COURT OF APPEAL OF YUKON

Citation: ***Commission scolaire francophone du Yukon no. 23 v. Yukon (Procureure générale),***

Citation number: 2014 YKCA 4
No.: 11-YU684

La Commission scolaire francophone du Yukon no. 23

v.

Procureure générale du Territoire du Yukon

JUDGES:	Groberman J.A. Bennett J.A. MacKenzie J.A.
JUDGMENT GIVEN BY:	The Court
JUDGMENT RELEASED:	February 11, 2014
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APPEALED FROM:	Ouellette J.

SUMMARY:
The francophone school board brought an action against the Yukon government alleging it had failed to meet its obligations under s. 23 of the *Charter*, had violated the *Languages Act* and had breached fiduciary duties by re-allocating funds earmarked for minority language education to French as a second language instruction. The trial judge held in favour of the plaintiff, granting a number of remedies including structural remedies and damages. The government appealed, arguing that there was a reasonable apprehension that the judge was biased, and alleging a number of errors of fact and law. Held: Appeal allowed. The judge's comportment during the trial gives rise to a reasonable apprehension of bias, as do the inexplicable procedures that he adopted on the post-trial costs application. While his former connections to francophone education in Alberta do not raise concerns about bias, his continuing role as a governor of a foundation do. Because almost all of the orders made by the judge depended on factual findings, they must be vacated and a new trial ordered. With respect to issues of law alone, the judge erred in holding that the *Education Labour Relations Act* allows term contracts for principals.

He also erred in finding that s. 23 of the *Charter* affords minority language school boards an automatic right to admit the children of non-rights-holders to their schools. Finally, the plaintiff is not a "member of the public" for the purposes of the *Languages Act*. Claims of rights under that statute should be adjudicated in proceedings brought by affected individuals.

COURT OF APPEAL OF YUKON

Citation: *Commission scolaire francophone du Yukon no. 23 v. Yukon (Procureure générale)*, 2014 YKCA 4

Date: 20140211
Docket: 11-YU684

Between:

La Commission scolaire francophone du Yukon no. 23

Respondent
(Plaintiff)

And

Procureure générale du Territoire du Yukon

Appellant
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Bennett
The Honourable Madam Justice MacKenzie

On appeal from: An order of the Supreme Court of Yukon, dated July 26, 2011 (*La Commission Scolaire Francophone du Yukon No. 23 c. Procureure Générale du Territoire du Yukon*, 2011 YKSC 57, Whitehorse No. 08-A0162)

Counsel for the Appellant:	M. Faille F. Baril G. Régimbald
Counsel for the Respondent:	R.J.F. Lepage F. Poulin
Place and Date of Hearing:	Whitehorse, Yukon March 5 - 7, 2012
Place and Date of Judgment:	Vancouver, British Columbia February 11, 2014

Written Reasons of the Court

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Summary:

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Reasons for Judgment of the Court:

I. Introduction

[1] This is an appeal by the Attorney General of Yukon from a judgment concerning minority language education rights in Yukon. The Supreme Court of Yukon held that the Government of Yukon ("Government") had failed to accord the Commission scolaire francophone du Yukon ("CSFY") adequate management and control of French language education in the Territory in accordance with the requirements of s. 23 of the *Canadian Charter of Rights and Freedoms*. The Government was ordered to change its practices in certain regards, and to provide resources to improve the CSFY school facility. In addition, the court found that the Government had, by requiring the CSFY to engage in communications with it in English, failed to respect the provisions of the *Languages Act*, R.S.Y. 2002, c. 133. Finally, the court found that the Government had breached its fiduciary duties in its handling of funds transferred to it by the Government of Canada.

[2] The trial commenced in May 2010. The Government sought an adjournment of the trial on the basis that an important witness had fallen ill. The judge denied the adjournment, but agreed to bifurcate the trial so that the issues on which the witness was to give evidence would proceed at a later date. The initial phase of the trial lasted six weeks. Thereafter, the trial judge made certain interim orders, and adjourned the trial. In October of 2010, the Government filed an application asking the trial judge to recuse himself, alleging that there was a reasonable apprehension of bias in respect of him. The judge dismissed the application, and the second phase of the trial, lasting approximately three weeks, commenced in January 2011.

[3] The trial was a complex one. The court heard from 25 witnesses (10 called by the CSFY and 15 called by the Government) and examined 541 exhibits (excluding those tendered on *voir dires* but not admitted at trial). The transcripts occupy over 2,300 pages, and the exhibits take up a further 5,453 pages. It is evident that the trial was a difficult one, and that the participants found it, at times, frustrating; tensions arose at various points in the proceedings.

[4] A number of issues have been argued on the appeal. Regrettably, we are of the opinion that the Government's contention that there is a reasonable apprehension that the trial judge was biased must be upheld. In the circumstances, the matter must be remitted to the Supreme Court for a new trial before a different judge. Because most of the issues in this matter involved questions of mixed fact and law, we are unable to make determinations on the substantive issues on the appeal. There are three exceptions. We are able to resolve a relatively minor question concerning the interpretation of a provision of the *Education Labour Relations Act*, R.S.Y. 2002, c. 62. We will discuss, briefly, the right of the CSFY to admit children of persons who are not right-holders under s. 23 of the *Charter*. Finally, we are also able to provide some guidance on the interpretation of the *Languages Act*.

II. Background

A. Legislative Framework

[5] Section 23 of the *Canadian Charter of Rights and Freedoms* enshrines minority language education rights. It reads as follows:

23. (1) Citizens of Canada	23. (1) Les citoyens canadiens :
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or	a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,	b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,
have the right to have their children receive primary and secondary school instruction in that language in that province.	ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.
(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.	(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.
(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province	(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province:
(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of	a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction

minority language instruction; and	dans la langue de la minorité;
(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.	b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

[6] In Yukon, public schools have generally been administered directly by the Government. Consultative school councils have been set up for each school. Their powers are set out in the *Education Act*, R.S.Y. 2002, c. 61. The statute also allows for the establishment of school boards, which have greater powers than school councils. In July 1996, the CSFY was established by Ministerial Order 1996/5, (1996) Y Gaz II, 205 (*Education Act*), as Yukon's first school board. It remains the only school board in the Territory.

