
>
> (a) it discloses no reasonable claim or defence as the case may be;
>
> (b) it is unnecessary, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding; or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs

Subrule 20(26)(a) – Failure to disclose a reasonable claim

[6] The test applicable for striking out a claim for failure to disclose a reasonable claim is as follows:

> … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: … . Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: … [citations omitted].

(*R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 ("*Imperial Tobacco*") at para. 17)

[7] In *North America Construction (1993) Ltd. v Yukon Energy Corporation,* 2019 YKSC 42, Duncan J., as she then was, referred to the test to strike out a claim as summarized in *McDiarmid v Yukon (Government of)*, 2014 YKSC 31 ("*McDiarmid*"):

> [11] …
>
> > [14] …The essential elements are: (i) that a claim should be struck out only if it is plain and obvious that the claim is bound to fail; (ii) the mere fact that the case is weak or not likely to succeed are not grounds to strike; (iii) if the action involves serious questions of law or fact then the rule should not be applied; and (iv) the court, at this stage, must read the statement of claim generously, with allowances for inadequacies due to deficient drafting.

[8] The power to strike a claim has been described as a "valuable housekeeping measure essential to effective and fair litigation", and as a measure that allows litigants as well as judges to focus their attention on the claims that have a reasonable chance of success and, ultimately, on the real issues between the parties (*Imperial Tobacco* at para. 19).

[9] No evidence is admissible on a motion to strike for failure to disclose a reasonable claim. The application proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven (*Imperial Tobacco* at para. 22; Rule 20(29) of the *Rules of Court*). An application to strike is not about evidence, it is about the pleadings. As stated in *Imperial Tobacco* at para. 22:

> [22] … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[10] However, a judge needs only accept as true material facts that are capable of proof. Allegations based on speculation or assumptions, bare allegations or bald assertions without any factual foundation, pleading of law, or allegations that are patently ridiculous or incapable of proof do not have to be accepted as true (see: *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455; *Grenon v Canada (Revenue Agency),* 2016 ABQB 260 at para. 32; *Al-Ghamdi v Alberta*, 2017 ABQB 684 at para. 110; *Brooks v Canada*, 2019 FCA 293 at para. 8; *Grenon v Canada (Revenue Agency)*, 2017 ABCA 96 at para. 6; *Das v George Weston Limited*, 2018 ONCA 1053 ("*Das*") at para. 74).

Subrule 20(26)(b) - the claim is unnecessary, scandalous, frivolous or vexatious

[11] The test to strike a claim on the basis it is unnecessary, scandalous, frivolous or vexatious requires the defendant to demonstrate that the pleading is groundless or manifestly futile, or that it is not in an intelligible form, or that it was instituted without any reasonable grounds whatsoever or for an ulterior purpose. (*Sidhu v Canada (Attorney General)*, 2015 YKSC 53 ("*Sidhu*") at para. 8, adopting the findings in that regard of *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress* (1999), 91 ACWS (3d) 362 ("*Citizens*") at para. 47; *McDiarmid* at para. 24; *Smith v Potvin*, 2021 YKSC 59 ("*Smith*") at para. 24; *Vachon v Twa*, 2019 YKSC 37 at para. 7; and *Wood v Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16 at para. 10).

[12] More specifically, in the context of an application to strike, the terms "unnecessary," "frivolous," and "vexatious" have been found to mean:

> … A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law; ... A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks

> an evidentiary basis, but because of the doctrine of estoppel [citations omitted].

(*Smith* at para. 23 referring to *Sidhu* at para. 8, which adopted the findings of the British Columbia Supreme Court in *Citizens*)

Subrule 20(26)(c) - the pleading may prejudice, embarrass or delay the fair trial or hearing of the proceeding

[13] A pleading may be struck under this subrule if it is irrelevant to a point where it will embroil the parties "in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: [citation omitted]" (*Sidhu* at para. 8, adopting the findings of the British Columbia Supreme Court in *Citizens* at para. 47).

Subrule 20(26)(d)- abuse of the process of the court

[14] In *Smith*, Duncan C.J. touched upon the notion of abuse of process and described the power of a judge to strike a claim for abuse of process as follows:

> [25] "Abuse of process" has been interpreted broadly by courts. It may be found in *Citizens* at para. 52:
>
> > ... where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose ...
>
> [26] Judges have an inherent and residual discretion to prevent the misuse of the court's process in a way that would bring the administration of justice into disrepute (*Canam Enterprises Inc v Coles* (2000), 51 OR (3d) 481 (CA), ("*Canam*") rev'd on other grounds, 2002 SCC 63).
>
> [27] A finding of abuse of process generally allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice (*Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 ("*Toronto*"); *Vachon* at para. 8).

[15] Evidence is admissible on an application to strike based on subrules 20(26)(b) to (d) (*Sidhu*; see also Rule 20(29)).

The Statement of Claim[2]

[16] The plaintiffs claim various Yukon policies, practices, guidelines, actions, inaction or conduct related to the provision of, and access to, education for students with disabilities in the Yukon violate s. 7 and/or s. 15 of the *Charter*, and/or of the *Act*. They claim the *Charter* violations are not saved by s. 1 of the *Charter.* They seek declaratory and injunctive relief against the defendant in that regard.

Section 15 Charter Claim(s)

[17] The plaintiffs plead that Yukon policies, guidelines, practices, actions or conduct in the provision of, and access, to education for students with disabilities who have special educational needs are in breach of s. 15 of the *Charter*.

[18] The plaintiffs claim the following government actions are specific demonstration of the defendant's systemic failure to provide free and appropriate education to students with disabilities who have special educational needs. The plaintiffs submit the defendants' actions or inaction are in violation of the equality rights of students with disabilities, including C.D., protected by s. 15 of the *Charter* and are not saved by s. 1 of the *Charter*.

> *a) Failure to allocate space for the provision of education to students with disabilities*

[19] The plaintiffs claim the defendant's decision to decommission the Occupational Therapy Room at the school C.D. attends has adversely impacted C.D. and students with disabilities who have special educational needs. The plaintiffs allege the parents

[2] The Amended Amended Amended Statement of Claim filed on January 20, 2022

were not advised of the defendant's plan to decommission that room. They also state the defendant decommissioned the Occupational Therapy Room without conducting a needs-based analysis in consultation with the affected students or their parents. The plaintiffs state the Occupational Therapy Room is a critical adaptation required to ensure students with disabilities who have special educational needs, including C.D., have equal access to a free and appropriate education. In addition, they plead the lack of an Occupational Therapy Room makes the school unsafe for those students, therefore impacting those students' access to a free and appropriate education.

[20] In addition, the plaintiffs plead that the closure of school portables at C.D.'s school has led to the closure of a classroom for students requiring individualized educational support and of the flexible learning Centre "ILC''. The plaintiffs plead these closures have had a disproportionate impact on students with disabilities who have special educational needs. They state those classrooms have not been replaced and a planned extension of C.D.'s school does not include an Occupational Therapy Room or space for the programs for students requiring individual support that were housed in the portables that had to be closed. They state the defendant failed to consult with the affected students and/or their parents, and to conduct a needs-based analysis of students with disabilities who have special educational needs prior to allocating funds for and planning the extension. The plaintiffs state the educational goals and outcomes of students with disabilities who have special educational needs, and in particular C.D., have been and will be adversely impacted by these failures. They state their disability is a factor in this adverse effect.

b) Funding and allocation of LATs

[21] The plaintiffs claim the defendant's funding and allocation of LATs are not based on needs but on a standardized ratio that is insufficient to ensure schools hire an appropriate number of LATs. They state LATs are a critical component of the delivery of special education services in Yukon. The plaintiffs state the defendant's application of this ratio has led to understaffing of LATs across Yukon schools, particularly at C.D.'s school.

[22] The plaintiffs state LATs are teachers with specialized training in the provision of individualized educational programming. In the Yukon, LATs act as case managers for students in need of Individualized Education Plan ("IEP") programming. LATs are the only school personnel who are trained in the computer program used to record and track IEPs. The plaintiffs plead the implementation, review, and monitoring of IEPs require available LATs, both for their technical and practical knowledge.

[23] The plaintiffs plead the lack of LATs in schools, including C.D.'s school and more particularly in rural schools, has led to the defendant's failure to properly deploy the Response to Intervention Model ("RTI"). The defendant ascribes to the RTI in providing special education services in the Yukon. The lack of LATs has also rendered the defendant incapable of measuring and monitoring the progress of students with IEPs. This prevents the defendant from determining and mobilizing the level of services and supports required to ensure such students have equitable access to education. The plaintiffs state C.D.'s school does not have sufficient LATs to discharge its obligations under the *Act* toward students with disabilities who have special educational needs, including C.D.

