SUPREME COURT OF YUKON

Citation: *AB v Yukon (Government of)*, 2025 YKSC 64

Date: 20250925
S.C. No.21-A0024
Registry: Whitehorse

BETWEEN:

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

PLAINTIFFS

AND

GOVERNMENT OF YUKON (DEPARTMENT OF EDUCATION)

DEFENDANT

AND

THE YUKON ASSOCIATION OF EDUCATION PROFESSIONALS

INTERVENOR

Before Justice E.M. Campbell

Appearing on their own behalf	A.B. and C.D.
Counsel for the Government of Yukon (Department of Education)	I.H. Fraser and Stuart Leary
Counsel for Yukon Association of Education Professionals	Shaunagh Stikeman

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.

[2] The plaintiffs claim that various Government of Yukon ("Yukon") policies, practices, guidelines, or lack thereof, and actions, inaction, or conduct related to the implementation of special education in the Yukon as well as the provision 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 a number of 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*. The plaintiffs also seek a number of declaratory and injunctive relief against Yukon with respect to the implementation of, access to, and delivery of special education in the Yukon.

[3] The plaintiffs filed an application seeking an order that the following issues be severed from the litigation for disposal by way of declaration:

1- Whether s. 15(3) of the *Act* mandates the issuance of public-facing rules that serve to guide and constrain the exercise of discretionary power under Part 3, Division 2 of the *Act*.

2- Whether the defendant has a duty (hereafter "Departmental Publication Duty") under ss. 39(c), 39(d), 40, 41, and 83(1) of the *Access to Information and Privacy Protection Act*, SY 2018, c 9 ("*ATIPPA*"), and ss. 15(3), 16(2), 18(1)(c), and 34(e) of the *Act*, to disclose and publish to its open access register, information on the departmental

   i. services that are available to students with special educational needs;
   ii. supports that are available to students with special educational needs;
   iii. procedures that can impact students with disabilities and their parents;
   iv. guidelines that can impact students with disabilities and their parents; and
   v. standards that can impact students with disabilities and their parents;

[4] They ask that partial summary judgment be granted under Rule 18(2)(a) of the *Rules of Court* of Supreme Court of Yukon (the "*Rules*") on these issues. In the alternative, they seek that these issues be decided at summary trial.

[5] The first question raised in this application is whether the issues put forward by the plaintiffs are amenable to summary judgment or, in the alternative, summary trial.

ANALYSIS

Is a Summary Procedure Appropriate?

Positions of the Parties

The Plaintiffs

[6] In their amended notice of application and their written reply to the defendant's outline, the plaintiffs clarified that they are not seeking that the above-mentioned issues be severed and disposed of under Rule 41(18). Instead, they are seeking partial summary judgment under Rule 18, or, in the alternative, an order under Rule 18(2) granting permission to apply for determination by summary trial.

[7] The plaintiffs submit that partial summary judgment, or in the alternative an order granting permission to apply for determination by summary trial, is appropriate because:

(a) Yukon chose not to plead any alternative facts that would require a trial in relation to this part of the claim.

(b) The issues to be decided constitute primarily questions of law because the plaintiffs ask the Court to engage in an exercise of statutory interpretation where the evidentiary record is driven by tabled public documents, and credibility is not a concern.

(c) The issues before the Court are extricable from the other issues raised in this litigation because the outcome of the *Charter*-based aspects of the claim will not be pre-determined by any conclusion reached in this application. In addition, the interpretation of select provisions of territorial legislation will not add complexity to future *Charter* analyses, rather, it will make the proceeding more efficient by defining the scope of the remaining issues and by shortening the anticipated length of trial.

(d) There is an obvious disparity in financial resources between the parties, and the private expenses engaged in defending the rights and interests of children like C.D. are proving less justifiable as their public schooling draws nearer to its end.

(e) Any risk associated with an early determination would be offset by benefits in access to justice and is manageable by the judge seized in this matter, given that:

i. The Minister of Education (the "Minister") has not issued a scheme of public facing policies and guidelines to allow those affected to form legitimate expectation surrounding the availability of safeguards mandated by the special education division of the *Act* despite publicly establishing deadlines to do so.

ii. A ruling on the Yukon's duty to ensure that relevant information is made openly accessible to the public would mitigate the ongoing risk of prejudice to students with disabilities, their families and the community at large.

The Defendant, Yukon

[8] Yukon submits that summary judgment under Rule 18, which is intended for instances where there is no fact which would constitute a defence to the claim except as to amount, is not appropriate for determining the complex legal issues that are not free from doubt raised by the declarations sought by the plaintiffs.

[9] Also, Yukon submits that the legal issues raised by this application for declarations are extensively intertwined with many other issues raised by the claims advanced in this action in relation to Yukon's duties under the *Act*, many of which directly or indirectly involve Yukon's duty to provide records or information in an effective ("transparent") manner, making summary judgment or a separate summary trial inappropriate.

[10] Yukon submits that the only authority cited by the plaintiffs in support of their position that this application for declarations may be heard separately prior to trial deal with severance of an issue for trial under Rule 41. Yukon adds that an order under Rule 41(18) is discretionary, that severance is the exception rather than the rule, and that a cautious approach to severance is warranted. Yukon submits that the extensive intertwining of the issues raised on this application with the other issues the Court will have to determine at trial, make these issues unsuitable for severance under Rule 41 as well**.**

The Intervenor

[11] The intervenor, the Yukon Association of Education Professionals (the "YAEP") broadly supports the plaintiffs' application. From the perspective of the YAEP, partial

summary judgment or proceeding to a summary trial would help reduce costs and help the parties focus their submissions on specific issues.

[12] The YAEP also submits that, if partial summary judgment is granted and the Court finds that Yukon is required to publicly share its policies, procedures, and guidelines for special education, its members may be more quickly positioned to implement these targets with students in need.

Legal Principles

Summary Judgment

[13] A plaintiff may seek summary judgment under Rule 18(1) of the *Rules*, which provides that:

> In an action in which an appearance has been entered, or in an action referred to in Rule 17(13) or in a family law proceeding that is not an uncontested divorce proceeding within the meaning of Rule 63(1), the plaintiff, on the ground that there is no defence to the whole or part of a claim, or no defence except as to amount, may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount.

[14] Rule 18(2) sets out the powers of the court, on the hearing of an application for summary judgement by a plaintiff. Under Rule 18(2), the court may:

> (a) grant judgment for the plaintiff on the whole or part of the claim and may impose terms on the plaintiff, including a stay of execution of any judgment, until the determination of a defendant's counterclaim or third party proceeding;
>
> (b) allow the defendant to defend the whole or part of the claim either unconditionally or on terms relating to the giving of security, time, the mode of trial or otherwise, and may give directions under Rules 42(46) and (53) for the hearing of evidence at trial;

> (c) with the consent of all parties, dispose of the action finally in a summary way, with or without pleadings;
>
> (d) award costs; or
>
> (e) grant any other order it thinks just.

[15] In *Nelson Drywall Interiors Alberta Inc. v Dowland Contracting Ltd.,* 2019 YKSC 32 at paras. 9 to 11, Vertes J. reviewed the legal principles applicable to summary judgment under Rule 18 in light of the decision of the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 ("*Hryniak*"):

> [9] The legal principles applicable to a summary judgment are well established. The test is whether there is a *bona fide* triable issue of fact or law. The objective of the rule is to screen out claims or defences that, based on the evidence provided, ought not to proceed to trial. It must be plain and obvious that there is no genuine issue for trial. On the other hand, where there are significant facts in dispute, the case should likely be sent to trial. The traditional approach has been to apply this standard quite strictly.
>
> [10] In recent years, this traditional approach has been relaxed in an effort to avoid the high costs and length of time it takes to hold a trial in most cases. The Supreme Court of Canada, in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, stated that summary judgment rules "must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (para. 5). <u>The question is not whether there is a genuine issue for trial but, rather, whether there is a genuine issue *requiring* a trial to allow a court to reach a fair and just result.</u>
>
> [11] The Court, however, did not depart from the traditional approach that where there are complex and competing facts that cannot be adequately resolved on a summary judgment application, the just and fair thing to do is to send the case to trial (paras. 49-51).
>
> > [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for

> summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> [51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination. [italics in original, underline my emphasis]

Summary Trial

[16] Rule 19 of the *Rules* provides for the determination of an issue or matter by way of summary trial. More specifically, Rule 19(1)(a) allows a party to an action, in which a defence has been filed, to apply to the court for judgment either on an issue or generally.

[17] Rule 19(12) provides that, on the hearing of the application, the court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable, on the whole of the evidence on the application, to find the facts necessary to

decide the issues of fact or law, or is of the opinion that it would be unjust to decide the issues on the application.

[18] Yukon decisions, post *Hryniak*, have found that:

> [14] … the existence of one or more of the following circumstances will be cause for a summary trial application to fail:
>
> > [28] …
> >
> > (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
> >
> > (b) the unsuitability of a summary determination of the issues is relatively obvious, e.g. where credibility is a crucial issue;
> >
> > (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
> >
> > (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.
>
> *O'Murchu v Deweert*, 2020 YKSC 24 at para. 14, quoting from *Inspiration Management Ltd. v McDermid St. Lawrence Ltd.* (1989), 36 BCLR (2d) 202 (CA) at para. 28. See also *St. Cyr v Atlin Hospitality*, 2024 YKSC 52 at para. 93; and *McKee v Melew*, 2025 YKSC 48 at para. 15.