[7] Section 56 of the *Education Act* recognizes minority language education rights, and envisages that detailed provisions respecting those rights are to be set out in regulation:

56. Students whose parents have a right under section 23 of the *Canadian Charter of Rights and Freedoms* to have their children receive an educational program in the French language are entitled to receive that program in accordance with the regulations.	56. Les élèves dont les père et mère ont le droit en vertu de l'article 23 de la *Charte canadienne des droits et libertés* de faire instruire leurs enfants en français ont droit à cet enseignement en conformité avec les règlements.

[8] Some of the arrangements for minority language education in Yukon are set out in the *French Language Instruction Regulation*, Y.O.I.C. 1996/99.

B. École Émilie Tremblay

[9] Attempts to comply with the requirements of s. 23 of the *Charter* pre-date the establishment of the CSFY as a school board. In 1984, l'École Émilie-Tremblay ("EET") commenced operation. At that time, the school provided public education to children of s. 23 rights-holders up to grade 6. Like other public schools in the

Territory, the school was administered by the Government in consultation with a school council.

[10] The program at EET was soon extended to grade 9. The school operated within school buildings that also housed English language schools. In 1990, EET moved to its own facility (a pre-fabricated building) in Whitehorse, and the program was extended to grade 12.

[11] In 1996, the same year that the CSFY was established as a school board, EET moved into a new building, constructed at a cost of approximately $6,250,000. There were 113 students. When construction bids exceeded the estimates by $600,000, the design of the building was scaled back in two regards: a planned industrial arts room was not constructed, and one secondary school classroom was deleted. The constructed building had a maximum capacity of 250 students in 1996. While the size of the building had not changed since that time, utilization factors employed by the Government have been modified. A Department of Education document tendered at trial indicated that the school's total capacity was 150 elementary students and 139 secondary students.

[12] The trial judge found that in the 2009-2010 school year, there were 170 students registered at EET – 129 in elementary grades and 41 in junior high and high school. The most up-to-date figures at the time of trial indicated that at the end of October 2010, there were 184 students, comprised of 21 students in K-4 (which we will refer to as "pre-kindergarten"), 20 in kindergarten, 116 in grades 1-7, and 27 in grades 8-12.

[13] There were a number of issues at the trial, and they touch nearly all aspects of French language education in Yukon. They included: school admission criteria (whether the CSFY was entitled to admit as students the children of persons who do not hold s. 23 rights), programs (the need for a special needs program and the need for the Government to fund a pre-school program), facilities (the construction of a new secondary school and the transfer of title to school property to the CSFY), staffing (the formula for determining staffing levels and the term of the principal's

contract), training (professional development opportunities for teachers), and ancillary school services (control of buses used to transport students to and from school). The issues also encompassed relations between the Government and CSFY including: budget administration (whether the budget for staff salaries and benefits is properly held by the Government or whether it had to be held by the CSFY) and communications (whether the Government is required to communicate with the CSFY in French). Finally, there was a claim for breach of fiduciary duty against the Government, alleging that it had wrongly arranged to re-allocate federal funds earmarked for minority language education so that they were used, instead, for French immersion programs.

III. Judgment at Trial

A. Findings of Credibility

[14] The trial judge began his judgment with a lengthy summary of the evidence of each witness, and an indication of whether, and to what extent he found the witness to be credible. He described each of the witnesses for the CSFY as credible. For the most part, he also found the witnesses tendered by the Government to be credible, though in a few cases, he noted limitations on their knowledge or reservations with respect to certain aspects of their testimony.

[15] There were, however, five witnesses tendered by the Government whose testimony the judge did not find to be of great value.

[16] At para. 428, he found the testimony of Elizabeth Lemay, the Director of Programs and Services of the Department of Education, to be "of little use", describing her as being "evasive" and indicating that she attempted to "divert questions."

[17] He found, at para. 450, that Anita Simpson, the former Manager of Accounting and Administrative Services of the Department of Education, was "very difficult to follow" and said that some of her testimony was "ambiguous, ...equivocal and evasive." He said that she left the impression of not wanting to respond to

questions, and concluded that that might have been "intentional or simply because she did not have much knowledge of the topic."

[18] Although the judge found, at para. 542, that Michael Woods, a superintendent of schools with the Department of Education, provided "some useful general information," he said that there were a number of contradictions in the witness's testimony. The judge found himself unable to "attribute much weight to his evidence." He said that Mr. Woods' suggestions and observations were "not very convincing."

[19] The judge also rejected the evidence of Christie Whitley (who he referred to as "Christey Whitley"), an Assistant Deputy Minister of Education and Superintendent of Schools. He found that she was not reliable and not credible. He found that she "intentionally tried to deceive the Court regarding the topic of special needs classes."

[20] Finally, the judge ruled inadmissible most of the evidence of Sébastien Markley, a statistician with the Government of Yukon, on the basis that it was expert opinion evidence for which an appropriate report had not been delivered.

B. Number of Rights-Holders

[21] After summarizing some of the major themes in s. 23 jurisprudence, the judge turned to the issues in the case before him. The first issue was a determination of the number of s. 23 rights-holders in Yukon.

[22] The precise rights of s. 23 rights-holders (and the corresponding obligations of the Government) depend, in large part, on the number of rights-holders. In *Mahe v. Alberta*, [1990] 1 S.C.R. 342, the Supreme Court of Canada described the specific rights set out in s. 23(3)(a) and (b) as representing the lower and upper range of mandatory institutional requirements, respectively. Where the number of rights-holders surpasses a minimum threshold, minority language education must be provided. At a higher threshold, that education must take place in "minority language educational facilities", a phrase that the Supreme Court interpreted to mean not only

educational facilities that are physically separate from those devoted to majority language education, but also educational facilities managed and controlled by s. 23 rights-holders.