[24] The plaintiffs plead that C.D., who has an IEP, does not have an LAT assigned as case manager to their school-based team despite reaching an agreement to that effect with the defendant.

[25] The plaintiffs claim the defendant's failure to conduct a needs-based analysis for the allocation of LATs in Yukon schools, and specifically in C.D.'s school, negatively impacts students with disabilities who have special educational needs and poses a significant obstacle and impediment to their rightful access to an education, under s. 10 of the *Act*.

> *c) The failure to evaluate schools against established guidelines, standards and procedure contrary to s. 114(2) of the Act.*

[26] The plaintiffs plead the defendant has the obligation under s. 114(2) of the *Act* to establish guidelines, standards and procedures to evaluate each of the schools it operates.

[27] The plaintiffs state the defendant has failed to established guidelines, standards and procedures that would allow for the evaluation of whether the special education services delivered at C.D.'s school are sufficient to meet the needs of students with disabilities.

[28] The plaintiffs allege the defendant has not developed metrics or data-collection practices that would allow it to identify the special education services needs of students at C.D.'s school and evaluate whether these needs are being met by the defendant. The plaintiffs assert the defendant's failure to adopt guidelines, standards and procedures to review services provided has a continuing adverse impact on C.D. as well as other students with disabilities who have special educational needs at C.D.'s school.

d) Failure to adopt guidelines under s. 15(3) of the Act

[29] The plaintiffs state the defendant has failed to issue guidelines for the implementation of special education in the Yukon despite being required to do so pursuant to s. 15(3) of the *Act* since 2002.

[30] The plaintiffs plead the lack of guidelines has and continues to have various negative and adverse impacts on Yukon students with disability and their parents. As a result, the defendant has failed to fulfill its obligations under the *Act* towards students in need of special education services, and in particular C.D.

[31] The plaintiffs seek declarations that Yukon has breached the *Act* and s. 15 of the *Charter*. They also seek injunctive relief to remedy these various breaches.

The claim the defendant's unwritten policy breaches the Act

[32] The plaintiffs seek to invalidate an unwritten policy they state exists within the Department of Education.

[33] The plaintiffs state there are two pathways in Yukon to complete secondary school. Students who satisfy the core requirements for graduation from Grade 12 obtain a high school diploma, also called a Dogwood diploma. Students meeting substantial program modifications and who achieve individualized objectives instead of the core requirements for graduation, earn a certificate of completion, also called Evergreen certificate.

[34] The plaintiffs claim students who are deemed capable of obtaining a Dogwood diploma are considered ineligible to receive an IEP even when they present with learning, communicative, behavioural, physical, or multiple disabilities. According to the unwritten policy those students are provided with a Student Learning Plan, which

provides no rights to students or their parents under the *Act*. This unwritten policy also deprives students who receive an IEP to strive to obtain a Dogwood diploma, which they may be capable of obtaining with the proper resources.

[35] The plaintiffs state C.D. has an IEP. They also state with adequate access to special education services, C.D. can be expected to obtain a Dogwood diploma. However, because of the unwritten policy, C.D. has been put on a path or curriculum that will not afford them the opportunity to obtain a Dogwood diploma.

[36] The plaintiffs claim the unwritten policy is contrary to the express language of s. 15(1) of the *Act*, which provides that every student in need of special education due to an exceptionality, shall be entitled to receive such services by means of an IEP. The plaintiffs claim the unwritten policy is contrary to ss. 4(b) and (e) of the *Act*. These sections require the defendant to promote the self-worth of students through a positive education environment and to promote the recognition of equality among Yukon people.

[37] The plaintiffs seek a declaration that the unwritten policy is contrary to the *Act* and is therefore *ultra vires* and of no force and effect.

Section 7 of the Charter

[38] The plaintiffs claim that the defendant's practices related to the provision of, and access to, education for students with disabilities with respect to special education in the Yukon are in breach of their s. 7 *Charter* rights (right to life, liberty and security of the person), which they claim encompass:

i. the right of a parent to nurture their child, to care for their development and to make decisions for them in fundamental matters, such as education; and

ii. the right of a child to self-determination, to exercise personal autonomy, to make fundamental choices, and to receive a free education, appropriate to their individual needs, in their home community

[39] They state the defendant's breaches are not saved by s. 1 of the *Charter*. They seek declaratory relief in that regard.

I. - Should some of the plaintiffs' claims be struck on the basis that the *Rules of Court* mandate they proceed by way of a petition rather than by way of a statement of claim?

[40] The defendant submits that what the plaintiffs seek to do with respect to most of their claims and corresponding declaratory and injunctive relief is seek judicial review of the defendant's and its representatives' decisions or actions.

[41] The defendant submits that Rule 54 of the *Rules of Court* states that applications for judicial review of administrative action seeking relief in the nature of declaration and injunction or *mandamus* must be brought by petition. The defendant submits that all the plaintiffs' claims and corresponding prayer for relief (except for the s. 7 *Charter* claims, which it concedes can proceed by way of an action) should be struck on the basis they reveal no reasonable claim or are vexatious as improperly brought. The defendant submits it will then be for the plaintiffs to decide whether to file a petition to pursue judicial review.

[42] The defendant submits that, if the plaintiffs were to pursue their judicial reviews by way of petitions, the court could exercise its discretion and direct that multiple judicial reviews be heard together because they involve the same government department and related issues.

[43] The defendant submits that Rule 54 provides for a more effective and expedient scheme of dealing with the administrative actions the plaintiffs seek to overturn as such matter proceeds in a streamlined manner based on affidavits. The defendant submits that proceeding by way of an action, which involves discoveries, a trial and, overall, a much lengthier process, would over complicate matters.

[44] The plaintiffs submit they are not seeking to review particular decisions made with respect to them individually, but rather seek to have this Court find the defendant's system in violation of s. 15 of the *Charter* against students with disabilities.

[45] In addition, the plaintiffs submit that Rule 54 is permissive rather than restrictive. The plaintiffs submit their claims are grounded in complex factual and legal disputes concerning the defendant's laws, policies, actions, inaction and conduct, which the plaintiffs assert are in breach of the *Charter* and the *Act*. The plaintiffs submit that the complex issues of a systemic nature raised by this proceeding require a proper factual matrix that can only be obtained by way of an action through discovery and trial.

[46] Rules 54(1) and (3) state as follows:

> (1) Applications for judicial review of administrative action seeking relief in the nature of declaration, injunction, *mandamus*, prohibition, *certiorari* or *habeas corpus* are governed by this rule.
>
> …
>
> (3) An application for judicial review is an originating application and shall be commenced by a petition in Form 2, setting out
>
> …

[47] In addition, the object of the *Rules of Court* is stated at Rule 1(6). It is:

> …. to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[48] I agree with the defendant that Rule 54 provides that challenges to administrative action seeking relief in the nature of, among other things, declarations, injunctions or *mandamus* shall be brought by way of a petition. *Charter* challenges are not immune from this Rule. I note that, in other jurisdictions, at least some s. 15 *Charter* challenges have been brought by way of application for judicial review, *Fraser v Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*") being one of them.

[49] However, the Court may decide to exercise its discretion to waive the application of any of the *Rules of Court*, which includes allowing a matter that would normally be subject to Rule 54 to proceed by way of an action (see Rule 1(14)).

[50] I find this is such a case. I am of the view it is not in the interest of justice to have two parallel proceedings, one pertaining to multiple judicial reviews, even if heard together, and one (an action) pertaining to a breach of the plaintiffs' s. 7 *Charter* rights, involving the same parties and, at least in part, the same factual matrix and underlying issues. Ordering this matter to be split into two distinct proceedings would not promote judicial economy considering the limited judicial and court administration resources in

this small jurisdiction. I am also of the view that ordering two parallel proceedings would not streamline the judicial process because certain factual issues are likely common to both proceedings and could be subject to affidavit evidence in the judicial review proceeding (petition), as well as discovery and testimony in the action. This could potentially lead to inconsistent findings with respect to the same matters.

[51] In addition, I am of the view this case involves complex issues that require a proper factual matrix, which, I find, could not be fully canvassed and assessed through the streamlined process provided by Rule 54.

[52] Therefore, I am of the view that all the plaintiffs' claims may proceed by way of an action.

[53] This part of the defendant's application is dismissed.