[19] The answer to the question of whether summary judgment, or in the alternative an order for summary trial, is appropriate is also tied to the declaratory relief sought in this application.

Declaratory Relief

[20] A declaration is a statement from the court "confirming or denying a legal right of the applicant": Lazar Sarna, *The Law of Declaratory Judgments* (Toronto: Thomson Reuters, 2016) at 1. Courts can and do grant declarations to enable parties to know

their rights and to avoid future disputes (*Yasin v Ontario*, 2018 ONCA 417 at para. 10, as cited by Duncan C.J. in *First Nation of Na-Cho Nyäk Dun v. Yukon*, 2023 YKSC 5, at para. 252).

[21] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11, the Supreme Court of Canada restated the applicable test for declaratory relief:

> … The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: … [citations omitted]

[22] In addition, the nature of the relief was described in detail in *Solosky v The Queen*, [1980] 1 SCR 821 ("*Solosky*") at 830-833:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [[1921], 2A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised.
>
> ….
>
> As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.
>
> The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)
>
> …
>
> Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.
>
> …

Analysis

[23] In *Hryniak* at para. 2, the Supreme Court of Canada stated that a shift in culture was required “in order to create an environment promoting timely and affordable access to the civil justice system”. The Court added that “[t]his shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.”

[24] The court also found “that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims” (at para. 5). While the Court recognized that the inappropriate use of summary judgment motions creates its own costs and delays, it found that

judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings (at para. 6).

[25] Summary judgment is a procedural vehicle provided under the *Rules* to resolve a claim or parts of a claim without a full trial. It is available when there is no genuine issue requiring a trial because the claim or the defence lacks merit, or there is no dispute over material facts. If a summary judgment application is unsuccessful, the usual result is that the matter will proceed to trial to allow the other side to pursue or defend the claim. Rule 18(1) requires a plaintiff to file an affidavit setting out the facts verifying the claim and stating that the deponent knows of no fact which would constitute a defence to the claim. In that sense and, at first glance, summary judgment appears to be a procedure ill fitted when one seeks a declaration regarding the proper interpretation of a statutory provision as opposed to, for example, severance of an issue under Rule 41(18), which allows for "one or more questions of fact or law arising in an action to be tried and determined before the others". Nonetheless, I note that Rule 18(2)(e) allows the court to "grant any other order it thinks just".

[26] The issues regarding the nature of the legal instrument (the "guidelines") that the Minister "shall issue" to implement special education, under s. 15 of the *Act* as well as the public access component of Yukon's statutory obligations under s. 15 and/or *ATIPPA*, which are at the forefront of this application, are important aspects of this litigation and constitute an ongoing stated concern of the plaintiffs. While the question of whether Yukon has failed or is failing to meet its obligations under s. 15 of the *Act* and under *ATIPPA* is parts and parcels of the plaintiffs' *Charter* claims, the declarations sought in this application focus on the nature and scope of Yukon's

statutory obligations. Also, the interpretation of specific territorial provisions is extricable from the issues raised by the plaintiffs' *Charter* claims because, in principle, the statutory interpretation exercise mainly raises questions of law rather than questions of facts. Nonetheless, contextual facts are required to determine whether there is a live controversy between the parties with respect to the declaration sought. I note the declaratory relief sought by the plaintiffs with respect to Yukon's alleged duty to disclose and publish certain types of information as well as policies, procedures and guidelines is identified as a stand-alone relief in the Statement of Claim, independent of any *Charter* remedy. Also, the declarations sought have the potential of delineating more clearly the scope of the factual matrix relevant to the claims pertaining to Yukon's alleged failure to meet its statutory obligations and the alleged *Charter* rights breaches, as well as the potential of reducing the length of the trial.

[27] In addition, while the plaintiffs hired counsel to make oral submissions on their behalf at the hearing of this application, the plaintiffs remain self-represented litigants, and their financial means are much more limited than that of the territorial government, defendant. Also, while the complex and expansive *Charter* litigation the plaintiffs decided to bring forward is progressing before the court, the students, including C.D., whose rights and interests are at the center of this litigation, are getting older and are progressively moving through the education system.

[28] It is with these considerations in mind that I have decided to examine the declarations sought in this application.

First Declaration

1. Whether s. 15(3) of the *Act* mandates the issuance of public-facing rules that serve to guide and constrain the exercise of discretionary power under Part 3, Division 2 of the *Act*.

Positions of the Parties

The Plaintiffs

[29] The plaintiffs ask the Court to engage in a statutory interpretation exercise regarding s. 15(3) of the *Act* and to issue a declaration they submit clarifies what the terms “shall issue guidelines for the implementation of this Division” mean. According to the plaintiffs, these terms impose on the Minister a duty to issue public facing rules that serve to guide and constrain the exercise of discretionary power with respect to special education.

[30] The plaintiffs submit the declaration sought is about due process and fairness. They argue that one cannot have inclusive education without rules of engagement, and that the declaration is required to clearly signal to the Minister that they have to issue public-facing and binding rules regarding special education, rather than a patchwork of administrative and internal policies, to ensure that education professionals, parents, and students know what to expect.

[31] The plaintiffs submit the term “guidelines” in s. 15(3) is ambiguous and the intended form and function of these guidelines may only be assessed in relation to surrounding context.

[32] The plaintiffs submit that the guidelines mandated by s. 15(3) are of a rule-making nature as opposed to internal administrative and interpretative guidelines. They submit that the words surrounding the term guidelines, when read in their grammatical and ordinary sense, support their proposed interpretation because they indicate that anything issued under the authority of s. 15(3) of the *Act* should

communicate expectations and impose binding operational norms. The plaintiffs submit the overall statutory scheme of the *Act* also supports their position.

[33] The plaintiffs submit that the term "shall" confers rule-making power and imposes a mandatory duty to issue guidelines, as per s. 5(3) of the *Interpretation Act*, RSY 2002, c 125.

[34] Second, the plaintiffs submit that the term "issue", suggests something that flows out, that is outward facing; meaning that the Minister must make public-facing rules that communicate expectations. The plaintiffs submit it is telling the legislature chose to use the term "issue" in s.15(3) rather than the term "establish", which appears in other sections of the *Act* (s. 52(5) for example). The plaintiffs argue the Court should give effect to the legislature's decision to use different words to convey different meaning.

[35] The plaintiffs also rely on s. 4 of the *Act*, which provides that the Minister must establish and communicate goals and objectives for the Yukon education system, in support of the public-facing interpretation of the word issue at s. 15(3).

[36] Third, the plaintiffs submit that the terms "for the implementation of" point to the issuance of binding standards or general norms. The plaintiffs rely on the interpretation of the words "to enforce" in *R v 16142 Yukon Inc.,* 2023 YKTC 4 at para. 37[1], to submit that implementation should be interpreted as meaning the issuance of rules that "constrain the exercise of discretionary power." The plaintiffs submit the term "enforcing" is very similar to the term "implementing" in the context of rights in that what is required for the Minister to implement something is to delegate

[1] The decision was overturned by *R v 16142 Yukon Inc. (c.o.b. Northern Enviro Services)*, 2025 YKSC 13

decision-making authority and specify what procedure and criteria will be used to make decisions.

[37] In addition, the plaintiffs submit that the language used in the *Act* is one of rights and that rights are given effect through legally enforceable norms, not *ad hoc* internal administrative guidelines that no one is aware of. The plaintiffs submit the preamble of the *Act* makes it clear that the nature of the right at stake is to partake in education. The plaintiffs submit that parents and students need to know what they are entitled to, and this needs to be and can be crystallized through s. 15(3).

[38] The plaintiffs also submit the preamble of the *Act* makes it clear that the *Act* is aimed at creating a collaborative framework that involves and include parents in the decision-making process. The plaintiffs argue that parents cannot be involved in that process if they do not know who is making the decision, what the decisions are, what the criteria for making those decisions are, when those decisions will be made, and what supports are available. The plaintiffs submit that all this information needs to be embodied somewhere and that all the statutory indicators point to s. 15(3).

[39] The plaintiffs submit that when all these terms are considered in their context, they convey the meaning that the Minister must make rules – i.e. judicially enforceable norms – that can meaningfully be challenged through judicial review.

[40] In addition, the plaintiffs point out that the division of the *Act* specifically aimed at special education is only composed of three sections. The plaintiffs note that s. 15, which creates special education in the Yukon, is broadly worded and only provides that a student with exceptionalities is entitled to an “Individualized Education Plan” (“IEP”) and to “a program delivered in the least restrictive and most enabling

environment". The plaintiffs submit that special education is much more than an IEP, it is the ramp that will allow students in need of special education to receive an education that is on an equal footing with anyone else. The plaintiffs argue that, clearly, three broadly worded sections are not enough; that something more is required to implement special education in the Yukon. The plaintiffs submit that this skeleton statutory framework reveals that the Legislature intended and chose to give to the Minister a rule-making power to fill in the gap, to provide for a proper policy and a proper set of general binding rules to allow people entitled to special education to know and understand what they can expect.