[23] The Government conceded, in this case, that the lower threshold was met, and that it was obliged to provide minority language education. Even though EET is a separate facility, and even though the Government has established the CSFY as a school board, it contended that the number of rights-holders in Yukon was not sufficient to require "minority language educational facilities." It argued, then, that it had gone beyond its obligations by establishing a minority language school board and by funding a separate educational facility for minority language education.

[24] In determining whether a particular educational service or facility must be made available under s. 23, the court is required to estimate the number of rights-holders who will potentially take advantage of it. The judge correctly instructed himself, in accordance with what was said in *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 at para. 32, that the number will be somewhere between the current proven demand and the total number of students eligible to use the service under s. 23.

[25] The judge gave a number of reasons for finding that Statistics Canada data underestimated the number of children of rights-holders in Yukon. He referred specifically to the evidence of Dr. Rodrigue Landry. Dr. Landry had not, in his expert report, provided an estimate, but did provide various statistics. In cross-examination he used those statistics to estimate the number of school-aged children of rights-holders to be between 200 and 400 and [TRANSLATION] "tended to think closer to 400."

[26] The judge also referred to the Yukon Action Plan dated March 22, 2006 that formed an appendix to the Canada-Yukon Agreement on Minority-Language Education and Second Official Language Instruction 2005-2006 to 2008-2009, which stated:

> Under Article 23 of the *Canadian Charter of Rights and Freedom* [sic], a few hundred Yukon children are entitled to receive French First-Language education, yet less than a third of them take advantage of this right.

[27] Despite evidence to the contrary, the judge concluded, at para. 640, that "the [Government] must have done...a study on the number of rights-holders." After determining that the number of students enrolled at EET in 2006 was 145, he found that "the evidence establishes that the number of rights-holders is between 400 and 435." It appears that the judge, in referring to "rights-holders" actually meant to refer to school-aged children of rights-holders.

[28] The Government argued that even if there were 400 school-aged children of rights-holders in Yukon, the numbers would not have required the establishment of a school board. It noted that a much larger number (3,750) was held to be insufficient for the establishment of a minority language school board in Edmonton in *Mahe*.

[29] The judge considered the absolute numbers to be of little import. He noted that the proportion of the school-aged population that was entitled to minority language education was higher in Yukon than in Edmonton (8% vs. 3.2%). He acknowledged that no Yukon school other than EET is currently governed by a school board, but noted that, under s. 72(3) of the *Education Act*, the electors in a school's attendance area are entitled to vote on the establishment of a school board, and, where the majority of voting electors vote in favour, a board must be established. He concluded that the number of school-aged children of rights-holders was sufficient to require the creation of a school board in the Yukon context.

[30] The judge, at para. 663, characterized the Government as having "refused or neglected to abide by its own legislation" and found that it engaged in "micro-management."

C. Employment Contracts for Principals

[31] The judge then turned to specific matters at issue in the litigation. The first concerned the length of the contract for the principal of EET. The Government requires the position to be a permanent appointment, primarily to conform with

provisions negotiated between it and its union. The CSFY contended that it should be entitled to set the term of the contract, and indicated a preference for a fixed term.

[32] The judge treated the issue as one of statutory interpretation. He found that regulations under the *Education Act* provide for fixed term contracts for principals. While provisions of the *Education Labour Relations Act* appear, on their face, to provide for permanent employment, the judge interpreted them to simply provide for the end of the probationary period. He considered them not to be inconsistent with term contracts.

[33] The judge found that nothing in the statutes or regulations precluded the CSFY from entering into fixed term contracts with the principal of EET. He also considered that the CSFY needed the ability to enter into a fixed term contract with a principal, because it did not have the option of transferring a principal to another school. While the judge acknowledged that the current collective agreement appears to preclude a fixed term contract for a principal, he considered that to be improper, and declared that the CSFY may appoint the school principal for a fixed term.

[34] Next, the judge turned to the issue of the school transportation. The CSFY took the position that it should have control of its own system for transporting students to school in order to ensure that transportation was carried out in conformity with the requirements of s. 23 of the *Charter.* The judge found that the cost of a separate transportation system could not be justified. He noted, however, that the Government was required to provide transportation in accordance with the school calendar adopted by the CSFY.

D. Professional Development, Staffing and Facilities

[35] The judge next addressed the number of hours of professional development for teachers. Both parties interpreted the *Education Act* as allowing teachers fifteen hours for professional development each year. The judge disagreed. While his reasoning is not completely clear, it appears that he did not consider professional development to constitute a "non-instructional purpose" under the statute.

[36] He found that, quite apart from the number of hours of professional development allowed, the Government's professional development programs failed to provide professional development opportunities in French. He concluded that the management of professional development had to be given over to the CSFY.

[37] The next issue discussed by the judge was the budget for staff, custodians, and utilities. The Government took the position that because the staff consisted of employees of government, the Government was required to pay them. It argued that payment of utilities was also its responsibility, as it holds title to the school property.

[38] The judge found that the CSFY was entitled to administer its budget, including staff salaries and deductions and including utilities charges. He considered that the government should be required to delegate its rights and obligations vis-à-vis the employees to the CSFY. He was further of the view that title to the school property should be transferred to the CSFY. In coming to these conclusions, the judge relied, in part, on specific wording in the *Education Act* and, in part, on his view, that management and control under s. 23 of the *Charter* required the budget for staff and for utilities to be in the hands of the CSFY.

[39] On the issue of school programs, the judge found that there was sufficient demand for special needs resources at EET to require the provision of those resources. He considered the issue to be one of whether EET had been provided with resources that were equivalent to those available to English language schools, citing *Dauphinee v. Conseil Scolaire Acadien Provincial*, 2007 NSSC 238. He found that some English language schools had been provided with special needs resources despite having demands in the same range as EET.

[40] On the issue of pre-school programs for children under 5 years of age, the judge noted that the Government has subsidized a pre-school program offered by CSFY for a number of years. He accepted, at para. 723, that there was a need for "francization and recruitment", finding these to be "part of the remedial steps contemplated by s. 23, and confirmed by the Supreme Court in *Mahe*."