II. - Are mandatory injunctions or *mandamus* available relief in this case?

[54] In addition to arguing that most of the claims are governed by Rule 54 and must be brought by way of petitions not a statement of claim, the defendant, in its written submissions, submits a request for *mandamus* in the guise of a mandatory injunction is not a reasonable claim and that, in any event, neither form of relief is available in this action.

[55] In its written submissions, the defendant adds the injunctive relief sought by the plaintiffs amount to requests for orders of *mandamus*. The defendant also states that *mandamus* and mandatory injunctions are different forms of relief and that the test for the issuance of a *mandamus* is stricter than the test for a mandatory injunction. The defendant also briefly states that ordering the government to fund specific programming

is not appropriate under either test. However, the defendant does not elaborate any further on this issue.

[56] At the hearing, counsel for the defendant focused her submissions on the application of Rule 54 to most of the plaintiffs' claims. She did not elaborate on what appears to be framed as a separate argument in her written submissions in support of striking some or all of the claims for injunctive relief listed in the Statement of Claim.

[57] The plaintiffs argue, in a general manner, that s. 24(1) of the *Charter* provides broad discretion on a court to craft a remedy that is appropriate and responsive to a *Charter* violation. The plaintiffs rely on the decision of the Supreme Court of Canada in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, in which the court granted an order in the nature of *mandamus* pursuant to s. 24(1) of the *Charter*, to support their position.

[58] Considering the very limited nature of the defendant's submissions on this issue, I decline to address any further what appears to be a separate argument briefly and summarily raised by the defendant in its written submissions.

III. - Should the declaratory relief sought by the plaintiffs be struck on the basis they have no practical utility?

[59] The defendant submits that a declaration is a special and discretionary form of judgment that differs from a "finding". The defendant submits that declarations are only available where a court chooses to exercise its discretion to grant them and where the test set out in the caselaw is met. The defendant submits that one of the requirements is that a court can only grant a declaration if it will have a practical utility. A declaration should not be made if it has no practical implication.

[60] The defendant submits a declaration is but a formal statement or expression of the court's opinion. The defendant submits that unlike an injunction order, a declaration is not enforceable by means of the contempt procedure. The defendant submits that in the *Charter* context, it allows the court to state a general principle of law and leave it to the government to take the necessary steps to comply with the *Constitution*.

[61] The defendant submits declaratory relief cannot be properly advanced in this case where the plaintiffs seek injunctive relief or *mandamus* as well in relation to the same claims. The defendant submits that when a court resolves a matter by issuing an order such as a *mandamus* or a mandatory injunction, it should not then issue a declaration with respect to the parties' rights because such a declaration accomplishes nothing more than the order does.

[62] I am of the view this argument is without merit. It would be premature, at this very early stage of the proceeding, to make a final determination on the availability and appropriateness of a declaratory relief in this *Charter* case. It will be for the trial judge to determine what remedy, if any, is appropriate in this matter.

[63] This part of the defendant's application is dismissed.

IV. - Should the claim regarding the alleged unwritten policy be struck on the basis it is incoherent?

[64] The defendant submits that, as written, the claim regarding the alleged unwritten policy at paras. 89 to 103 of the Statement of Claim is unclear and difficult to decipher. The defendant submits it is unclear what the unwritten policy is. The defendant also submits the plaintiffs plead contradicting facts. The defendant submits that, if this claim survives its application to strike, it should be amended and rephrased.

[65] I am of the view the pleadings pertaining to the nature of the unwritten policy are sufficiently clear to understand its alleged terms and scope. As stated earlier, the plaintiffs plead the unwritten policy provides that IEPs are only afforded to students who are deemed incapable of obtaining a Dogwood diploma contrary to the *Act*. However, some students in need of special education should also be expected to achieve a Dogwood diploma as long as they obtain the support afforded by an IEP. Also, some students with special educational needs, who should be afforded an IEP, are deprived of one, despite their disabilities, because they are deemed capable of obtaining a Dogwood diploma. The plaintiffs plead the unwritten policy is inconsistent with the provisions of the *Act* and supports their claims pursuant to s. 15 of the *Charter*.

[66] Nonetheless, as I indicated to counsel at the hearing, I agree that some of the factual allegations regarding the alleged impact of that policy on C.D. should be clarified because, as they stand, they could be interpreted as contradicting the terms of the unwritten policy they plead exists. As written, the allegations may be interpreted as C.D. having an IEP while, at the same time, being on a path or curriculum that will allow [them] to obtain a Dogwood diploma.

[67] This part of the defendant's application is dismissed. However, the plaintiffs shall amend the paragraphs of the Statement of Claim relating to the alleged unwritten policy to reflect the clarifications provided by counsel for the plaintiffs in the context of this application within a timeline to be determined in case management.

VI. - Should some of the plaintiffs' claims and/or pleadings be struck on the basis of lack of public interest standing?

Positions of the parties

Yukon

[68] The defendant submits the plaintiffs should not be granted public interest standing because there is a realistic alternative means to litigate this matter, which is a more suitable, efficient and effective use of judicial resources. The defendant argues the plaintiffs can bring, and have brought, a claim under their own private interest standing. The defendant submits that, as a result, there is no need to grant public interest standing to the plaintiffs because they can effectively litigate their claims under their private interest standing.

[69] The defendant submits that public interest standing is afforded to individuals or organizations who generally do not have private interest standing, and who would otherwise be shut out of court entirely. The defendant submits this is not the plaintiffs' case as they have private interest standing with respect to most of their claims and pleadings, except for those concerning Yukon's alleged "unwritten policy"; the funding and allocation of LATs; and other unnamed Yukon students.

[70] The defendant submits none of the injunctive relief sought by the plaintiffs is tied in any real way to their alleged public interest status. Yukon submits all the injunctive relief sought (except for the claim pertaining to funding and allocation of LATs) have direct application to the plaintiffs. Therefore, there is no need to broaden the scope of this litigation by granting them public interest standing.

[71] The defendant submits this would not have a particularly significant impact on the relief available. The Court could essentially decide the same questions and grant the

same relief, if available at all, without granting the plaintiffs public interest standing and this matter becoming litigation about students with disabilities and their families at large. This case could instead be about these plaintiffs.

[72] The defendant submits granting public interest standing to litigants who already have private interest standing would constitute a significant shift in the law.

[73] The defendant submits if the plaintiffs want to bring an action on behalf of all Yukon students with disabilities and their families, they can do so by filing a class action with all the requirements and safeguards associated with that type of proceeding.

[74] The defendant submits that should some or all of the plaintiffs' claims survive this application to strike, the Court should entertain those claims on the basis of their personal and direct interest only. The claims pertaining to the alleged "unwritten policy"; the funding and allocation of LATs and other unnamed students should be struck, as without public interest standing, the plaintiffs have no basis for them.

The Plaintiffs

[75] The plaintiffs submit their claim against the defendant is systemic in nature and raises issues of public interest. The plaintiffs argue public interest standing is required to pursue this lawsuit.

[76] The plaintiffs submit what is at stake in this application is the scope of this action and of its factual matrix. The plaintiffs submit the defendant wants to restrict the scope of discovery and of the evidentiary record to the plaintiffs' own experience. The plaintiffs submit that while their own experience is relevant and informs their view of the problem with the Department of Education, their claims, and the relief they seek, are not limited to their own situation. The plaintiffs claim the issues raised in this matter transcend the

experience of a single student. The plaintiffs submit their experience is a reflection of the endemic failure of the defendant to provide and ensure access to education to Yukon students with disabilities that is appropriate to their needs.

[77] The plaintiffs submit by taking the position they can pursue only the part of their claims relating to their own personal experience and not that of Yukon students with disabilities and their families in general under their private interest standing, the defendant has implicitly conceded that public interest standing is required to bring their systemic claim to court.

[78] The plaintiffs submit their claim raises real and legitimate legal issues capable of judicial resolution. The plaintiffs argue courts are the guardians of the *Charter*. They argue their case alleging systemic discrimination against students with disabilities under s. 15 of the *Charter*, violations of their s. 7 *Charter* rights and of the *Act* raises serious justiciable issues.

[79] The plaintiffs argue granting them public interest standing is a reasonable and effective way to litigate the issues before the court. The plaintiffs argue private interest standing is not an appropriate means to pursue this lawsuit considering the structural nature of the issues raised, the heterogeneity of the minority group in question, and the nature of the relief sought. They argue public interest standing is required to demonstrate the impact and effects of Yukon's systemic failures on students with disabilities and their families, which include the plaintiffs, and to expose the root causes of the problem in the education system for students with disabilities, like C.D.