[41] In addition, the plaintiffs point to s. 34, which sets out student rights, and most particularly s. 34(e), which states that students have the right to be treated in a fair and consistent manner in support of their position. They argue that in order to achieve fair and consistent treatment one needs an objective set of public facing rules rather than internal administrative guidelines that do not constrain the exercise of discretion by decision-makers. They argue that children with learning disabilities are part of a minority group with a protected characteristic under s. 15 of the *Charter*; that they are entitled to equality of opportunity; and finding that s. 15(3) imposes a duty on the Minister to make an outward facing set of rules fosters equality and inclusion, which are values embodied in the preamble of the *Act*.

[42] The plaintiffs also submit that the surrounding context indicates that the Legislature intended s. 15(3) guidelines to be rules, which means that they must be approved by the Minister and that it is a non-delegable duty. The plaintiffs rely on the definition of regulations in the *Regulations Act,* RSY 2002 c 195, which includes the

term rule, and s. 17(3) of the *Interpretation Act*, which provides that the authority conferred upon a minister to make a regulation, as defined in the *Regulations Act*, cannot be delegated to a deputy minister or a public servant, in support of their interpretation that the Minister's authority under s. 15(3) cannot be delegated. They also point out that s. 186(1) of the *Act* confers upon the Minister the discretion to address a list of more peripheral tasks under the *Act* through the issuance of policies and guidelines, which the Legislature specifically excluded from the application of the *Regulations Act* pursuant to s. 186(2). The plaintiffs submit this delegated power stands in direct contrast to the rule-making power specifically provided under s. 185(1) of the *Act*. The plaintiffs argue it is telling the Legislature chose not to specifically exclude s. 15(3) guidelines from the application of the *Regulations Act* as it did with policies and guidelines issued under s. 186(1).

[43] In addition, the plaintiffs submit that there is a live controversy between the parties regarding the legal nature of the s. 15(3) guidelines. The plaintiffs submit the declaration would have practical utility as the evidence filed demonstrates they have suffered hardship as a result of the lack of public-facing guidelines; and the education professionals, who came before the Court as interveners, support the declaration because it would help them administer special education in a fair and consistent manner.

[44] The plaintiffs also submit that a declaration clarifying the nature of s. 15(3) guidelines would advance this litigation because it would resolve a threshold question for the rest of the action. The plaintiffs submit that many of the allegations in the Statement of Claim relate to the issue of the absence of s. 15(3) guidelines or, in the

alternative, that what Yukon has issued does not constitute guidelines within the meaning of s. 15(3). Therefore, directions from the Court on this issue would narrow down the lawsuit and force Yukon to take position.

[45] The plaintiffs add that the declaration sought is suitable for summary judgment because none of the facts are critical to the Court's determination. The facts were put before the Court merely to provide context for the exercise of statutory interpretation and to show there is a live controversy and a right that requires determination.

The Defendant, Yukon

[46] Yukon submits that the Court ought not to issue the declaration sought because the test is not met.

[47] Yukon submits the declaration sought does not address a live controversy because it accepts that the word "shall" in s. 15(3) imposes an obligation to make guidelines for the implementation of special education. Yukon states that it has established guidelines, and that it has listed the documents it identified as the s. 15(3) guidelines in its affidavit of documents. Yukon also accepts that there is a public component to the term "issue" and that it has an obligation under s. 15(3) to make the guidelines available to the public in an appropriate manner and without the necessity of an access to information request. Yukon states it has posted the documents it identified as the guidelines on its website and has no intention of changing this practice. As a result, Yukon is of the view it has already complied with its obligation to make the guidelines available to the public under s. 15(3), and there is no need to issue a declaration to restate an obligation Yukon concedes it has. Yukon adds there is nothing the declaration sought would remedy.

[48] In addition, Yukon submits that the term “public-facing” is impossibly vague, and, to the extent this expression refers to any specific technology, it misconceives the character of the obligation imposed by the *Act*, which was enacted in 1990. Yukon submits technologies and preferred mode of communications have evolved greatly within the past thirty years and remain in constant evolution. Yukon submits that, as a result, the Court should refrain from interpreting the term “issue” as mandating the use by the government of any particular form of technology to make the guidelines accessible to the public.

[49] Yukon submits that the purpose of a declaration is to clarify rights and obligations so that the parties can better govern their actions in the future. Yukon submits the terms specified for the declarations sought in this application are so vague and general that they could not serve this purpose.

[50] In addition, Yukon objects to the issuance of the declaration sought on the basis that the plaintiffs’ assertion that guidelines “constrain the exercise of discretionary power” is wrong in law. Yukon submits that the established general principle is that guidelines (in contrast to statutory rules) cannot lawfully lay down a mandatory rule from which decision-makers have no meaningful degree of discretion to deviate.

[51] Yukon acknowledges the plaintiffs are of the view that the documents it produced and identified as the guidelines in this litigation do not meet the Minister’s obligation under s. 15(3). However, Yukon submits that the plaintiffs failed to put the guidelines into the record. Yukon argues that, as a result, the Court does not have the evidence required to determine the degree to which the guidelines, as drafted, do or

do not guide, and to what extent they do or do not constrain the exercise of discretionary authority, which is an essential consideration in determining whether the declaration sought is appropriate and of practical utility. Yukon submits that, if the substance of what has been issued is in issue, then the onus was on the plaintiffs to identify the defects in what has been issued and to explain why, in that context, the declaration sought should issue.

[52] Yukon adds that there is nothing in the language of the declaration sought that addresses the issue of delegation. Nonetheless, Yukon submits that s. 186(1)(n) of the *Act* more than covers the guidelines issued under s. 15(3) and, therefore, they are excluded from being regulations by the operation of s. 186(2).

The Intervenor

[53] The YAEP states that, from the perspective of its members who are the professionals tasked with the responsibility of implementing and delivering special education, it is necessary that the guidelines issued by the Minister under s. 15(3) be disclosed and made public to ensure that a student's full right to special education is upheld.

[54] The YAEP submits that, without complete transparency in respect of the full scope of services and supports available to students in need of special education, their right to special education is severely diminished as is the ability of the education profession to strive to fully deliver what those students are entitled to.

[55] In oral submissions, counsel for the YAEP set out what the guidelines should contain and address, from the YAEP's point of view, in order to implement and deliver special education.

Analysis

[56] Section 15 is found in Part 3, Division 2 of the *Act*, which is the Division that provides a framework for special education in the Yukon. Section 15(3) of the *Act* reads as follows:

(3) The Minister shall issue guidelines for the implementation of this Division.	(3) Le ministre établit les lignes directrices en vue de la mise en œuvre de la présente section.

[57] There is no dispute between the parties that the use of the term “shall” in s. 15(3) imposes a duty to issue guidelines to implement special education.

[58] In addition, while the parties disagree about the usefulness of the expression “public-facing” the plaintiffs included in the declaration sought, Yukon concedes that there is a public component to the word “issue” in s. 15(3). Yukon acknowledges that, as a result, the guidelines must be made publicly available, without the need for an access to information request. In my view, this acknowledgement that there is a public component to the word “issue” is consistent with the ordinary meaning of the verb “to issue” and the broader context of the *Act*, which provides, among other things, that the Minister must establish and communicate goals and objectives for the Yukon education system (s. 4)

[59] It became clear at the hearing that, at least, part of the dispute between the parties is about the documents identified by Yukon as the “s. 15(3) guidelines” and whether they fulfill Yukon’s obligation to issue guidelines under s. 15(3) to implement special education. This live issue was further exemplified by the fact that counsel representing the plaintiffs on this application asserted at first that there were no guidelines issued under s. 15(3). He later conceded that Yukon had produced

documents it identified as the guidelines in this litigation but added that the plaintiffs were of the view that those documents did not constitute s. 15(3) guidelines.

[60] In addition, counsel for the intervenor, which supports the plaintiffs' application, spent most of her time in oral submissions setting out and explaining what the guidelines should contain from her client's perspective.

[61] However, neither the plaintiffs nor the defendant found it appropriate to put the documents at issue into the record. The only evidence before me regarding those documents is as follows:

(i) they were formally disclosed to the plaintiffs through documentary discovery in the context of this litigation and identified to the plaintiffs as the s. 15(3) guidelines;

(ii) a copy of those documents (entitled "School Procedures Handbook", "Student Support Services Manual", and "Student Support Services Parent Handbook") is publicly accessible on Yukon's website. However, the website indicates that they are under review.

(iii) in 2019, a representative of the Department of Education provided to A.B., through the Education Appeal Tribunal process, a copy of document(s) identified as the special education guidelines; and

(iv) in 2021, a representative of the Department of Education stated in an email to counsel for the plaintiffs on this application, who, at the time, was representing someone else, that the Department did "not have guidelines issued under the authority of ss. 15(3) of the Act and approved by the Minister" but that they had "a School Procedures

> Handbook that provides direction for staff in many areas but is not typically made available."

[62] Nonetheless, the evidence and the positions put forward by the parties at the hearing also reveal that the scope of their disagreement includes the nature of the legal instrument that must be issued under s. 15(3) and, more specifically, whether the Legislature intended the "guidelines" to be legislative in nature and therefore legally binding on those to whom they are addressed. This issue raises a question of statutory interpretation.

[63] In addition, the evidence filed by Yukon in response to the application, also raises another live issue, which is whether the guidelines currently used and applied by the Department of Education are indeed available to the public on its website as stated by Yukon.

Legal Principles of Statutory Interpretation

[64] The modern approach to statutory interpretation is well-established. It provides that: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" in this case, the Legislative Assembly. *E.A. Driedger, Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21, and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para. 26.