[41] On the issue of staffing, the judge noted that the current staffing formula accords EET a supplementary budgetary allocation of 15% for professional educational staff allocation. The CSFY argued that the allocation was arbitrary and insufficient to account for the school's needs. It noted that the allocation was not based on an assessment of the actual educational needs of the students. It mentioned, in particular, its acknowledged need for a 1:12 teacher-student ratio in the pre-kindergarten and kindergarten classes and its need for higher than normal teacher-student ratios in order to deal with issues connected with exogamy (and the related need for remedial instruction in French as a first language).

[42] The judge found the 15% supplement to be an arbitrary allocation, and held it to be inadequate:

> [735] ...This formula does not take into account the high percentage of split or combined classes at EET, the lack of French pedagogical support resources, francization needs, recruitment or retention. The formula does not seem to take into account the needs of kindergarten 3 or pre-school, nor kindergarten 4, recognized by the GY in the Canada-Yukon agreement as being essential ... The formula does not recognize the fact that the CSFY is required to offer French first language instruction as well as English first language instruction, in contrast to every other school in the Yukon.

E. Admission of Non-Rights-Holders

[43] The judge next turned to the CSFY's argument that it was constitutionally entitled to admit the children of persons who do not hold s. 23 rights. The CSFY contended that the power to admit such children flows from its rights of management in matters affecting language and culture. The Government contended that s. 23 of the *Charter* establishes the extent to which it is required to establish minority language schools, and that it is not required to allow such schools to admit the children of non-rights-holders.

[44] The *French Language Instruction Regulation* contains the following provisions:

2. In this Regulation	2. Les définitions qui suivent s'appliquent au présent règlement :
...	...
"eligible student" means a student whose parent or parents are citizens of Canada who have the right under section 23 of the *Charter* to have their children educated in the French language and include those students whose parents or siblings would have the right under section 23 if they were citizens of Canada or if the instruction referred to in section 23 was not limited to Canada; «élève admissible»	«élève admissible» Élève dont un parent, étant citoyen du Canada, a le droit de faire instruire ses enfants en français en vertu de l'article 23 de la *Charte*. Sont compris les élèves dont les parents, les frères ou les soeurs auraient ce droit s'il étaient citoyens canadiens ou si l'instruction visée à l'article 23 ne se bornait pas au Canada; "eligible student"
9. Only eligible students shall be entitled to receive French language instruction at a school in Education Area #23.	9. Seuls les élèves admissibles ont le droit de recevoir une instruction en français dans une école du district scolaire 23.

[45] Notwithstanding these provisions, the practice since the establishment of the CSFY as a school board in 1996 has been to allow the CSFY flexibility in admitting students. In January 2010, the CSFY adopted an admission policy which is as follows:

> La CSFY peut accorder la permission d'admission aux enfants provenant des catégories suivantes:
>
> (a) dont un ancêtre était francophone;
>
> (b) dont un parent est un immigrant francophone ou un immigrant qui parle ni le français, ni l'anglais; et
>
> (c) dont les parents sont anglophones et veulent s'intégrer à la communauté minoritaire francophone.
>
> La CSFY peut accorder l'admission à des enfants provenant de l'extérieur des trois catégories garanties d'admission à l'article 23 en autant que cela:
>
> (a) fait avancer l'enseignement du français langue première;
>
> (b) fait avancer l'épanouissement et le développement de la communauté minoritaire de langue officielle; et
>
> (c) ne menace pas la survie de la langue majoritaire provinciale/territoriale.
>
> [TRANSLATION]:
>
> The CSFY may grant admission to children in the following categories:
>
> (a) those who have an ancestor who was francophone;

(b) those with a parent who is either a francophone immigrant or an immigrant who speaks neither French nor English; and

(c) those whose parents are anglophones and wish to integrate into the minority francophone community.

The CSFY may grant admission to children who are not within the three categories guaranteed admission under s. 23 [of the *Charter*] as long as their admission:

(a) promotes instruction in French as a first language;

(b) promotes the development and flourishing of the minority official language community; and

(c) does not threaten the survival of the majority language of the Province/Territory.

[46] On May 17, 2010, the date the trial commenced, the Government gave the CSFY notice that it intended to begin enforcing the provisions of the *French Language Instruction Regulation* with respect to admissions. The judge agreed to allow an amendment to the pleadings to allow the CSFY to raise the issue of admission criteria.

[47] The judge referred to an exhibit filed at trial that indicated that in the 2010-11 school year, 162 students at EET were children of rights-holders – 141 on the basis of French being a parent's first language, 12 on the basis that a parent had received primary school instruction in French, and 9 on the basis that a brother or sister had received instruction in French. Twenty-five students were not the children of rights-holders. Of those, 8 were admitted on the basis of having a francophone ancestor, and 1 on the basis of having an immigrant parent who was either francophone or spoke neither French nor English (it is not clear whether this student would have qualified for admission under the Yukon regulation or not). Sixteen students were children of anglophones who wished to have their children educated in the francophone community – a category described on this appeal as "francophiles."

[48] While not referred to by the trial judge, data for other years were also filed. They showed a slow but steady growth in the number of children of non-rights-holders admitted to EET. In 2005-06, the percentage of students who were, at the time of admission, the children of non-rights-holders was 5%; by 2010-11, it was

13%. The growth was particularly evident in the francophile category, which grew from 0% to 9% of the school's population.