[80] The plaintiffs submit that, as a student with disabilities and as a concerned parent, they have a real stake and a genuine interest in the proceeding. In addition, they

submit the pleadings reveal A.B. has extensive experience advocating for children and students with disabilities in the Yukon and is not a "busy-body" litigant. The plaintiffs submit that by filing and pursuing this claim and by retaining counsel they have demonstrated their capacity to bring this lawsuit forward.

[81] The plaintiffs submit there are no civil societies, organizations, or non-profit societies in the Yukon that possess the resources or capacity to bring a lawsuit challenging the systemic failures alleged in the Statement of Claim. The plaintiffs submit there are no civil liberties associations in the Yukon with a history of bringing forward public interest litigation to the courts. The plaintiffs state there have been no human rights tribunal hearings or education appeals heard in relation to the issues raised in this lawsuit. This is despite several reports, which they claim document Yukon's failure to afford equal educational opportunity to students with disabilities.

[82] The plaintiffs submit a class action is neither required nor appropriate in this *Charter* case. In addition, the plaintiffs submit a class would be difficult if not impossible to define considering the varied factual experiences of students with disabilities in the Yukon.

[83] The plaintiffs submit their request for public interest standing is to ensure their claim is heard in a way that best facilitate access to justice for a vulnerable minority: children with disabilities.

The Law of Standing

[84] Standing is the legal right to initiate a legal proceeding with respect to a specified question or issue to be litigated before a court. "The law of standing answers the question of who is entitled to bring a case to court for a decision" (*Downtown Eastside*

Sex Workers United Against Violence Society v Canada (Attorney General), 2012 SCC 45 ("*Downtown Eastside*") at para. 1; see also *Halsbury's Laws of Canada – Civil Procedure (2021 Reissue)* (Abrams, McGuinness, MacIvor, Brecher) HCV-40). Standing is not merely the right to assert a legal claim, but the "right to seek particular relief" (*Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 ("*Finlay*") at 635).

[85] There are two categories of standing: private interest and public interest standing.

[86] Private interest standing arises when a person has a direct and personal interest in the issue or question to be litigated. A person whose private rights are at stake or who is specially affected by the legal issue or question raised has private interest standing (*Downtown Eastside* at para. 1; *Wright v Yukon*, 2021 YKSC 54 at para. 29).

[87] As stated in *Finlay* at 623, citing with approval *Australian Conservation Foundation Inc. v Commonwealth of Australia* (1980), 28 ALR 257 (Australia H Ct.) at 270:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[88] Public interest standing is based on the courts' recognition that, in some instances, which may have a broad impact on society (particularly those involving constitutional challenges and/or the *Charter*), individuals or organizations who bring matters of public interest before the court should be granted standing. This is even where they do not have a personal and direct involvement in the matter at issue or their own rights are not infringed (*British Columbia (Attorney General) v Council of*

Canadians with Disabilities, 2022 SCC 27, ("*Council of Canadians with Disabilities*") at para. 2).

[89] The decision to grant or deny public interest standing is discretionary (*Downtown Eastside* at para. 20 and *Council of Canadians with Disabilities* at para. 28).

[90] The factors to consider in determining whether to grant public interest standing are:

i. Whether the case raises a serious justiciable issue;

ii. Whether the party bringing the action has a genuine interest in the matter; and

iii. Whether the proposed suit is a reasonable and effective means of bringing the case to court.

(*Council of Canadians with Disabilities* at para. 28)

[91] These factors must be assessed cumulatively and weighed flexibly and purposively in light of the "particular circumstances" before the court. They should be assessed in a "liberal and generous manner" (*Council of Canadians with Disabilities* at para. 41; *Downtown Eastside* at para. 2 citing *Canadian Council of Churches v Canada (Minister of Employment and Immigration*, [1992] 1 SCR 236 ("*Canadian Council of Churches*") at 253).

[92] The law of standing takes its source in the need to strike a balance "between ensuring access to the courts and preserving judicial resources" (*Canadian Council of Churches* at 252). Courts have recognized that "limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so" (*Downtown Eastside* at para. 22).

[93] There are three underlying purposes to the need to limit standing:

i. efficiently allocating scarce judicial resources and screening out "busybody" litigants;

ii. ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and

iii. ensuring that courts play their proper role within our democratic system of government.

(*Council of Canadians with Disabilities* at para. 29; *Downtown Eastside* at para. 25)

[94] Courts must also consider the purposes that justify granting standing in conducting their analysis. These purposes are:

i. giving effect to the principle of legality, which means that state action must conform to the law, and there must be practical and effective ways to challenge the legality of state action; and

ii. ensuring access to the courts, or more broadly, access to justice.

(*Downtown Eastside* at paras. 20, 23, 31, 36, 39-43, 49-50 and 76)

[95] In addition, in conducting the analysis, courts “should not, as a general rule, attach “particular weight” to any one purpose, including legality and access to justice” (*Council of Canadians with Disabilities* at para. 31).

[96] As stated in *Council of Canadians with Disabilities* at para. 30: “The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it.” Courts should strive to balance all the

purposes considering the circumstances and in the "wise application of judicial discretion" (*Downtown Eastside* at para. 21).

Analysis

[97] The defendant does not dispute that the plaintiffs have private interest standing with respect to most of their claims and relief sought, except for those concerning Yukon's alleged "unwritten policy"; the funding and allocation of LATs; and any part of their claims advanced on behalf of other unnamed Yukon students. I will therefore assess the issue of standing on the basis of the defendant's acknowledgement with respect to the plaintiff's private interest standing.

Section 15 Charter claim(s)

[98] The defendant concedes the plaintiffs have private interest standing to bring the s. 15 *Charter* claim(s) pertaining to the decommissioning of the Occupational Therapy Room at C.D.'s school, and the lack of dedicated space for students with disabilities in the proposed extension of C.D.'s school. They also have private interest standing for the claims pertaining to the defendant's alleged lack of implementation of guidelines, standards and procedures. All these issues directly impact the education and educational services C.D. has access to and receives in the Yukon public school system.

[99] However, I am of the view that the plaintiffs' private interest standing does not prevent them from bringing a claim in discrimination of a systemic nature and seek relief on that basis, and to plead facts that relate to other unnamed Yukon students with disabilities at large.

[100] Section 15(1) of the *Charter* states that:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[101] Section 15 specifically protects substantive equality. Substantive equality**,** as stated by Abella J. for the court in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 ("*Taypotat*") at paras. 17 and 18:

> [17] … is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.
>
> [18] … The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.

[102] Section 15 not only applies to legislation and regulations. It also applies to other forms of government action, such as policies, directions, programs and activities or government agent's action (see for example *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 and *Fraser*). It also applies to administrative action, such as the implementation of an otherwise non-discriminatory statute in a discriminatory way

by government officials (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69).

[103] A two-step test has been developed for assessing a s. 15 *Charter* claim (*R v Sharma*, 2022 SCC 39 ("*Sharma*") at para. 37, citing: *Fraser* at para. 27; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para. 30; *R v Kapp*, 2008 SCC 41 at para. 17; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25). The test requires the claimant to demonstrate that the impugned law or state action:

> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. [*Sharma* at para. 28]

[104] At step one, a claimant must demonstrate that the law or state action at issue has a disproportionate effect on them based on their membership in an enumerated or analogous group (*Taypotat* at paras. 21-22).

[105] At step two, the claimant must establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage.

[106] At this second stage, as stated in *Sharma* at para. 52:

> Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: "The goal is to examine the impact of the harm caused to the affected group", which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added), citing C. Sheppard,

> *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63). In *Withler*, this Court explained that a negative impact or worsened situation was required:
>
> > Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation. [emphasis in original]

[107] Stereotyping, prejudice and arbitrariness are factors courts may consider at the second step of the analysis. Therefore, factual allegations related to those factors are relevant to a s. 15 claim and its analytical framework.

[108] The plaintiffs private interest standing does not change the legal test or the analytical framework applicable to their s. 15 claim(s). The Court must conduct a comparative analysis that goes beyond C.D.'s personal circumstances (see *Sharma, Fraser, and Taypotat*). Based on the above, I reject Yukon's argument that the Court must strike all the allegations regarding the educational needs of Yukon's students with disabilities at large and the impact of the defendant's actions on them and their parents on the basis the plaintiffs' private interest standing only allows them to advance a claim in discrimination and seek relief limited to their own personal circumstances. The facts pertaining to the circumstances and impact of the alleged defendant's actions or inaction on the protected group are relevant and tied to the plaintiffs' s. 15 *Charter* claim(s). I have reviewed the factual allegations pertaining to Yukon's students with disabilities at large and their parents in the plaintiffs' Statement of Claim with respect to

the s. 15 *Charter* claim(s), and I am satisfied they are sufficiently connected to the s. 15 analytical framework to be relevant to the claims they advanced.