[65] In *La Presse inc v Quebec*, 2023 SCC 22, the Supreme Court of Canada clarified two principles flowing from the application of the modern approach:

> [23] First, the plain meaning of the text is not in itself determinative and must be tested against the other

> indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" *(Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10).
>
> [24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way *after* due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the *Canadian Charter of Rights and Freedoms* — only if differing readings of the same provision *cannot* be decisively resolved through the contextual and purposive approach set out by Driedger … . [italics in original]

[66] The *Interpretation Act* must also be considered and applied when interpreting territorial statutes, such as the *Act*.

[67] Section 10 directs that every statute, regulation, or every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.

[68] Section 8 provides that the title and preamble of a statute must be read as a part of the statute which is intended to assist in explaining its purpose and object:

> The title and preamble of an enactment shall be read as a part thereof intended to assist in explaining its purpose and object.

[69] Finally, s. 4 of the *Languages Act*, RSY 2002, c 133, provides that the English and French versions of Yukon statutes and regulations are equally authoritative.

The nature of the s. 15(3) guidelines

[70] The plaintiffs essentially argue that the terms "shall issue guidelines to implement" in s. 15(3) means that the Minister has a duty to issue public-facing legally binding rules that guide and constrain the discretion of education professionals and others in the provision of special education in the Yukon.

[71] In *Canada (Citizenship and Immigration*) *v Thamotharem*, 2007 FCA 198 ("*Thamotharem*"), the Federal Court of Appeal explained that the word "guidelines" normally refers to non-legally binding rules or "soft law" as opposed to delegated legislation or "hard law", which is legally binding and enforceable:

> [66] … guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

[72] Soft law instruments cannot fetter the discretion of administrative decision-makers, meaning that they cannot bind decision-makers. However, they may go as far as permitting "to establish how discretion will normally be exercised", as long as they do not "preclude the possibility that the decision-maker may deviate from normal practice in the light of particular facts" (*Thamotharem* at para. 78, underlined in original referring to *Maple Lodge Farms Ltd. v Government of Canada*, [1982], 2 SCR 2).

[73] However, courts have recognized that the meaning of the term "guidelines" in a statute may depend on context *(Thamotharem* at para. 67), and that, in certain circumstances, terms such as guideline, directive, and circular may give rise to delegated legislation having the full force of law ("hard law"), i.e. legally binding rules that must be applied. Therefore, the use of the term guidelines in a statute is not

necessarily determinative of the type of instrument (soft or hard law) that can be issued. Courts have upheld the validity of guidelines containing mandatory language because, once placed in their statutory context, they were found to constitute delegated legislation, thus legally binding (see *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 ("*Friends of the Oldman River*") at 33-37; and *Canada (Attorney General) v Public Service Alliance of Canada*, [2000] 1 FC 146 (TD)).

[74] In *Friends of the Oldman River*, the applicants were seeking an order for *certiorari* and *mandamus* to require two federal departments to conduct an environmental assessment in accordance with the Federal Environmental Assessment and Review Process Guidelines Order for a dam being built on the Oldman River in Alberta.

[75] To determine whether the guidelines could constitute delegated legislation capable of requiring or directing the ministers to act in a certain way, the Supreme Court of Canada turned to the enabling statute to determine whether it was capable of supporting a power to create subordinate legislation:

> The principal ground on which it is contended that the *Guidelines Order* is invalid is that by using the term "guidelines" s. 6 does not empower the enactment of mandatory subordinate legislation, but instead only contemplates a purely administrative directive not intended to be legally binding on those to whom it is addressed. There is of course no doubt that the power to make subordinate legislation must be found within the four corners of its enabling statute, and it is there that one must turn to determine if the Act can support delegated legislation of a mandatory nature, the non-compliance with which can found prerogative relief. (at 33)

[76] The Court concluded that Parliament had elected to adopt a regulatory scheme that is “law” and therefore amenable to enforcement through prerogative relief. The Court’s determination turned on the fact that the statute required the “guidelines” to be formally enacted by “order” and promulgated with the approval of the Governor in Council[2]:

> Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:
>
> When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

[2] Section 6 of the *Department of the Environment Act* read as follows:
6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

> The word "guidelines" cannot be construed in isolation; s. 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is "law", and thus amenable to enforcement through prerogative relief. (at 36)

[77] In *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 ("*Bell Canada*"), the Supreme Court of Canada took "a functional and purposive approach" (at para. 37) to conclude that Parliament intended the "guidelines" issued by the Canadian Human Rights Commission pursuant to s. 27(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 to be a form of law akin to regulations because like regulations of general application, they must pertain to a class of cases. In addition, as the guidelines were to be made by order, they were subject to the *Statutory Instrument Acts,* RSC 1985, c S-22, and must be published in the Canada Gazette. In addition, the process to be followed to formulating the particular guidelines resembled the legislative process in that it involved formal consultation with interested parties and revision in light of the consultation. The Court noted that the use of the word "ordonnance" in the French version supported this interpretation. In addition, as noted in *Thamotharem* at para. 70, s. 27(3) expressly provides that guidelines issued under s. 27(2) are binding on the Canadian Human Rights Commission, and on any person or panel assigned to inquire into a complaint of discrimination referred by the Commission.

[78] In *Thamotharem* at paras 71-72, the Federal Court of Appeal found that the "guidelines" the Chairperson of the Immigration and Refugee Board has the authority to issue under s.159(1)(h) of the *Immigration Refugee and Protection Act*, SC 2001, c.

27 (“*IRPA*”) cannot not have the same legally binding effect on members as statutory rules may:

> [71] In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word "*directives*" in the French text of paragraph 159(1)(h) suggests a less legally authoritative instrument than "*ordonnance*."
>
> [72] I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(h) cannot have the same legally binding effect on members as statutory rules may.

[79] I also note that, in *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, at para. 64, the Supreme Court of Canada stated that a policy that is not administrative in nature may be “law” for the purpose of s. 1 of the *Charter* provided it meets certain requirements, including that it be enacted by a government entity pursuant to a rule-making authority. The court added that:

> A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

[80] The Court then turned to the specific language of the enabling legislation to determine whether a rule-making power had been conferred upon the transit authorities whose policies were being challenged (paras. 67 to 71) prior to determining whether the policies at issue were of an administrative nature or not, in order to decide whether they fell within the meaning of the word “law” for the purpose of s. 1 of the *Charter* (paras. 72-73):

> [67] A review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink.
>
> [68] Section 3(1)(c) of the *British Columbia Transit Act* authorizes BC Transit's board of directors, with the Minister's approval, "to pursue commercial opportunities and undertake or enter into commercial ventures in respect of those systems and the authority's assets and resources". According to s. 4(4)(e) of the Act, the board of directors
>
> > must supervise the management of the affairs of the [transit] authority and may ... by resolution ... establish rules for the conduct of their affairs ... .
>
> [69] A similar authority is conferred on TransLink's board under s. 2(4) of the *Greater Vancouver Transportation Authority Act*:
>
> > **2**(4) The authority may carry on business, and, without limiting this, may enter into contracts or other arrangements, adopt bylaws, pass resolutions, issue or execute any other record or sue or be sued under a name prescribed by regulation of the Lieutenant Governor in Council, and any contract, bylaw, resolution or other arrangement or record entered into, adopted, passed, issued or executed, as the case may be, and any suit brought, by the authority under the prescribed name is as valid and binding as it would be were it entered into, adopted, passed, issued, executed or brought by the authority under its own name.

> [70] The enabling statutes thus confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system through advertising sales. Further, according to documents filed in the record, the policies were "reviewed and adopted" by the boards of both entities (Appellants' Joint Record, at pp. 179 and 326). The policies therefore appear to have been adopted in a formal manner.
>
> [71] Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. In this case, TransLink is empowered to "establish rules" and to "enter into contracts", "adopt bylaws" and "pass resolutions". Bylaws and contracts are intended to bind. In the context of the enabling provisions, it follows that resolutions have the same binding effect as the other enumerated instruments.

[81] Applying a functional and purposive approach, I am of the view that s. 15(3) does not confer a rule-making power and that the term “guidelines” in s. 15(3) does not refer to or mean legally binding rules.

[82] First, there is no specific mention anywhere in the *Act* that s. 15(3) guidelines are binding on decision-makers such as school professionals and administrators or others in the implementation and provision of special education, as there was in the statute at issue in *Bell Canada* and *Friends of the Oldman River*.

[83] The French version of s. 15(3), which is equally authoritative, uses the terms “lignes directrices”, which refers to a “less authoritative instrument” than the term “ordonnances”, which was chosen by Parliament in the statute at issue in *Bell Canada* or even the term “arrêtés”.

[84] Also, while, as I note later in my reasons, the Preamble of the *Act* recognises that greater parental and public participation is encouraged, the *Act* does not contain

any provision mandating or prescribing a specific consultation mechanism or process to follow in drafting the guidelines. Section 15(3) does have a public component, as acknowledged by Yukon. However, the *Act* does not prescribe any specific mechanism, mode or process by which the guidelines are to be made publicly available. In saying that, I am mindful of the plaintiffs' argument regarding the application of the *Regulations Act and* the *Interpretation Act,* which I will examine later in my reasons.