[49] The trial judge found that the CSFY has a constitutional right to admit the children of non-rights-holders to EET. His reasoning on the issue is brief:

> [762] I find that the control and management of admission of rights holders and non rights holders falls to the CSFY. This conclusion is in keeping with the following comments of the Supreme Court in *Arsenault-Cameron* (paras. 43 and 44):
>
> > [43] ... Where a minority language board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province...
> >
> > [44] When the Minister exercises his discretion to refuse a proposal pursuant to the Regulations, his discretion is limited by the remedial aspect of s. 23, the specific needs of the minority language community and the exclusive right of representatives of the minority to the management of minority language instruction and facilities...
>
> [763] A school board's management power over admissions is not unlimited. The province or territory has the right to intervene in two situations: the first is where the official minority language threatens to assimilate the majority language in the territory (*Solski* [*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14] and *Nguyen* [*Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47]), and the second is where the minority school no longer fulfills its mandate under s. 23 of the *Charter*.
>
> [764] For all of the foregoing reasons, I find that the CSFY has the right to manage and control admissions, and therefore any regulation under the *Education Act* which limits this right is unconstitutional.

F. Facilities

[50] The next issue addressed by the judge was facilities. The CSFY argued that the Government had a duty to fund the construction of a building to house a separate secondary school.

[51] While acknowledging that current registration from pre-kindergarten to grade 12 is 184 students, the judge noted that he had to consider not only current demand, but also potential future demand for space. He had, as we have noted, determined

that there were approximately 400 to 435 school-aged children of rights-holders in Yukon. He determined that that estimate should be augmented to account for pre-kindergarten students, students who would take advantage of a K-3 program for children under the age of 4, and children of non-rights-holders admitted by the CSFY. Based on an assumption that 80% of eligible students would attend the school, he estimated future demand to be 320-400 students. He projected the number of secondary students to be 90-150, and found, at para. 774 that a population of 90-125 secondary students would "be viable from a pedagogical point of view." He found that the current facility would not be sufficient for the school population that he projected.

[52] The judge considered the established pre-kindergarten program to be integral to EET and to the CSFY's functions. He also found that a planned new K-3 program for children under the age of 4 needed to be added. Finally, he found that in order to be competitive with nearby anglophone schools so as to retain students, EET should have dedicated facilities beyond those that now exist. Among the facilities mentioned in the expert report of Mr. Kubica, accepted by the judge, were an industrial arts facility, an accessible music room, additional gymnasium space, a full-time library, a multi-use space for special needs students, a weight room, a cafeteria, and dedicated rooms for special needs students, distance education, and seminars.

[53] The judge found that there is a current need for additional space and facilities at EET. Based on the Government's surplus in 2010, he concluded that the Government could afford to spend $30 million on a new secondary school for the CSFY. He considered, however, that the appropriate solution was the construction of an addition to EET on the existing grounds. Such a building would serve as a minority community center as well as a school.

G. Languages Act

[54] The judge next addressed issues raised by alleged contradictions between s. 6 of the *Languages Act* and a Department of Education Policy establishing English as the Government's language of the workplace.

[55] The operative provision of the *Languages Act* is s. 6(1), which is in the following terms:

6(1) Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French....	6(1) Le public a, au Yukon, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions de l'Assemblée législative ou du gouvernement du Yukon ou pour en recevoir les services.

[56] The judge noted that s. 6 appears to be modelled on s. 20 of the *Canadian Charter of Rights and Freedoms*, which establishes a constitutional right to communications and services in both official languages in respect of dealings with the Government of Canada and the Government of New Brunswick.

[57] He also referred to s. 1 of the *Languages Act*.

1(1) The Yukon accepts that English and French are the official languages of Canada and also accepts that measures set out in this Act constitute important steps towards implementation of the equality of status of English and French in the Yukon.	1(1) Le Yukon accepte que le français et l'anglais sont les langues officielles du Canada et accepte également que les mesures prévues par la présente loi constituent une étape importante vers la réalisation de l'égalité de statut du français et de l'anglais au Yukon.
(2) The Yukon wishes to extend the recognition of French and the provision of services in French in the Yukon.	(2) Le Yukon souhaite étendre la reconnaissance du français et accroître la prestation des services en français au Yukon.

[58] The judge noted the similarities between that section and s. 16(1) of the *Charter*:

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.	16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.Yukon.

[59] Finally, the judge noted the "quasi constitutional" nature of the *Languages Act*, which is given special protection under s. 27 of the *Yukon Act*, S.C. 2002, c. 7:

27(1) The ordinance entitled the *Languages Act* made on May 18, 1988 under the former Act and any successor to it may not be repealed, amended or otherwise rendered inoperable by the Legislature without the concurrence of Parliament by way of an amendment to this Act.	27(1) L'ordonnance relative aux langues prise le 18 mai 1988 en vertu de l'ancienne loi et les textes qui la remplacent ne peuvent être abrogés, modifiés ou rendus inopérants par une loi de la législature sans l'agrément du Parlement donné sous forme de modification de la présente loi.

[60] The Government has attempted, in Volume I of the *General Administration Manual (Corporate Policies – General)*, to provide guidelines to ensure compliance with the *Languages Act*. Policy 1.7 – French Language Policy includes the following provision:

> 1.3.2.1 Recognition of French:
>
> The Government of Yukon wishes to extend the recognition of French and to provide services in that language.
>
> This means the measures in the *Languages Act* promoting and providing for the use of French are rights to which members of the public are legally entitled. The Act commits the Government of Yukon to providing public services in French where those services are already available in English. Notwithstanding these commitments, the administrative language of work in the Yukon public service is English.

[61] The judge found that the part of the policy declaring the administrative language of work in the Yukon public service to be English contravened the *Languages Act*. In the result, he made an order that all communications between the Government and the CSFY, whether written, verbal or electronic, as well as all services, be provided in French.

H. Breach of Fiduciary Duty

[62] The final issue addressed by the judge was a claim for breach of fiduciary duty brought by the CSFY against the Government concerning $1,954,228 which Yukon was entitled to receive from the Federal Department of Canadian Heritage under the *Protocol for Agreements For Minority-Language Education and Second Language Instruction 2005-06 to 2008-09 between the Government of Canada and the Council of Ministers of Education, Canada*. Under that protocol Yukon was to be

entitled to funds for minority language education, and other funds for French as a second language instruction.