[109] With respect to the relief sought by the plaintiffs for their s. 15 claim(s), which they seek not only for themselves, but for the members of their protected group, I note in *Fraser* the Supreme Court of Canada granted a remedy that extended beyond the circumstances of the individual claimants who had a personal and direct interest in the matter:

> [138] In my view, the appropriate remedy is a declaration that there has been a breach of the s. 15(1) rights of full-time RCMP members who temporarily reduced their working hours under a job-sharing agreement, based on the inability of those members to buy back full pension credit for that service. The methodology for facilitating the buy-back of pension credit is for the government to develop, but any remedial measures it takes should be in accordance with this Court's reasons. They should also have retroactive effect in order to give the claimants in this case and others in their position a meaningful remedy (*Vancouver (City)* v. *Ward*, [2010] 2 S.C.R. 28, at para. 20*; Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at paras. 55-58). [emphasis added]

[110] As a result, I am of the view the plaintiffs' private interest standing does not preclude them from seeking specific remedies that extend beyond their personal situation and will benefit all members of the protected group affected by the *Charter* breach.

The Unwritten Policy

[111] I am of the view the plaintiffs have private interest standing to challenge the legality of the Department of Education's alleged unwritten policy because they pleaded facts that reveal they are directly affected by that policy, as clarified at the hearing by counsel for the plaintiffs. The plaintiffs pleaded that C.D. is capable, with the appropriate

resources, to obtain a Dogwood diploma at the end of high school. However, C.D. has an IEP. The plaintiffs state that, due to the unwritten policy, C.D. has been put on a curriculum that makes it impossible for them to obtain a Dogwood diploma, and they are not provided the resources needed to attain a Dogwood diploma. In addition, I am of the view the plaintiffs' private interest standing is not a bar or an obstacle to them pleading that other Yukon students with disabilities have been and continue to be affected in different ways by the unwritten policy because that fact is, at least, relevant to the very existence of that unwritten policy and whether it is, as a whole, contrary to the *Act*. In addition, I disagree with the defendant that the plaintiffs do not have private interest standing to challenge the part of the alleged unwritten policy that affects students with special educational needs who are not afforded an IEP because they are deemed capable of obtaining a Dogwood diploma. That part of the policy is based on the same premise that allegedly affects C.D. It simply affects those children differently. Therefore, I am of the view that A.B., as litigation guardian for C.D., does not require public interest standing to challenge the unwritten policy as a whole and to seek the declaratory relief included in the Statement of Claim. In addition, because the specific provisions of the *Act* pertaining to special education (ss. 15 to 17) provide, among other things, that parents are interested parties with respect to whether their child should be afforded an IEP and what IEP is appropriate to meet their needs, I am also of the view that A.B., on their own, has private interest standing to bring this claim.

Funding and allocation of LATs

[112] I am of the view the plaintiffs do not have a direct and personal interest in the claim pertaining to the funding and allocation of LATs. The facts as pleaded in the

Statement of Claim reveal the plaintiffs and the defendant have reached an out-of-court agreement by which the defendant agreed to provide an LAT to C.D. Therefore, C.D.'s entitlement to an LAT no longer arises from the application of the defendant's funding and allocation formula, it arises from the agreement reached between the parties.

Section 7 *Charter* claim(s)

[113] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[114] Section 7 involves a two-step analysis:

i. Is there an infringement of one of the three protected interests that is to say a deprivation of life, liberty or security of the person?

ii. Is the deprivation in accordance with the principles of fundamental justice?

(*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 47)

[115] Yukon did not raise any issue with the plaintiffs having private interest standing to bring their s. 7 *Charter* claim(s). In addition, the declaratory relief the plaintiffs seek refers to A.B. and C.D. only: "A declaration that the defendant's Practices violate the s. 7 *Charter* rights of A.B. and C.D., in a manner that is not saved by s. 1 of the *Charter*."

[116] However, some of the allegations of facts contained in the plaintiffs' Statement of Claim refer to alleged systemic practices of the defendant that affect students with disability in general and their parents, including A.B. and C.D. It is unclear, considering the manner in which Yukon advanced its argument on this issue, whether it is challenging those specific pleadings or not on the basis of standing. I note Yukon's Notice of Application and Outline in support of its application to strike were filed before

the plaintiffs filed their last amended Statement of Claim on January 20, 2022, and do not include the s. 7 claim(s) even though counsel for the defendant touched upon that claim in her oral submissions at the hearing. Nonetheless, considering the nature of the legal test applicable to a s. 7 *Charter* claim, I am of the view those allegations are, at least, relevant to demonstrate how A.B.'s and C.D.'s respective liberty interest, as a parent and a student with disabilities who has special educational needs, are affected by the defendant's general practices that also impact others. As a result, I am of the view the plaintiffs do not require public interest standing to pursue their s. 7 *Charter* claim(s) as pleaded.

[117] In addition, while the declaration sought is in relation to A.B. and C.D. personally, such a declaration would presumably have an impact on other students with disabilities in the Yukon as well as their parents, and on the scope of s. 7 *Charter* rights of others.

[118] Having found the plaintiffs' private interest standing does not permit them to advance the part of their s. 15 *Charter* claim that relates to the funding and allocation of LATs, I now turn to the issue of whether they should be granted public interest standing in this matter. For the following reasons, I am of the view I should exercise my discretion to grant public interest standing to the plaintiffs on all their claims in this matter.

Public Interest Standing

[119] The issue of public interest standing is usually raised in cases where litigants do not have private interest standing to bring a matter before the court.

[120] However, there are precedents where public interest standing was granted to plaintiffs to advance a claim alongside co-plaintiffs with private interest standing.

[121] In *Manitoba Metis v Canada*, 2013 SCC 14 at paras. 42 to 44, the court found the presence of other claimants with private interest standing did not necessarily constitute a bar to granting public interest standing to the Manitoba Metis Federation ("MMF"). In doing so, the Court rejected an argument similar to the one advanced by Yukon in this matter:

> [42] The courts below denied the MMF public interest standing to bring this action. At trial, MacInnes J. found that the MMF would fail the third step of the test set out in *Canadian Council of Churches*, on the ground that the individual plaintiffs demonstrate another reasonable and effective manner for the case to be heard. The Court of Appeal declined to interfere with MacInnes J.'s discretionary standing ruling.
>
> [43] The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.
>
> [44] As discussed below, the action advanced is not a series of claims for individual relief. It is rather a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada. The Manitoba Act provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing

> the collective Métis interest to come before the Court. We would grant the MMF standing.

[122] In *Council of Canadians with Disabilities*, the court rejected the opposite argument, that the lack of a directly affected co-plaintiff was fatal to the Council's claim for public interest standing because, without such a plaintiff, the Council could not adduce a sufficient factual setting to resolve the constitutional issue before the Court.

[123] In both cases, the court emphasized the importance of courts exercising their discretion on the issue of public interest standing in accordance wit the *Downtown Eastside* framework. In *Council of Canadians with Disabilities* at para. 109, the court noted that standing is fact and context specific, and that while the result the court reached was the appropriate result in that case; it may not be appropriate in other cases.

[124] In addition, I note that in *Downtown Eastside*, the court granted public interest standing to one of the plaintiffs (Ms. Kiselbach) who, it had been argued, may also have had private interest standing to bring part or all of the constitutional challenge to the prostitution provisions of the *Criminal Code* before the court. However, the court chose not to delve into the issue of private interest standing, as deemed unnecessary, after it determined that matter was best resolved by granting her and the other plaintiff (a society) public interest standing (*Downtown Eastside* at paras. 4 and 77).