[85] The purpose and object of the *Act*, as reflected by its Preamble and its provisions as a whole, is to establish a right to education for persons of school-age, as defined in the *Act,* and to put in place an education system that "provide[s] a right to an education appropriate to the individual learner based on equality of educational opportunity; prepare[s] students for life and work in the Yukon, Canada, and the world; instill[s] respect for family and community; and promote[s] a love of learning" (Preamble of the *Act*). Working cooperatively with parents, encouraging meaningful partnerships with greater parental and public participation, recognizing the importance of including the cultural and linguistic heritage of Yukon Indigenous peoples and the multicultural heritage of Canada; as well as recognizing that respect for the rights and privileges of minorities as enshrined in the law must be respected, are also identified as underpinning values and/or goals of the *Act* (Preamble of the *Act*).

[86] The *Act* provides a legal framework for the implementation and provision of education in the Yukon. However, as pointed out by the plaintiffs, the *Act* only contains three sections dedicated to the implementation and provision of special education (ss. 15 to 17*).* Nonetheless, the *Act* is not devoid of parameters regarding access to and

delivery of special education. While s. 17 is devoted to creating and delineating a right of appeal to the Education Appeal Tribunal in matters relating to special education, the other two sections specifically create a right to special education for certain students, as described in the *Act* (s. 15), and provides for a specific procedure by which the school administration, in consultation with professional staff and parents, is to determine whether a student is a student in need of special education, and, if so, what IEP is appropriate (s. 16).

[87] In addition, the definition of the expression IEP at s. 1 of the *Act* is comprehensive. It details not only what an IEP should contain but also confers on the school-based team the responsibility to determine the specific educational program for the student, subject to the determination of the school administration pursuant to s. 16(1). Section 16(4) makes it mandatory to invite parents to be members of the school-based team established for their child. Even if a parent chooses not to be part of the school-based team, s. 16(2)(f) mandates that a parent and, if appropriate, the student be consulted before the determination of and during the implementation of an IEP.

[88] In addition, the *Act* sets out, through the definition of an IEP, what an IEP contains:

- a description of the student's present level of functioning;
- long term or annual goals;
- short term goals or specific behavioral 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 consent for implementation

[89] The *Act* therefore clearly sets out and mandates the procedure to be followed to determine whether a student is in need of special education because of "intellectual, communicative, behavioural, physical or multiple exceptionalities" (s. 15(1)), and, therefore, entitled to receive an education program, outlined in an IEP, and tailored, to the extent possible, to their specific needs. The *Act* also clearly sets out what information an IEP is to contain.

[90] As a result, I do not find that the small number of statutory provisions specifically dedicated to special education necessarily points to the conclusion that binding rules rather than "guiding principles" are required to ensure proper implementation of Division 2 of the *Act*.

[91] The plaintiffs also point out that s. 186(2) of the *Act* specifically states or clarifies that policies and guidelines issued under s. 186(1) are not regulations within the meaning of the *Regulations Act* whereas the *Act* is silent with respect to the legal nature of s. 15(3) guidelines.

[92] I note that ss. 185 and 186 are the only two provisions found in Division 1 (Regulations, Policies and Guidelines) of Part 11 (General) of the *Act*. On the one hand, s. 185 specifically provides that the Commissioner in Executive Council may make regulations with respect to a number of areas under the *Act*, including

"generally, to give effect to any provision of this Act" (ss.185(s)). On the other hand, s. 186 lists a number of areas of the *Act* in respect of which the Minister may issue policies and guidelines. Section 186(1)(n) also sets out a general power to make policies and guidelines to give effect to any provision of the *Act*. That power is worded exactly as s. 185(s). Section 186(2), which specifies that s. 186 policies and guidelines are not regulations within the meaning of the *Regulations Act*, must therefore be read in that statutory context; i.e. to reflect and clarify that these two consecutive provisions relate to distinct types of legal instruments to be issued by different state actors that may be used to give effect to the *Act*.

[93] Also, neither s. 185 nor s. 186 specifically refer to s. 15(3) guidelines which, in my view, is consistent with the fact that s. 15(3) uses mandatory language ("shall issue") rather than the permissive but non-mandatory language ("may issue") found in ss. 185 and 186. I note that other provisions that impose an obligation to issue policies and guidelines, such as ss. 52(5), are not specifically listed in either ss. 185 or 186.

[94] Also, section 150 appears to be the only other provision of the *Act* where the Legislature found it necessary to specifically clarify that certain legal instruments are not regulations within the meaning of the *Regulations Act*. Section 150 provides that "[n]either a bylaw nor a resolution passed by a School Board or a Council is a regulation within the meaning of the *Regulations Act*". However, this clarification was required because the definition of regulations in the *Regulations Act* specifically includes bylaws and resolutions whereas it does not specifically include or mention guidelines.

[95] In addition, s. 9 of the *Act* specifically provides that:

> The Minister may in writing delegate any power, duty or function conferred on the Minister by this Act to a School Board, a Council or to any employee of the department.

[96] In contrast, s. 17(3) of the *Interpretation Act* provides that a power to make regulation cannot be delegated. Section 9 therefore supports the interpretation that the guidelines issued under s. 15(3) are not of a rule-making nature.

[97] As a result, and as stated earlier, I am of the view that s. 15(3) does not confer a rule-making power and that the term "guidelines" in s. 15(3) does not refer to or mean legally binding rules.

[98] Having reached this conclusion, I note that legally binding instruments are not the only way by which to achieve transparency and predictability, as seem to suggest the plaintiffs. As noted in *Thamotheram*, at paras. 55- 57:

> [55] Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.
>
> [56] Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue

> guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 ("*Ainsle*y").

[99] In addition, as stated in *Thamotheram* at para. 59:

> Although not legally binding on a decision-maker in the sense that it may be be [as written] an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at 6):
>
> > The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; . . ." does not fetter the exercise of that discretion. [Emphasis added.]
>
> The line between law and guideline was further blurred by *Baker* at para. 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

[100] As a result of the legal interpretation exercise the plaintiffs urged me to conduct on this application, I am of the view that the declaration, as put forward by the plaintiffs, should not issue because it does not reflect the nature of the authority conferred upon the Minister under s. 15(3), and of the legal instrument (the "guidelines") that must be issued under s. 15(3).

[101] Nonetheless, as stated earlier, the evidence filed on this application raises concerns regarding the extent of Yukon's concession that s. 15(3) guidelines must be made publicly available, and of Yukon's statement that the guidelines are, indeed, available on its website.

[102] The printouts of Yukon's website filed in evidence on this application reveal, even though the documents themselves were not filed with the Court, that the documents identified by Yukon as the guidelines are available on Yukon's website. However, the website indicates that the documents are under review. The website also contains a warning that the documents may not contain the most current guidance with respect to special education and the public is directed to contact the Department to obtain the most up to date information. The printout of the website reveals the following statement/warning for each of the documents identified as a s. 15(3) guideline:

> [the documents were last updated in 2024 have] a watermark and disclaimer explaining [they are] under review. Some of the procedures contain outdated information.
>
> The Department of Education is actively working to review, update, and align operations and procedures for inclusive education. Users and readers are advised to verify information and consult with the appropriate contact, such as the Student Support Services branch at studentsupportservices@yukon.ca for the most current guidance.
>
> For more information on inclusive and special education, visit Inclusive and special education| Government of Yukon. (my emphasis)

[103] After the plaintiffs pointed to this passage in the evidence in oral submissions, Yukon argued that, since the documents are not before the Court, there is no evidence that any portion of the documents identified as the guidelines and made publicly available on its website are not currently in effect or in place.

[104] It is true the documents are not before the Court. Nonetheless, the statement appearing on Yukon's website clearly reveals that the documents identified in this

litigation as the s. 15(3) guidelines are under review. The statement is a clear warning to the public that there is a real likelihood those documents do not fully reflect the guidance currently applied by the Department in the implementation of special education. The statement also reveals that, in order to obtain the current guidance, the public must contact the Department. In my view, this evidence is sufficient to reveal a live controversy regarding the public component of Yukon's obligation to issue guidelines under s. 15(3); and a declaration to the effect that Yukon's obligation to issue s. 15(3) guidelines include the obligation to make the s. 15(3) guidelines that are currently being used and applied publicly available, would clarify the rights and obligations of the parties in that regard.

[105] In *Solosky*, at 833, the Supreme Court of Canada recognized the court's discretion to settle the wording of a declaration if it finds that the applicant is entitled to a judicial statement on a live controversy:

> However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, Judicial Review of Administrative Action (3rd ed. 1973, p. 431). Further, s. 50 of the Supreme Court Act allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

[106] Therefore, I am of the view it is appropriate to issue a declaration to the effect that s. 15(3) guidelines must be public facing, that is that they cannot be treated as internal guidelines and must be made publicly available.

Second Declaration

2. Whether the defendant has a duty (hereafter "Departmental Publication Duty") under ss. 39(c), 39(d), 40, 41, and 83(1) of the *Access to Information and Privacy Protection Act* SY 2018, c.9 and ss 15(3), 16(2), 18(1)(c), and 34(e) of the *Education Act* RSY 2002, c. 61 to disclose and publish to its open access register, information on the departmental

    i. Services that are available to students with special educational needs;
    ii. Supports that are available to students with special educational needs;
    iii. Procedures that can impact students with disabilities and their parents;
    iv. Guidelines that can impact students with disabilities and their parents; and
    v. Standards that can impact students with disabilities and their parents.