[63] On January 18, 2006, the Director General of the Official Languages Support Programs Branch of the Department of Canadian Heritage wrote to the Assistant Deputy Minister and Superintendent of Schools at the Department of Education. He did so because he understood the Government to be seeking to re-allocate federal funding, so that funds originally earmarked for French First Language ("FFL") objectives would instead be used for French as a second language objectives. He said:

> Canadian Heritage is seriously considering this transfer request. However, given the already reduced funding to FFL in 2005-2006, I have concerns at this time approving such a transfer....
>
> [T]o enable Canadian Heritage to complete its analysis of the Yukon's multi-year action plan, it would be greatly appreciated if you could provide me with the Yukon government's reason for reducing its contribution to FFL while requesting increased federal regular funding for FFL and a transfer of federal additional funding from FFL to FSL.

[64] On January 30, 2006, Gilbert Lamarche, an employee of the Department of Education, wrote to the Director of Operations and Regional Coordination of the Official Languages Support Programs Branch of the Department of Canadian Heritage as follows:

> Using clause 6.4.3.3 of [the Council of Ministers of Education, Canada's] *Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2005-2006 to 2008-2009*, the Yukon Department of Education would like to request Canadian Heritage's approval to transfer funds from the French First-Language sector to the French Second-Language sector. The reallocation of funds would ensure the continuation of several new FSL initiatives such as: full-time Kindergarten, Late French Immersion Program, Extensive French Program Intensive French Program, etc. The Yukon Francophone School Board was consulted on this matter and agrees with the transfers.
>
> Transfers per year:
>
> - 2005-2006: $384,025
> - 2006-2007: $513,401
> - 2007-2008: $528,401
> - 2008-2009: $528,401

[65] The letter indicated that a copy of it had been sent to the Executive Director of the CSFY. The clause of the protocol referred to in the letter is as follows:

> 6.4.3.3 Transfers of additional funds between linguistic objectives may be made by the provincial/territorial governments with the prior agreement of the Government of Canada.

[66] The Department of Canadian Heritage responded on February 6, 2006, approving the reallocation. The Canada-Yukon Agreement on Minority-Language Education and Second Official Language Instruction 2005-06 to 2008-09 was entered into on March 31, 2006. It reflected the re-allocations of funds requested by Yukon.

[67] On April 8, 2008, the Chair of the CSFY wrote to the Department of Canadian Heritage, denying that the CSFY had ever been consulted with respect to the re-allocation.

[68] The judge found that the CSFY had not been consulted about the re-allocation of funds. Instead, he found that the CSFY made budget requests based on false advice from Mr. Lamarche as to the amounts that were likely to be available. The judge found that the budget requests did not fully meet the CSFY's needs.

[69] The judge held that the Government breached fiduciary obligations to the CSFY. He ordered it to compensate the CSFY for the $1,954,228 of re-allocated Department of Heritage Canada funds.

I. The Order

[70] The judge's formal order after trial was a lengthy and complex one. It included provisions:

- Declaring that he remained seized of the matter;
- Declaring that there were 400 to 435 children of s. 23 rights-holders in Yukon;
- Declaring that that number of children justified the establishment of a school board with powers stipulated in the *Education Act* and that

such a board was also justified by the existing number of students (183) at EET;

- In regard to the management of facilities, staff, programs and finances, requiring the Government to respect the powers and duties of the CSFY as set out in the *Education Act*, and also but to take positive and active measures to implement them, taking into account the francophone rights under the *Education Act* and s. 23 of the *Charter*;
- Requiring the Department of Education to consult with the CSFY regarding the annual operations and maintenance budget within the time limits set out in the *Education Act*, as defined in s. 174;
- Requiring the Government to consult the CSFY regarding all collective bargaining regarding CSFY employees;
- Requiring the Government, in consultation with the CSFY, to establish a staffing formula taking into account the CSFY's particular needs and the requirements imposed by s. 23 of the *Charter*;
- Declaring that the CSFY may appoint the school principal for a fixed term, under a contract that is renewable at its pleasure;
- Declaring that the CSFY has the right to manage the land and buildings, including the necessary annual operations and maintenance budget, as provided under s. 174 of the *Education Act*;
- Requiring the Government to grant to the CSFY the human resources and funds necessary to enable it to fulfill its obligations under ss. 11, 15, 32, 33, 34, 42, 43, 44, 56, 116, 174, 175 and 178 of the *Education Act*, and the provisions of the *French Language Instruction Regulation*;
- Declaring that the CSFY has the power to establish its school calendar in compliance with s. 46 of the *Education Act*;
- Requiring that the Government respect the CSFY's duty to appoint a secretary-treasurer as contemplated by s. 127, and to provide a budget for the hiring of the secretary-treasurer, as contemplated by s. 174 of the *Education Act*;
- Requiring the Government to establish financing formulas for the CSFY, taking into account the specific needs arising out of s. 23 of the *Charter*;
- Requiring the Government, in consultation with the CSFY, to establish a professional development budget for its teachers, and provide funds according to that budget;
- Declaring that the expansion of EET will enable the CSFY to fulfill its mandate and carry out its obligations under s. 23 of the *Charter* and the *Education Act* and to accommodate students from Kindergarten 3 (or of pre-school age) to Grade 12;
- Declaring that the CSFY has the right to enlarge EET on the existing grounds to accommodate a secondary program offering courses

similar to those available in the other secondary schools in Whitehorse;