[125] Finally, the decision of the Supreme Court of Canada in *Vriend v Alberta*, [1998] 1 SCR 493 ("*Vriend*"), may be the most relevant to the issue raised by Yukon with respect to public interest standing. In *Vriend*, the plaintiff had been dismissed from his employment because he was gay. Mr. Vriend attempted to file a complaint with the Alberta Human Rights Commission on the grounds his employer discriminated against

him because of his sexual orientation. The Commission advised Mr. Vriend he could not make a complaint under the Alberta *Individual's Rights Protection Act ("IRPA")* because it did not include sexual orientation as a protected ground. Mr. Vriend, as well as several organizations, filed a s. 15(1) *Charter* challenge to the validity of certain provisions of the Alberta legislation. The respondents, in that case, argued Mr. Vriend only had standing to challenge the provisions of the *IRPA* that dealt with employment not the others because his grievance only involved employment. According to the respondents, this was the only area where he had standing as of right. The Court found it was not Mr. Vriend's dismissal from his employment that was relevant to the question before them, but the denial of access to the complaint procedures of the Alberta Human Rights Commission. Despite Mr. Vriend's personal and direct interest in that issue, the Supreme Court of Canada granted him, and the organizations that were co-claimants in that matter, public interest standing to challenge all the provisions of the *IRPA* at issue, based on the three factors set out at the time in *Canadian Council of Churches*.

[126] Based on the above-mentioned cases, I conclude a claimant's private interest standing in a matter does not constitute an automatic bar to that claimant being granted public interest standing provided the specific facts and context of the case and of the claimant meet the *Downtown Eastside* framework.

Application of the Downtown Eastside Framework

[127] The defendant acknowledges the plaintiffs meet the first two factors of the analysis for public interest standing set out in *Downtown Eastside* and reaffirmed in *Council of Canadians with Disabilities*.

[128] Based on the pleadings, I have no difficulty finding the plaintiffs' *Charter* claims raise serious justiciable issues. So does their claim regarding the alleged violations to the *Act*.

[129] I also have no difficulty finding that as a concerned parent and as a student with disabilities, who has allegedly suffered from the systemic failures and discriminatory practices of the defendant, the plaintiffs have a genuine interest in this matter.

[130] The real issue in this case pertains to the third factor of the analysis: whether the proposed suit is a reasonable and effective means of bringing the case to court.

[131] In *Council of Canadians with Disabilities*, the court stated the following with respect to the third factor:

> [54] To determine whether, in light of all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the court, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality *(Downtown Eastside*, at para. 50). Like the other factors, this one should be applied purposively, and from a "practical and pragmatic point of view" (para. 47).
>
> [55] The following non-exhaustive list outlines certain "interrelated matters" a court may find useful when assessing the third factor (*Downtown Eastside*, at para. 51):
>
> > 1. *The plaintiff's capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?
> >
> > 2. *Whether the case is of public interest*: Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest

> litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.
>
> 3. *Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?
>
> 4. *The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established complaints? (para. 51, citing *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093).

[132] The defendant does not really dispute, based on the facts pleaded in the Statement of Claim, that this matter is of public interest and that A.B., on their own behalf and on behalf of C.D., has the capacity to bring their claims forward. I agree the lawsuit raises matters of public interest with respect to the defendant's provision of, and access to, public education in this territory for students with disabilities. I am also of the view that the case the plaintiffs want to bring forward transcends their own personal interests with respect to the defendant's policies, guidelines, actions, inaction, or conduct.

[133] In addition, I am of the view that A.B. has the capacity to bring the plaintiffs' claims of a systemic nature forward due to A.B.'s involvement with local associations concerned with the rights of children and their families, as pleaded in the Statement of

Claim. A.B. also has experience in advocating for adequate resources allocation for early childhood education, including supported childcare services for infants and children with disabilities and their families, as pleaded in the Statement of Claim. I also consider the fact A.B. has a history of engagement with various stakeholders to advocate for the rights of C.D. and students with disabilities generally, as pleaded in the Statement of Claim. Finally, A.B. has retained and has the assistance of counsel to pursue this matter.

[134] However, Yukon raises the interests of others who are affected by the impugned legislation as a concern in granting public interest standing to the plaintiffs and in suggesting that a class action would be more appropriate. In *Council of Canadians with Disabilities* at para. 90, the Supreme Court of Canada addressed this type of concern as follows:

> The second concern relates to the interests of others who are affected by the impugned legislation. The chambers judge surmised that CCD was not in a position to "fairly represent" everyone's interests. But public interest standing has never depended on whether the plaintiff represents the interests of all, or even a majority of, directly affected individuals. What matters is whether there is a serious justiciable issue, whether the plaintiff has *a* genuine interest, and whether the suit is *a* reasonable and effective means of litigating the issue. [emphasis in original]

[135] In addition, I note the plaintiffs do not seek damages, on behalf of others, they seek declarations and/or injunctive relief to compel the government to cease its alleged discriminatory practices and act in compliance with the *Charter* and the *Act*.

[136] Also, the plaintiffs' direct interest in the issues raised, the direct impact they have on them, and the overall context of this action greatly reduces the possibility that subsequent potential challenges by parties with other specific and factually established

complaints in this area be negatively affected by granting public interest standing to the plaintiffs to advance their claims.

[137] In addition, I am of the view that A.B. has sufficient community involvement to ensure a proper evidentiary basis will be presented to the Court in this proceeding, which would include the facts that specifically pertains to the plaintiffs' own experience.

[138] I have concluded the plaintiffs do not have private interest standing to challenge the funding and allocation of LATs as part of their s. 15 *Charter* claims. Therefore, they require public interest standing to bring this particular aspect of their claims forward. I am of the view the issue of funding and allocation of LATs is part and parcel of the factual matrix of the plaintiffs' s. 15 *Charter* claim(s), which involve the alleged systemic actions and inaction of the defendant. I note the plaintiffs state they are concerned the agreement they reached with the defendant, to the effect that C.D. will be afforded an LAT, will result in one or more students in need and entitled to being afforded an LAT, but not in a position to advocate for their rights, being deprived of one, based on the manner the defendant allocates and funds LATs positions. In addition, if I were wrong in concluding earlier that the plaintiffs can advance the systemic nature of their claims on the basis of their private interest standing, the plaintiffs would also be unable to pursue this central aspect of their claims without being granted public interest standing.

[139] I note the plaintiffs state in the Statement of Claim that the manner in which the defendant has implemented or failed to implement or give effect to the relevant provisions of the *Act* is discriminatory. They plead there are serious systemic problems with the administration, provision, and access to education for students with disabilities, including C.D., that infringes their equality rights protected by s. 15 of the *Charter.* In

that context, I disagree with the defendant that restricting this case to the plaintiffs' very own experience would resolve the issues of a systemic nature that the plaintiffs state are the root causes of the discrimination against students with disability, including C.D. The plaintiffs also plead the defendant's practices breach their s. 7 *Charter* rights.

[140] I also consider, as pleaded in the Statement of Claim, that the alleged defendant's failures to afford equal educational opportunity to students with disabilities have been documented in recent reports from the Auditor General of Canada and the Yukon Child and Youth Advocate's Office.

[141] In addition, I am of the view that the limited number and small sizes of civil societies, organizations, or non-profit societies in the Yukon, as pleaded in the Statement of Claim, make it unlikely that they would have the capacity to bring forward a claim targeting the same issues. I note, as pleaded in the Statement of Claim, that there are no civil liberties associations in the Yukon with a history of bringing forward public interest litigation to the courts. Also, as pleaded in the Statement of Claim, there have been no human rights tribunal hearings or education appeals heard in relation to the issues contained in this claim.

[142] I agree with the plaintiffs that, in that context, granting the plaintiffs public interest standing would best facilitate access to justice for children with disabilities.

[143] I am therefore of the view the proposed suit based on public interest standing is a reasonable and effective means of bringing this *Charter* case to court.

[144] Based on the above, I find the *Downtown Eastside* factors weigh in favour of exercising my discretion to grant public interest standing to the plaintiffs in order to fully

advance all their claims before the Court. The plaintiffs are granted public interest standing to pursue all their claims in this case.

[145] Therefore, the part of the application to strike based on the issue of standing is dismissed.

[146] I would add that the Court's case management powers can be used to effectively oversee and manage pre-trial issues that may be raised by the scope of this action as well as the progress of this judicial proceeding.

VI. - Should part of the plaintiffs' claims be struck on the basis of incoherence and lack of justiciable standard?

[147] The defendant submits that paras. 36(f), 40, 59, 75, 78, 87, 89, 149 and 156 of the Statement of Claim should be struck on the basis of Rules 20(26)(a) and (c) because they are incoherent and/or do not correspond to any justiciable standard. The plaintiffs submit these paragraphs disclose no reasonable claim, and the claims they assert cannot reasonably be adjudicated by a court.