Positions of the Parties

The Plaintiffs

[107] The plaintiffs submit that, in addition to the duty to issue public facing guidelines under s. 15(3) of the *Act*, Yukon has a duty to disclose and publish the services and supports available to students with special educational needs as well as the policies, procedures and guidelines used by Yukon that can impact students with disabilities and their parents under ss. 39 and/or 83 of *ATIPPA*. They submit that Yukon's obligation to disclose and publish that information and those records under *ATIPPA* is informed by and must be read alongside ss. 15(3), 16(2), 18(1)(c), and 34(e) the *Act*.

[108] The plaintiffs submit that, in asking the Court to recognize a departmental publication duty, they are not asking the Court to legislate or change the law as passed by the Legislature, but rather to determine that all education policies that may benefit or otherwise impact the accommodation of students with disabilities in Yukon schools must be disclosed and published under the law as it exists today.

[109] The plaintiffs submits that s. 83(1) of *ATIPPA* imposes a duty on a minister to disclose records held by their department(s) without delay in instances where, without

such disclosure, an individual, a group, or the public is or is likely to be at risk of significant harm.

[110] The plaintiffs argue that, in the action plan released by Yukon in 1988, prior to the enactment of the *Act*, Yukon professionals recognized and determined that without the safeguards later enacted in the Special Education Division of the *Act*, which includes a duty to issue public-facing guidelines to implement special education, students with disabilities in the Yukon, by nature of the barriers they face, were likely at risk of significant harm when enrolled in (or suspended from, or in effect excluded from) public schools operated by Yukon, unless information regarding the availability of special education safeguards is disclosed by the Minister. The plaintiffs add that, in that action plan, Yukon clearly stated its intention to enact specific policies and procedures manual and accompanying handbook to support the implementation of special education reform initiatives. The plaintiffs submit that the Minister does not have jurisdiction to ignore or defy the determination made by their department in the 1988 action plan and later enshrined by the Legislature in the *Act*, and that disclosure and publication is therefore required under s. 83(1).

[111] The plaintiffs assert that the Minister has not issued a scheme of public-facing policies and guidelines to allow those affected to form legitimate expectations surrounding the availability of safeguards mandated by the Special Education Division of the *Act*, despite establishing deadlines to do so in the Reimagining Inclusive and Special Education Work Plan and making promises in that regard to the Public Accounts Committee of the Legislature.

[112] The plaintiffs argue there is an informational void regarding special education in the territory and that a ruling on the defendant's duty to ensure that relevant information is made openly accessible to the public would mitigate the ongoing risk of harm to students with disabilities, their families, and the community at large.

[113] In addition, the plaintiffs submit that Yukon has a duty to disclose and publish the categories of documents listed in the declaration sought under ss. 39(c) and (d) of *ATIPPA*.

[114] The plaintiffs submit that s. 39(c) of *ATIPPA* classifies as open access any information held by Yukon for which the Minister is satisfied that it is in the public interest to make the information available to the public without requiring an individual access to information request be made.

[115] The plaintiffs submit that, with the proactive disclosure requirements embedded in *ATIPPA*, the Minister has a duty to regularly (not less frequently than once a year) evaluate and decide whether posting a description of each education policy record is sufficient or if the information must be disclosed and published in its entirety to conform to the public interest, pursuant to ss. 39 to 41 of *ATIPPA*.

[116] The plaintiffs say that Yukon has admitted in a previous court case (*GX v Yukon (Government of)*, 2023 YKSC 51 at para. 38) to owing a fiduciary duty to students enrolled in its care. They submit that, as a result, it is reasonable to expect that any discretion exercised regarding the disclosure and publication of education policies that would affect the rights of students must be carried out for the good and in the best interests of the child.

[117] In addition, the plaintiffs submit that courts have recognized the existence of a freestanding constitutional right of access to government information in situations where meaningful public discussion and criticism on matters of public interest would be substantially impeded without access to such information.

[118] The plaintiffs submit that there is no reasonable exercise of discretion under s. 39(c) of the *Act* that would allow the Minister to be satisfied that the public interest could be served by making policies that affect the rights of students effectively inaccessible to members of the public, unless sought by individual access request, this includes all education policies that may benefit or otherwise impact students with disabilities and their parents.

[119] The plaintiffs further submit that a duty to disclose and publish also exists under s. 39(d) of *ATIPPA*, as it establishes that the Minister must make available to the public "information or a record of a type or class of information or record prescribed as open access information" without the need for an access request.

[120] The plaintiffs submit that information generated at the expense of the public is presumed to belong to the public. Therefore, they argue that Cabinet, in effect, prescribed education policies as open access information when it allowed the appropriation of public money from the consolidated revenue fund to the Department of Education for the purposes of "Policy and Partnerships".

[121] The plaintiffs argue that, in an application for summary judgment, the parties have the obligation to put their best foot forward. The plaintiffs state they have done so in providing the evidence that is available to them. They point out that Yukon could have filed affidavit evidence disputing or denying the plaintiffs' assertion that a

determination regarding the thresholds for disclosure and publication established under ss. 39 and 83 of *ATIPPA* has previously been made by Yukon. However, Yukon chose not to do so. According to the plaintiffs this inextricably leads to the conclusion that Yukon admits that the required determination has indeed been made compelling disclosure and publication of the categories of information, records, or documents listed in the declaration sought. Also, the plaintiffs submit that the defendant chose not to plead any material fact that requires a trial in relation to the declaration sought, and, therefore, there is no claim to support their defence.

[122] The plaintiffs also assert in their written submissions that Yukon admitted in a case management conference held in this matter on September 28, 2023, that it is in breach of its duty under ss. 39-41 of *ATIPPA* to deposit some information into the open access register.

[123] The plaintiffs further argue that the simple fact Yukon opposes the declaration sought demonstrate there is a live controversy.

[124] The plaintiffs submit that a declaration is therefore needed to ensure that the public is properly made aware of ministerial guidelines issued for the implementation of special education and of any intended operational norms of general application that may benefit or otherwise impact students with disabilities and their parents – such that these students and their parents are able to receive equal protection and benefit of the law as it exists. The plaintiffs submit that, as a result, the declaration would serve the practical purpose of determining the rights and obligations of the parties.

The Defendant, Yukon

[125] Yukon submits that the declaration sought should not issue because there is no dispute regarding the existence of a duty under *ATIPPA* to provide public access to certain records and information in the prescribed manner. Yukon also acknowledges that it must comply with the terms of these statutory provisions.

[126] In addition, Yukon acknowledges that the *Act* imposes statutory obligations on officials in the Department of Education to provide information to parents and students with special educational needs, and officials are obliged to comply with those statutory provisions according to their terms.

[127] However, Yukon submits the declaration should not issue because it describes broad categories of documents in a manner that is not tied in any meaningful way to the language of the statutes. Yukon submits that, as a result, the declaration sought has no practical utility because it would not allow the parties to know with certainty whether or not a particular record or item of information was caught by the obligation to "publish and disclose", nor would it put the parties in any better position to know what their rights and obligations were than they would be in if they were to rely solely on the language of the statutes.

[128] In addition, Yukon submits the plaintiffs did not file any evidence disclosing any live dispute over the application of its statutory duties to disclose and publish to any particular documents, records, or information. Yukon argues that, if the plaintiffs are of the view that there are documents or information that ought to be made available to the public through the open access register that are not already in the open access register, they should identify them so the parties can argue over whether they are

captured by the language of the statute or not. Otherwise, the declaration sought is not in relation to a real dispute but to a hypothetical one.

[129] Also, Yukon submits that the plaintiffs did not file any evidence in support of their allegation that counsel for Yukon would have made an admission that Yukon was in breach of its statutory duty at a case management conference in this matter. In addition, Yukon submits that even if counsel had made a bald admission of non-compliance at some previous time, it could not assist the plaintiffs in establishing that a declaration is now required.

[130] In addition, Yukon submits there is no evidence that anything has been prescribed as open access information under s. 39(d). Yukon further submits there are no regulations prescribing the disclosure and publication of the broad categories of documents, records or information listed in the declaration pursuant to s. 39(d).

[131] Finally, Yukon submits that the *Act* was enacted prior to *ATIPPA* and there are no provisions in the *Act* that refers to any obligation to make records, documents or information available to the public through the open access register contrary to the wording of the declaration sought.

The Intervenor

[132] The YAEP state that Yukon's failure to publicly disclose policies, procedures or guidelines in respect of special education resources that should be available to students is detrimental not only to its ability to advocate for its members but also to its ability to support, advocate and train its members to deliver special education to the level required. The YAEP further submits that it prevents school administrators, who are also YAEP members, from conducting their own assessment as to whether

resources in schools are sufficient to deliver special education to the target established.

[133] However, the YAEP did not make specific submissions regarding Yukon's obligation to disclose and publish under *ATIPPA*.

Analysis

[134] The plaintiffs seek a declaration that *ATIPPA*, read together with the *Act,* mandates the disclosure and publication of certain categories of information and records relating to the implementation and provision of special education in the Yukon.

ATIPPA Statutory Provisions

[135] Sections 39 and 41 of *ATIPPA* read together clearly requires Yukon to make certain information and records it holds available to the public without requiring that an access for information request be submitted, by depositing the specified information and records (as open access information) in an open access register it maintains subject to certain exclusions and prohibitions (see ss. 38 and 41).

[136] Under s. 39(c), the information and/or records must be made available if the head of the public body is satisfied that it is in the public interest to do so. Under s. 39(d), the information and/or records must be made available if they are prescribed as open access information.