- Requiring the Government to provide the capital budget necessary for the expansion of the secondary school;
- Requiring that the expansion of EET will be sufficient to accommodate up to 150 students from Grades 7 to 12, in keeping with the concept of a school community centre. The expansion will incorporate the following: single class rooms, a dedicated science laboratory, an area for plastic and visual arts, an area for theatre arts (music and theatre), an area for francization, an area for English first language, an area for traditional industrial arts, an area for modern industrial arts (computers and technologies), a functional cafeteria/canteen, the expansion of the EET gymnasium to accommodate the secondary level, an area for teaching special needs children, an area for home economics, a student radio area, a working area for teaching staff, an area for specialized staff and cleaning and storage space;
- Requiring the Government to immediately undertake steps toward the construction, and requiring the expansion work to be completed within 24 months;
- Declaring that the Government may make a request to the Court to push back the deadline if it proves to be impossible to comply with it;
- Requiring the Government to give updates on its progress on a quarterly basis to the CSFY and the Court;
- Requiring the Government to provide, pending construction of the secondary school, two portables to accommodate an elementary and a secondary special needs resource room, and equitable access to premises in Whitehorse for traditional industrial arts;
- Declaring that the CSFY may manage the admission of individuals not expressly contemplated in s. 23 of the Charter;
- Declaring, pursuant to s. 52 of the *Constitution Act, 1982*, ss. 5, 6 and 9 of the *French Language Instruction Regulation* invalid as inconsistent with s. 23 of the *Charter;*
- Declaring policy 1.3.2.1, which established English as the administrative language of work of the public service to be inapplicable to the CSFY and its personnel;
- Requiring that all communications between the Government and the CSFY, whether written, verbal or electronic, as well as all services, be provided in French, in compliance with s. 6 of the *Languages Act;*
- Declaring that the Government had a fiduciary duty to consult the CSFY before transferring, for other purposes, the amount of $1,954,228.00 which was designated by the federal government for teaching French first language from 2005 to 2009;
- Imposing on the Government a constructive trust whereby it holds the sum of $1,954,228 for the CSFY.

J. Costs

[71] The judge requested written submissions from both sides on costs, setting a deadline of 14 days from the pronouncement of the judgment. Both sides filed their submissions on August 9, 2011.

[72] In its brief, the CSFY sought solicitor and own client costs in the amount of $969,190, covering all legal fees and disbursements from 2002, some seven years prior to the filing of the Statement of Claim. It also sought punitive costs in the same amount.

[73] On August 10, 2011, the Government requested a right to reply to the CSFY's costs brief, on the ground that what was being requested went well beyond anything that could have been anticipated. The court engaged in some correspondence with counsel, which we will discuss further in the reasons. Ultimately, the judge denied the Government's request to file a reply.

[74] In lengthy reasons indexed as 2011 YKSC 80, the judge awarded the CSFY costs in the full amount of $969,190 as well as an additional sum of $484,595.

IV. Analysis

A. Reasonable Apprehension of Bias

[75] The Government's primary ground of appeal concerns bias. It alleges that the trial judge's background, which was unknown to it until after the commencement of trial, leads to a reasonable apprehension of bias. It also says that a number of things that the judge said and did during the course of the proceedings were improper and should lead this Court to conclude that there is a reasonable apprehension that the trial judge was not impartial.

[76] Claims that a judge displayed signs of bias are, fortunately, rare. Successful claims are even more so. Judges are presumed to be impartial, and substantial indications of bias are necessary to displace that presumption. That said, judicial impartiality is absolutely crucial to the integrity of the legal system. Thus, it is never

necessary to prove that a judge was actually biased; all that is necessary is that there is sufficient indication of bias to create a reasonable apprehension of partiality.

[77] In *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350, the court, drawing on what was said in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, provided this summary of the principles applicable to claims of judicial bias at para. 7:

> i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (iii) the criterion of disqualification is the reasonable apprehension of bias;
>
> (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is *more likely than not that the judge*, whether consciously or unconsciously, *would not decide fairly*;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific.
>
> [Emphasis in original.]

[78] Bias may be apprehended on a variety of grounds. Obviously, a judge who has a personal interest in a matter must be disqualified from hearing it; the Latin maxim *nemo iudex in causa sua* (persons are prohibited from judging their own cause) represents the most obvious form of bias. Similarly, a judge will generally have to refrain from hearing a case in which close friends or relatives have an interest. While a judge may not, in such cases, have a personal interest in the outcome of the case, bonds of friendship or kinship are apt to impair the judge's ability to be impartial.

[79] The bias alleged in the case before us is not a bias based on the judge having a material interest in the matter. Rather, it is suggested that he was

attitudinally biased – *i.e.* that his beliefs or predispositions prevented him from approaching the case with the requisite impartiality.

[80] An apprehension of attitudinal bias may arise either from things that a judge does or says during a hearing, or from extrinsic evidence demonstrating that a judge is likely to have strong predispositions that will prevent impartial consideration of the issues.

[81] Care must be taken, however, in placing too much emphasis on a judge's activities or statements prior to being appointed to the bench. There is a strong presumption that upon appointment to the bench, a judge will put aside predispositions and judge cases according to their merits. Further, a judge need not disavow all opinions in order to be neutral. The point is well made by Cory J. speaking for a majority of the Supreme Court of Canada on this issue in *R. v. R.D.S.*, [1997] 3 S.C.R. 484:

> [119] The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
>
> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
> >
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> (*Canadian Judicial Council, Commentaries on Judicial Conduct* (1991), at p. 12.)

[82] On this appeal, counsel for the Government separates his argument into five separate categories that, he says, found a reasonable apprehension of bias:

A) Indications that the judge had decided certain questions of fact before hearing all of the evidence and argument;

B) Inconsistency in interlocutory decisions on the admissibility of evidence;

C) Interlocutory rulings in favour of the CSFY made in blatant contravention of rules of law and applicable procedures;

D) Sarcastic and disparaging remarks directed at counsel for the Government; and

E) The judge's background and current association with the Franco-Albertan Foundation.

[83] These categories strike us as somewhat arbitrary divisions, and we are not fully convinced that the incidents and situations that the Government relies on fit neatly into them. Nonetheless, they give some structure to the allegations, and we will use them for that purpose in our analysis.

[84] Before reviewing the various allegations, some comment should be made on the way that we have examined them. Counsel for the CSFY warns, in his argument, that the court must undertake a meticulous and complete examination of the case and review the entirety of the file before concluding that there is a reasonable apprehension of bias.

[85] There is merit in this position. Anyone can experience frustration, be annoyed, or simply "have a bad day." While trial judges are, in the main, extraordinarily patient and even-tempered, they too are subject to these human failings. We should not be too quick to label isolated instances of impatience, irritation, or stubbornness as indicators of partiality.