[148] The defendant takes issue with the plaintiff's use of qualitative words in their Statement of Claim, such as ""meaningful", "regular" and "consistent" access to an Occupational Therapy Room" and "concerted efforts"" (para. 36(f)); "failure to conduct "needs-based analyses" (paras. 40, 59, 87); "consultation" with "students with disabilities who have special educational needs or their parents" (para. 40); "failure to properly deploy a Response to Intervention Model" (para. 75); "IEPs containing "rigour" and "substantive" content"" (para. 78); "negative impacts" (para. 87); "negative effects" (para. 149); "a "fair" and transparent "framework" and "a "disregard" for students with disabilities"" (para.156).

[149] The defendant submits the above-mentioned paragraphs should be struck because none of these terms describe legal rights to which the plaintiffs are entitled. Also, the defendant submits the language used is so vague and subjective that it cannot found causes of action. In addition, the defendant submits whether the plaintiffs have made out these alleged material facts would embroil the parties in needlessly long semantic exercises. The defendant submits the plaintiffs used the same type of adjectives in the relief portion of their claim. The defendant submits that court orders should be specific and that orders containing these types of words would not be enforceable because they are so inherently subjective that it would be impossible for the defendant to know what is required to comply with them. The defendant submits the use of these words makes it impossible to know what the plaintiffs are seeking and what the implications would be for the defendant.

[150] I do not intend to address all the adjectives and expressions targeted by the defendant because I do not think it is necessary to address this part of the defendant's application.

[151] First, I note that expressions such as " meaningful access", "needs based analysis" and "negative impact" the defendant objects to were used to delineate issues in *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61, a case raising similar issues as this proceeding, where the Supreme Court of Canada upheld the conclusion of the British Columbia Human Rights Tribunal that "the failure of the public school system to give [a child with severe learning disabilities] the support he needed to have **meaningful access to educational opportunities** … amounted to discrimination

under the [*British Columbia Human Rights*] *Code*" (para.4) [emphasis added]. In that decision, the Supreme Court of Canada also referred to:

> [36] But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied ***meaningful* access** to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.
>
> …
>
> [49] … In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the **negative impact** on the individual".
>
> …
>
> [52] More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:
>
> > The Tribunal found that prior to making the decision to close [the Diagnostic Centre], the District did not undertake **a needs-based analysis**, consider what might replace [the Diagnostic Centre], or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring was not prepared until two months after the decision had been made (paras. 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them*. Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the Diagnostic Centre].

> The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no **meaningful access** to an education for [a child with severe learning disabilities] because it had no economic choice. In order to decide that it had no other choice, it had at least to consider what those other choices were. [italics in original; bold and underline my emphasis]

[152] With respect to "IEPs containing "rigour" and "substantive" content" at para. 78 of the Statement of Claim, I note the word "IEP" is defined at s. 1 of the *Act* and that its definition provides specific guidance with respect to an IEP's content or substance:

> "**Individualized Education Plan"** (IEP) is a document which outlines the educational program for a student as determined by a school based team, containing a description of the student's present level of functioning; long term or annual goals; short term goals or specific behavioural objectives; special resources required; suggested instructional materials, methods and strategies; IEP review dates; persons responsible for the implementation of the IEP, including parents; and parents' written, informed consent for implementation; « plan d'études individualisé »

[153] In addition, the *Act* provides that students attending school have the rights to s. 34(a) "receive a free educational program appropriate to their needs", and at s. 34(e) "be treated in a fair and consistent manner", without these terms being defined. They are nonetheless used in the *Act* to delineate the rights of students and corresponding obligations of the defendant.

[154] Overall, I do not find the arguments raised by the defendant regarding the above-mentioned paragraphs have merit. I agree it is in the interest of all involved that pleadings be as concise as possible and clearly delineate matters at issue. However, I am unable to accept that the use of adjectives as well as expressions that are not precisely defined render the above-mentioned paragraphs so vague and subjective that

the defendant is not given "fair notice" of the case it has to defend and would embroil this case in unnecessary semantic debate. The fact that many of the words the defendant singled out are used in the *Act* and referred to in the jurisprudence demonstrate the contrary. Also, the defendant has chosen to seek particulars, which have been answered, regarding some but not all of the paragraphs with which it takes issue. Finally, I am of the view the paragraphs identified by the defendant contain allegations that are relevant to the inquiry into the plaintiffs' *Charter* claims. The above reasoning also applies to the wording of the relief sought by the plaintiffs. In any event, if any debate arises or some form of ambiguity remains with respect to the wording of any order the trial judge may consider making in this matter, this should be raised by the parties at that time.

[155] This part of the defendant's application is dismissed.

VII. - Should para. 81 of the Statement of Claim be struck on the basis the plaintiffs plead evidence?

[156] The defendant submits that para. 81 of the Statement of Claim does not assert a fact underlying a claim but names a piece of evidence the plaintiffs apparently intend to rely on in support of their claims. The defendant submits its inclusion is improper and, consequently, this paragraph should be struck.

[157] Rule 20(1) of the *Rules of Court* states a pleading must contain the material facts on which the party relies, not the evidence by which the facts are to be proved.

[158] Paragraph 81 of the Statement of Claim refers to a report tabled by the Auditor General of Canada on the state of Yukon Education in 2019, which allegedly identified educational outcome gaps between rural students as compared to urban students. The plaintiffs allege the understaffing of LATs is one of the causes of these gaps.

[159] I am of the view that para. 81, which concisely refers to the timing and general content of a report of the Auditor General of Canada on a topic that is relevant to the plaintiffs s. 15 *Charter* claim(s), constitutes more than just a reference to a piece of evidence the plaintiffs may wish to rely on in support of their claims, but is part of the factual matrix of the claims before the Court. Therefore, this pleading is permissible.

[160] This part of the defendant's application is dismissed.

VIII. - Should paras. 55 to 62 regarding the extension of C.D.'s school and lack of consultation with School Council be struck on the basis they disclose no reasonable claim?

[161] The plaintiffs plead that between 2018 and 2019, the defendant closed or decommissioned spaces at C.D.'s school that had been used for students with disabilities who have special educational needs. At paras. 55 to 62, the plaintiffs plead that the defendant failed to conduct a needs-based analysis and to consult with children with disabilities who have special educational needs or their parents when budgeting and planning for the extension of C.D.'s school. The plaintiffs plead the defendant did seek input from the School Council. However, they plead the School Council cannot communicate the needs of students with disabilities because the defendant did not provide any information regarding these students and their IEPs to the School Council nor has it provided any information that would have allowed the School Council to seek input from the parents of those students. In addition, the plaintiffs plead School Council members were told by a representative of the defendant not to allow parents with specific concerns to speak to their concerns at school meetings due to perceived jurisdictional limitations. The plaintiffs also plead that the extension does not provide designated spaces for the provision of education or educational services to children with

disabilities who have special educational needs and, therefore, fails to address their needs.

[162] The plaintiffs plead the educational outcomes of students with disabilities who have special education needs, and in particular C.D., have been and will be adversely affected, and their disability is a factor in the adverse effect.

[163] The defendant submits the plaintiffs have not pleaded it was under any obligation to engage in such consultation with them or to designate space in the extension for use of particular groups of students.

[164] The defendant also submits the plaintiffs have not pleaded the defendant had any legal obligation or there was any legal requirement to provide information to the School Council regarding students' IEP's as well as the identity of students with disabilities and contact information of their parents.

[165] The defendant submits the pleadings reveal no reasonable cause of action or no reasonable chance of success because, even if all the plaintiffs' factual allegations are taken as true, there would be no corresponding legal duty, obligation or requirement the defendant would have failed to fulfill.

[166] The defendant submits that, as a result, paras. 55 to 62 of the Statement of Claim assert no reasonable cause of action, have no reasonable chance of success, and should be struck.

[167] The plaintiffs submit the defendant misunderstand the nature of their claims. The plaintiffs submit the failure to consult students with disabilities or their parents and its failure to adequately engage School Council prior to seeking its advice, are facts that

substantiate the claim in discrimination pursuant to s. 15 of the *Charter*, not an independent breach of duty to consult.

[168] I agree with the plaintiffs that, when read in the context of the entire Statement of Claim, the factual allegations regarding the lack of consultation, failure to conduct a needs-based analysis, and failure to allocate space that address the needs of student with disabilities when budgeting and planning for the extension of C.D.'s school relate to their claim in discrimination pursuant to s. 15 of the *Charter* not a stand alone duty to consult.

[169] I also agree those factual allegations are relevant to the Court's analysis under the two-step test developed for assessing a s. 15 *Charter* claim. In addition, issues regarding the lack of consultation and the failure to recognize and consider the needs of students with disabilities formed part of the court's finding of discrimination in *Moore*. While *Moore* is a case that was decided under provincial human rights legislation, the Supreme Court of Canada's considerations, analysis, and findings in that case may still be considered and inform the analysis of a claim in discrimination under s. 15 of the *Charter* in light of the overall nature and legal test applicable to the respective claims.