[137] The definition of open access information in *ATIPPA* is of limited use because it simply refers back to information and records described in ss. 39(a) to (d). Nonetheless, s. 125(l) provides that the Commissioner in Executive Council may make regulations specifically "for the purpose of paragraph 39(d), prescribing a type or class of information or record as open access information". Neither party has brought to my

attention any regulation specifically prescribing a type or class of information or record as open access information for the purpose of para. 39(d).

[138] Subsections 39(c) and (d) and s. 41 read as follows:

> **Division 2 – Open Access Information**
>
> **39 Information to be made available without access request**
>
> The head of a public body that is a ministerial body must make the following information and records available to the public in accordance with section 41:
>
> …
>
> (c) information or a record held by the public body for which the head is satisfied that it is in the public interest to make the information or record available to the public without requiring that an access request for the information or record be submitted;
>
> (d) information or a record of a type or class of information or record prescribed as open access information. [my emphasis]
>
> …
>
> **41 Making open access information available to public**
>
> (1) The head of a public body that is a ministerial body must make open access information available to the public by
>
> (a) establishing an open access register for the public body;
>
> (b) subject to subsection (2), depositing all open access information into the open access register; and
>
> (c) maintaining the open access information deposited into the open access register in accordance with subsection (3).

(2) The head of a public body

(a) must not deposit into the open access register the following information and records:

(i) generally excluded information,

(ii) information or a record to which access is prohibited under Division 8; and

(b) may remove information from a record to be deposited into the register if the information is information to which the head may deny access under Division 9.

(3) The head of a public body must maintain open access information in a complete and accurate form by

(a) depositing it into the open access register not later than 90 days after the day on which the information is completed in its final form; and

(b) adding to, removing or changing any information or record contained in the open access register without delay after determining that it requires updating in order to be complete and accurate.

(4) The head of a public body is not required under this section to deposit into the public body's open access register

(a) information or a record that is incomplete or in a draft form; or

(b) despite paragraph 39(b)

(i) a record in which is contained a significant amount of information to which access is prohibited under Division 8, or access is denied by the head under Division 9, or

(ii) a record that has been in existence for 15 years or more.

[139] In addition, s. 83 of *ATIPPA* mandates the disclosure to an individual, a group of individuals or the public, without delay, of information held by a public body when the head of that public body determines that without disclosure of the information, an individual, a group of individuals or the public is, or is likely to be, at risk of significant harm. Section 83 reads as follows:

> **83 Duty to disclose if risk of significant harm**
>
> (1) Despite any other provision of this *Act* and in the absence of an access request, if the head of a public body determines that without disclosure of information (including personal information) held by the public body, an individual, a group of individuals or the public is, or is likely to be, at risk of significant harm, the head must, without delay after making the determination, disclose the information to the individual, the group of individuals or the public.
>
> (2) Before, or if that is not practicable then as soon as practicable after, the head of a public body discloses information under subsection (1), the head must
>
> (a) provide, in accordance with the regulations, if any, and each applicable protocol, a notice of the disclosure to each individual who the head reasonably believes could be adversely affected by the disclosure; and
>
> (b) provide a copy of the notice to the commissioner.

The Act

[140] None of the statutory provisions of the *Act* relied upon by the plaintiffs specifically mention or refer to a duty to disclose and publish under *ATIPPA*. Also, some of the provisions refer to by the plaintiffs in support of the declaration specifically refer to an obligation to share information with the parents of a specific student not the public in general (see ss. 16(2) and 18(1)(c)). Nonetheless, I agree with the plaintiffs

that the content of the *Act* may inform the extent of Yukon's duty to disclose and publish under *ATIPPA.*

The Pleadings

[141] After filing their application, the plaintiffs amended their Statement of Claim dated January 11, 2023, to seek, in addition to the other relief sought in their claim, that Yukon "has a duty to disclose and publish the services and supports available to students with special educational needs, as well as the policies, procedures and guidelines used by [Yukon] that can impact students with disabilities and their parents".

[142] Also, at para. 142.1 of their claim, the plaintiffs specifically plead that Yukon has a statutory duty to publish and disclose certain information and records as follows:

> The plaintiffs plead that the respondent, as a matter of law pursuant to ss. 39 to 41, and 83 of the *Access to Information and Protection of Privacy Act, S.Y. 2008, c.9* and ss. 16(2), 18(1)(c), and 34(e) of the *Education Act* is duty bound to publish and disclose the services and supports available to students with special educational needs, as well as the policies, procedures and guidelines used by the respondent that can impact students with disabilities and their parents. This would include information that would facilitate access by such students and their parents to bodies such as the Yukon Child and Youth Advocate's Office and review mechanisms such as EAT.

[143] The plaintiffs did not plead any facts that specifically mention or relate to the open access register and its content or lack thereof. However, the plaintiffs plead the following in their Statement of Claim, as amended, which, in my view, situates the declaration sought in the context of the plaintiffs' claim:

- that Yukon has failed to issue guidelines under s. 15(3) of the *Act* (at paras. 111 to 133) and, instead, has established "… unpredictable, insulated, and fragmentary directions to school staff which interfere with the fulfillment of their statutory duty to provide equitable educational opportunity to students with disabilities" (at para. 114);
- that Yukon's failure to issue guidelines has left students with disabilities, their parents, and schools in a complete informational and procedural void, which in turns deprives students and their parents of their rights under the *Act* (at paras. 115- 122);
- that Yukon's avoidance of responsibility in defining guidelines for the implementation of special education, and the corresponding informational lexical and procedural void culminate to form a structural barrier that serves to alienate and disenfranchise students with disabilities from effectively securing their right to a fair consistent treatment from fully participating in the education system, and from freely pursuing their maximum potential (at para. 125);
- that Yukon has failed to provide A.B. with information regarding what public resources are available for the education of C.D.; non-governmental resources it funds to service the needs of students; and resources that can be sought out privately and reimbursed by the defendant to ensure C.D. can reach their full potential (at paras. 140-142); and

- that, in addition to having failed to meet its obligations under its statutory duty to disclose and publish, Yukon failed on various occasions specified at para. 142.2 of the Statement of Claim to provide information to A.B. regarding support and services available for C.D. (at para. 151).

[144] As pleaded, Yukon's alleged failure to issue guidelines under s. 15(3) of the *Act* and to disclose and publish information and records regarding the implementation of special education is parts and parcels of the plaintiffs' wider ss. 7 and 15 *Charter* claims.

[145] As stated earlier, one of the considerations when determining whether to issue a declaration is whether it would help resolve a live controversy.

[146] Yukon broadly denies the allegations contained in the plaintiffs' Statement of Claim regarding the issue of lack of communication, disclosure and publication of information and records. As stated earlier, Yukon also takes the position that it has issued s. 15(3) guidelines.

[147] At the time the plaintiffs filed their application, Yukon's Amended Statement of Defence contained a bald statement that: "[n]either the *Education Act* nor the *Access to Information and Protection of Privacy Act* imposes the obligations alleged at paragraph 142.1 of the Statement of Claim" (at para. 9). In my view, that broad, unqualified, and formal denial in Yukon's Amended Statement of Defence may well have been sufficient to ground a finding of a live controversy.

[148] However, after the plaintiffs amended their Notice of Application and their Statement of Claim to clarify and reflect the specific declarations sought, Yukon

amended its Amended Statement of Defence to clarify its position with respect to its statutory obligations as follows:

> 9.1. The *Access to Information and Privacy Act* does impose statutory obligations on the Deputy Minister of Education to provide public access to certain records and information, and the Deputy Minister is obliged to comply with those statutory obligations according to their terms. However, the obligations set out in the very broad language of paragraph 142.1 of the Statement of Claim do not correspond to the obligations established by the statute.
>
> 9.2 The *Education Act* does impose statutory obligations on officials in the Department of Education to provide information to parents of students with special educational needs, and officials are obliged to comply with those statutory obligations according to their terms. However, the obligations set out in the very broad language of paragraph 142.1 of the Statement of Claim do not correspond to the obligations established by the statute.
>
> 9.3 In particular, amongst other differences, neither statute: (i) uses "can impact student with disabilities and their parents" as a criterion for determining which records or information are covered by the statutory obligations; or (ii) makes any reference to an obligation to provide "information that would facilitate access… to bodies such as the Yukon Child and Youth Advocate's Office and review mechanisms such as EAT".

[149] In addition, Yukon clarified in its submission its position with respect to s. 15(3) of the *Act*. It specifically acknowledged that the term "issue" in s. 15(3) contains a public component and that, consequently, Yukon must make s. 15(3) guidelines publicly available in an appropriate manner.

[150] Nonetheless, the plaintiffs maintain that the declaration sought is required because there is an informational void, and parents do not know what to reasonably

expect in the provision of special education to their children in need of special education, and what services and support are available to their children. They say the declaration is needed to ensure that the public is properly made aware of ministerial guidelines issued for the implementation of special education and of any intended operational norms of general application that may benefit or otherwise impact students with disabilities and their parents – such that these students and their parents are able to receive equal protection and benefit from the law as it exists.