IX. - Should the allegation regarding the Education Appeal Tribunal Settlement Agreement found at paras. 83 and 84 be struck on the basis it is an abuse of process, vexatious and disclose no reasonable claim?

[170] Paragraphs 83 and 84 of the Statement of Claim allege that in 2020, in the context of a proceeding before the Education Appeal Tribunal, A.B. and the defendant reached an agreement that the defendant later breached by not providing a LAT to chair C.D.'s IEP team and act as their case manager.

[171] The defendant submits the plaintiffs are not seeking any breach of contract remedy with respect to these alleged facts and their Statement of Claim does not disclose any discernable connection between these allegations and any of the forms of relief they seek. The defendant submit pleading this alleged contractual breach as a material fact when not seeking a remedy for it is an abuse of process as well as a failure to raise a reasonable claim. Consequently, paras. 83 and 84 should be struck.

[172] The plaintiffs submit these paragraphs are relevant to their asserted public interest standing. The plaintiffs submit these paragraphs reveal A.B.'s continued struggle to hold the defendant into account. They further support their position that a systemic approach is required because remedies addressing only certain individuals' needs are not sufficient to ensure that appropriate measures are taken by the defendant to address the rights of all students with disability enrolled in the defendant's care to be afforded any and all reasonable opportunities to achieve and receive a Dogwood diploma.

[173] I agree with the plaintiffs that the factual allegations made in these two paragraphs are relevant to the issue of public standing considering (1) the three factors the court must assess in determining whether to exercise its discretion to grant public interest standing; and (2) the position taken by the defendant that there is a reasonable means to pursue this litigation, which is through the plaintiffs' private interest standing, because the plaintiffs can advance most of their claims and correlating remedies, but not all, on the basis of their private interest standing.

[174] This part of the defendant's application to strike is dismissed.

X. - Should paras. 140 to 142 of the Statement of Claim alleging the defendant failed to advise the plaintiffs of public and private resources in the territory be struck on the basis they disclose no reasonable claim?

[175] At paras. 140-142, the plaintiffs plead that the defendant has failed to provide them with information regarding what public resources are available for the education of C.D. in Whitehorse and their home community, as well as what non-governmental resources it funds and what resources can be sought out privately and reimbursed by the defendant with respect to C.D.'s educational needs in these two communities.

[176] The defendant submits the plaintiffs have not pleaded that they have made request for such information or that the defendant had any duty to advise them in that regard. Therefore, these paragraphs disclose no reasonable claim against the defendant and should be struck.

[177] The plaintiffs submit it is not necessary to plead that they requested the information identified in paras. 140-142, in order for those facts to be relevant to their s. 7 claim. The plaintiffs submit the pleadings are sufficiently lengthy and sufficiently detailed for the defendant to understand the case being brought against it. The plaintiffs also added in their submissions that the defendant will be made aware of any requests for information made by the plaintiffs, and should not be surprised when this evidence is heard at trial. The plaintiffs submit it can also be the subject of discoveries.

[178] Contrary to what the plaintiffs advance, I am of the view that pleading a failure to advise or inform in what is essentially a contextual void, considering there are no allegations they requested that information or the defendant had any duty, at any point, to provide that information, cannot be construed as pleadings advancing a reasonable s. 7 *Charter* claim, even in light of the Statement of Claim as a whole.

[179] Rule 20(1) requires that a pleading contain the material facts on which the party relies. If there are material facts in support of the plaintiffs s. 7 *Charter* claim pertaining to the plaintiffs seeking information from the defendant that it failed to provide, as pleaded at paras. 140-142, or if they claim the defendant had an obligation or a duty, arising out of the *Act* or other statutes, to provide that information, then the plaintiffs must properly plead those facts.

[180] Considering the additional information provided by the plaintiffs in their response to the defendant's argument, the plaintiffs shall amend their Statement of Claim, within a timeframe to be determined in case management to include the relevant additional information with respect to this aspect of their s. 7 *Charter* claim. Failure to do so will result in paras. 140-142 being struck.

XI. - Should portions of the Statement of Claim be struck because they mainly consist of argument not material facts and are vexatious?

[181] The defendant submits that paras. 114-133, 137-139 and 144 of the Statement of Claim are vexatious because they consist mainly of argument. The defendant submits these portions of the Statement of Claim are replete with adjectives and creative turns of phrase that make it impossible for the Court to investigate their truth.

[182] The defendant submits that para. 114 is not justiciable, the defendant submits the Court would have to apply the meaning of words like "unpredictable", "insulated" and "fragmentary" and decide whether "directions" to school staff truly "interfere with the fulfillment of their statutory duty".

[183] In addition, the defendant submits paras. 119 and 120 consist of complaints for which no remedy is either sought or available, pertaining to definitions section of the *Act* and disclose no reasonable claim.

[184] The plaintiffs submit the paragraphs targeted by the defendant are relevant to their *Charter* claims. More specifically, the plaintiffs submit that paras. 114 to 144 are relevant pleadings concerning the reality of students with disabilities and their parents, and the barriers they face.

[185] The plaintiffs also submit the pleadings support their s. 15 *Charter* claims as well as the alleged violation of s. 15(3) of the *Act* because they describe how the defendant's failure to adopt guidelines for the implementation of special education in the Yukon unnecessarily burdens students with disabilities and their parents, impacting them disproportionately, and causing them to suffer adverse effects.

[186] The plaintiffs submit that paras. 132 and 133 speak to the reality of students with disabilities and their particular vulnerability at a younger age, as well as of the compound effect of government inaction through time. The plaintiffs submit this is relevant to the adverse effect experienced by members of the protected group under their s. 15 *Charter* claims.

[187] The plaintiffs submit that para. 114 is relevant to their *Charter* claims because it describes how the alleged failure to issue guidelines precipitates an *ad hoc*, centralized, and chaotic system for the administration of special education in Yukon and how this system has impeded the ability of the defendant's educational staff to deliver an education appropriate to the individual needs of students with disabilities. The plaintiffs submit that para. 114 also describes what they consider to be the "law" at issue that they identify as a "patchwork of informal policies", which they allege causes discrimination against students with disabilities.

[188] The plaintiffs submit that paras. 119 and 120 are allegations relevant to the barriers created by the lack of operational guidelines for students with disability and their parents and must be read in conjunction with paras. 121 and 122. The plaintiffs submit the failure of the defendant to define terms central to the application of the special education provisions of the *Act* and to identify what supports may be available to students with disabilities and their parents lead to forfeited educational opportunities, which grounds their s. 15 *Charter* claims.

[189] Rule 20 makes it clear that pleadings should consist of material facts and, if necessary, points or conclusions of law, not arguments. In my view, paras. 126 to 130 and 133 consist essentially of arguments that unnecessarily clutter the Statement of Claim and are better left for written or oral submissions. Consequently, they are vexatious and should be struck.

[190] However, I agree that paras. 114-125, 131, and 132 are allegations regarding the negative impacts the alleged failure of the defendant to issue guidelines for the implementation of special education in Yukon (pleaded at para. 111 of the Statement of Claim) has on students with disabilities, including C.D. and their parents, including A.B. They are therefore relevant to the plaintiffs' s. 15 *Charter* claim(s).

[191] I must say to counsel for the plaintiffs and the defendant that while I have decided to let paragraphs such as para. 114 stand as written because they contain factual allegations that are relevant to the *Charter* claims advanced by the plaintiffs, pleadings drafted in a more concise and streamlined manner, as directed by Rule 20 of the *Rules of Court*, would be as efficient and would have the added benefit of avoiding unnecessary debates as to whether they strictly conform to the *Rules of Court*, as

advanced by the defendant, as well as allowing the parties and the Court to focus on the real and important legal issues raised by this case.

Conclusion

[192] The defendant's application to strike is granted with respect to paras. 126 to 130 and 133 of the Statement of Claim, without leave to amend, and paras. 140 to 142, with leave to amend.

[193] The remainder of the defendant's application to strike is dismissed.

[194] The plaintiffs are granted public interest standing to pursue all their claims.

[195] The plaintiffs shall amend their Statement of Claim with respect to the Unwritten Policy as per paras. 64-67 of these Reasons for Decision.

[196] The issue of costs of this application is to be addressed in case management, if necessary.

_____

CAMPBELL J.