Review of the Evidence

[151] The plaintiffs' evidence on this application consists of A.B.'s Affidavits #3 and #5. In their affidavit #3, A.B. relays that one of the grounds that lead them to file an appeal with the Education Appeal Tribunal with respect to the provision of special education to C.D. was the inaccessibility of special education policy. A.B. further attests that, they agreed to enter into mediation with Yukon in order to resolve their appeal. A.B. further states that the chair of the Education Appeal Tribunal instructed Yukon to provide the policy at issue prior to mediation, which Yukon did. Email correspondence attached to A.B.'s Affidavit confirms the circumstances surrounding the disclosure to A.B. of a document Yukon's representative (then Director of Policy and Planning) identified as the special education policy.

[152] However, A.B. also attests in that affidavit, that, in March 2021, after they settled their appeal, their former counsel requested the said policy on behalf of someone else. In his email response to counsel, which is attached to A.B.'s affidavit, the same Yukon representative indicated that the Department of Education did not have "guidelines issued under the authority of ss. 15(3) of the Act and approved by the

Minister" but that they did have a School Procedures Handbook providing directions to staff that is not typically made publicly available. The representative added that if there were "a particular operational issue you are dealing with that you would like more information on, we are willing to look at providing you with what you need." I note that the originating email from counsel that could provide context to the government official's response was not included in the documents attached to A.B.'s affidavit.

[153] The plaintiffs point to the documents attached to A.B.'s Affidavit #3 as evidence that Yukon's actions create not only an informational void but confusion, within and outside the Department, that is harmful to parents and students in need of special education. They add, that A.B.'s affidavit clearly demonstrates there is a live controversy regarding the disclosure and publication of the information and records listed in the declaration sought.

[154] However, on this application, Yukon filed an affidavit revealing that more recently (in 2022) in this litigation, its counsel formally identified to plaintiffs' counsel the specific documents that constitute the s. 15(3) guidelines. In that email, counsel for Yukon also indicated to plaintiffs' counsel that the documents were available on Yukon's website. As stated earlier, the plaintiffs disagree that these documents meet Yukon's obligation to issue guidelines to implement special education under s. 15(3).

[155] In addition, the evidence reveals these documents are identified on Yukon's website as being under review. However, I note that s. 41(4) of *ATIPPA* provides that information or a record that is incomplete or in a draft form does not have to be deposited in the open access register. Also, I have already determined that a declaration to the effect that s. 15(3) guidelines must be public facing, that is that they

cannot be treated as internal guidelines and must be made publicly available, should issue.

[156] Other than the specific evidence that relate to the plaintiffs and former plaintiffs' counsel experience, prior to the start of this litigation, regarding their efforts to identify and obtain the s. 15(3) guidelines, there is no evidence of exchange(s) between the plaintiffs or others and government officials revealing that Yukon refused, ignored, or failed to make accessible to the public information or records held by Yukon that ought to have been disclosed or published under *ATIPPA* or that Yukon determined or failed to determine whether information and records it holds must be made available to the public pursuant to its statutory obligations. These two affidavits do not contain any evidence that pertains to the open access register or Yukon's website and their current content or lack thereof. There is no evidence that A.B., another parent, or someone else consulted the open access register or Yukon's website and that they were unable to find information and/or records included in the categories listed in the declaration sought, that ought to have been published through the open access register. There is no evidence of exchanges between A.B. or others and government officials regarding the content or lack thereof of the open access register and/or Yukon's website in relation to the categories of information or records listed in the declaration sought.

[157] As for A.B.'s Affidavit #5, it was essentially filed as a conduit to put before the Court a number of reports and publications the plaintiffs rely on as contextual evidence for the purpose of this application. I am alive to the objections raised by Yukon regarding the admissibility of expert opinions and hearsay contained in those reports,

and the weight to accord to them. However, I do not believe it necessary to delve into that specific issue considering the limited use of these documents on this application.

[158] The reports attached as exhibits to A.B.'s affidavit include the 2009 and 2019 Reports of the Auditor General of Canada to the Yukon Legislative Assembly and Yukon's responses, as well as Dr. Nikki Yee's 2021 Review of Inclusive and Special Education in the Yukon. In these reports, the authors expressed their opinions regarding Yukon's performance in the implementation and delivery of special and inclusive education in the Yukon. Some of the reports also provide recommendations to Yukon in that regard. The reports focus on areas found to be of particular concerns by the authors of the reports, such as the sufficiency of resources, Yukon's monitoring or lack thereof of program delivery and student outcomes, and whether the students' learning needs are being met by the system in place, which are issues also raised by the plaintiffs in their claim. While the topic of effective and transparent communications is mentioned in some of the reports[3], the plaintiffs did not direct me to data or findings that relate to Yukon's obligation under *ATIPPA* to make information and records regarding the implementation and provision of special education available to the public and Yukon's compliance or lack thereof with its statutory obligation.

[159] I note that in its public response to the Review of Inclusive and Special Education performed by Dr. Yee, which is also attached as an exhibit to A.B.'s Affidavit #5, Yukon identified in its November 8, 2021 work plan, the task to "Publish

[3] See p. 25 of Dr. Yees' report for example where she identifies the following medium-term and long-term ideas to work from: "Medium-term: Compile and collaboratively review policies that relate to inclusive and special education, purposefully and collaboratively coordinate policies to facilitate Yukon's vision of inclusive and special education. Long-term: Clearly and transparently communicate policies to families and communities" See also p. 29 of Dr. Yee's report.

current policies and procedures – ASAP" under the " Inclusive and Special Education website/handbook for parents" as a deliverable. This statement would appear to be an acknowledgment by Yukon that policies and procedures regarding special education were not being published back in 2021, but that action would be taken to publish them as soon as possible. However, the document does not relate to the open access register or its content.

[160] In addition, as I undertook to do at the hearing of this application, I reviewed the Affidavit #1 of Ted Hupé, president of the YAEP dated January 11, 2022, and filed in relation to another application in this matter. In his affidavit, Mr. Hupé essentially states that, in his opinion and in the opinion of the YAEP, there is a lack of guidelines in respect of special education that impacts the delivery of special education. However, his affidavit does not address the issue of disclosure to the public of existing policies, procedures, and guidelines regarding special education.

[161] As for the admission allegedly made by Yukon's counsel in this proceeding, I agree with Yukon that it was incumbent on the plaintiffs to file the transcript of the case management conference of September 28, 2023, if they wanted to rely on any admission allegedly made by Yukon's counsel at the time. Nonetheless, because the plaintiffs are self-represented in this matter, I listened to the recording of that proceeding. In my view, what the plaintiffs put forward as an admission by counsel that Yukon is in breach of its statutory duty to publish and disclose, is better described as a statement reaffirming Yukon's legal position at the time, as outlined in their amended statement of defence. Counsel's statement does not help the plaintiffs in establishing a live controversy.

[162] In my view, it was incumbent on the plaintiffs to provide evidence that reveals a live controversy with respect to the declaration sought, and more specifically regarding Yukon's obligations to disclose and publish under *ATIPPA*. Also, contrary to what counsel for the plaintiffs argued, the fact a party opposes the issuance of a declaration does not automatically lead to the conclusion that there is a live controversy that warrants the issuance of a declaration by the Court.

[163] As stated earlier, what the evidence and positions of the parties before me reveal is that the real and live controversy between the parties is about the sufficiency of the guidelines, standards, and procedures currently in place; whether Yukon meets its statutory obligations with respect to the implementation and delivery of special education, and whether Yukon meets its obligation to make its current s. 15(3) guidelines publicly available. Also, as stated earlier, the evidence does not address the content of the open access register nor Yukon's compliance or lack thereof with its specific obligations to disclose and publish under *ATIPPA* in general or in relation to the categories of documents listed in the declaration sought.

[164] As a result, I am of the view that the evidence before me, including the reports and documents attached as exhibits to A.B.'s affidavits #3 and #5, does not assist the plaintiffs in establishing a live controversy regarding the scope of Yukon's duty to disclose and publish under *ATIPPA* that the declaration sought would address and help resolve.

[165] It is important to note that *ATIPPA* imposes an obligation to disclose and publish certain information and records held by Yukon. It does not impose an obligation to establish guidelines, policies, standards, and procedures; it does not

impose an obligation to communicate information efficiently to parents and communities; and it does not impose an obligation to offer and provide services and support. These obligations must come from somewhere else.

[166] Therefore, even if the declaration sought issued, it could not be used to compel Yukon to do anything other than to disclose and publish information and records it already holds that are not otherwise excluded or protected from disclosure under *ATIPPA*. As stated earlier, there is no evidence before me that Yukon does not already and currently comply with that statutory obligation or that there is a current controversy with respect to specific information or records that Yukon ought to make available to the public pursuant to *ATIPPA*.

[167] As a result, I am of the view that the declaration sought would not help resolve a live controversy between the parties, and it would not be appropriate to exercise my discretion to grant this declaration considering the lack of evidence on this issue.

[168] In addition, I conclude this issue is not suitable for an order that it be decided through summary trial because this litigation is extensive, perfecting the evidentiary record would require the filing of additional affidavit materials, and the hearing of the application for summary judgment already took two days of court time. In my view, a summary trial on this specific issue would not be an effective use of court time or resources considering all the other claims that will nonetheless have to proceed to trial, which is now set for three weeks in the fall of 2026.

CONCLUSION

[169] Partial summary judgment is granted with respect to the first declaration sought in this application. The plaintiffs are entitled to a declaration that s. 15(3) guidelines

must be public facing, that is that they cannot be treated as internal guidelines and must be made publicly available.

[170] The issue of costs of this application may be spoken to in case management.

[171] The remainder of the application is dismissed.

_____
CAMPBELL J.