[86] We have taken up the plaintiff's invitation, and have read the entire transcript of the trial and all of the judge's written rulings. Having done so, we are able to say that, through most of the proceedings, the judge performed his duties in a professional manner. As we will indicate, however, there were several instances in which the judge's actions give rise to serious concerns, and the materials do not provide any suitable explanation for those events.

1. Predetermination of Facts

[87] The Government cites examples of situations in which it says that the judge appeared to pre-judge matters before hearing all of the evidence and argument.

a) Ruling on Confidentiality of Student Files

[88] The first situation arose during the testimony of Jean-François Blouin on June 1, 2010. Mr. Blouin gave evidence to the effect that two of his three children left EET as a result of the school's lack of resources for addressing special needs. Counsel for the Government attempted to cross-examine Mr. Blouin using information contained in the children's school files to show that their special needs had been addressed, and that those needs did not cause the children to leave EET. Counsel for the CSFY objected to this line of cross-examination on the basis that the Government had not listed or disclosed the student files. Counsel for the Government responded to the objection by saying, in essence, that the files originated with the CSFY, and that neither side had disclosed them because their relevance to the case was not apparent before Mr. Blouin gave his evidence.

[89] Counsel for the CSFY then raised an issue with respect to the confidentiality of student files. He contended that it was inappropriate for the Government to make use of the files without the consent of the parents.

[90] The judge appears to have immediately accepted that proposition without hearing argument. It is somewhat curious that he did so, given that both sides had, in fact, made extensive use of information gleaned from student files. In any event, he expressed considerable concern that the Government had breached the students' rights to confidentiality in providing information to its counsel.

[91] Counsel for the Government was not able to immediately address the issue, except in very general terms. At the end of the day's proceedings, the judge indicated that the issue of breach of confidentiality was a very serious one, and that he would await further argument on it the following morning.

[92] The following morning, counsel for the Government was prepared to argue the issue. He intended to refer the judge to certain provisions of the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c.1, and to argue that his client was entitled to disclose information to him for use in court proceedings. The judge, however, commenced proceedings by indicating that he would be ruling on

the matter. In his reasons, he cited s. 20 of the *Education Act* and s. 36 of the *Access to Information and Protection of Privacy Act.* He concluded that [TRANSLATION] "the defendant appears to have violated two statutes with a view to obtaining the information in question. The defendant's behaviour is objectionable and reprehensible."

[93] After the unexpected ruling, counsel for the Government reminded the judge that he had said that he would hear argument on the issue at the commencement of the proceedings. Counsel advised the judge that he wished to bring certain statutory provisions to his attention. The judge refused to listen. Instead, he repeatedly asked counsel whether he had obtained the consent of Mr. Blouin or his children to use the records. When counsel reminded the judge that the parties had both disclosed many student records in the discovery process, the judge accused him of playing games.

[94] The CSFY contends that the judge's conduct on this occasion does not raise concerns. It says that the judge treated both parties equally, as both had made superficial arguments when the issue arose initially, and neither had sought more time for argument. Further, it says that some of the cross-examination that the Government intended to embark upon was not proper. Finally, it says that any frailties in the reasons given by the judge on June 2 were corrected when he gave supplemental reasons on June 11.

[95] These arguments are not compelling. We are not convinced that both parties were treated "equally." The judge's disparaging remarks and dismissive attitude were directed only at the Government of Yukon and its counsel. As the judge had, from the outset, indicated that he was inclined to agree with the CSFY's position on the use of the files, his refusal to hear argument on June 2 was detrimental only to the Government.

[96] While it is true that neither party had expressly asked for additional time for argument, there was no need for them to do so. It is clear from the record that the issues had not been fully canvassed on June 1. Further, the judge clearly stated, at

the close of proceedings on June 1, that he intended to hear further argument on June 2.

[97] We are not persuaded that any supplemental reasons provided by the judge on June 11 can be of assistance, as he had already made his ruling and had unequivocally refused to hear further argument.

[98] Looking at what occurred on June 1 and 2, it seems to us that the judge's conduct was inappropriate. It is true that some of it may be explained; the judge's initial reaction to the use of student files was rather strong, but may simply have been an indication that he approached the issue with a particular understanding of the law. Even if his understanding was incorrect (an issue that we need not decide), he did not deny counsel a right to be heard on that day, and nothing in his statements indicates that he had closed his mind to the possibility of persuasion. While some of his comments on June 1 may not have been as respectful of counsel or of the Government as would have been desirable, we recognize that, particularly in the heat of a difficult trial, judges cannot be held to a standard of perfect courtesy.

[99] The judge's actions on June 2 are more problematic. There is no obvious explanation for his decision to commence the proceedings with a ruling when he had unequivocally stated, at the close of the hearing the previous day, that he would hear further argument. Nonetheless, the fact that he proceeded as he did is not necessarily an indication of animus against the Government's counsel or his client. It is possible that the judge had simply forgotten that he was to hear further argument.

[100] It is the judge's reaction to counsel's attempts to raise issues and draw his attention to statutory provisions, however, that is most difficult to countenance. Counsel politely drew the judge's attention to the fact that the argument had not been completed, and succinctly stated that he wished to draw the judge's attention to statutory provisions that the judge had overlooked. The judge's flat refusal to allow counsel to raise the issues is troubling and surprising. Rather than acknowledge that there were matters that still needed to be canvassed, the judge cut off all of counsel's attempts to raise the issues with demands that counsel answer questions

about his whether his client had obtained parental consent for disclosure. It does not appear that the judge's questions were genuinely directed at obtaining information; rather the impression left by the transcript is that the judge was, in effect, taunting counsel.

b) Interlocutory Injunction Application

[101] The second event of alleged pre-judgment raised by the Government concerns the granting of an interlocutory injunction at the close of the first phase of the trial in June 2010. The judge had initially intended to conduct the trial in two parts, ruling on the first part before embarking on the second. Near the close of the first phase of the trial, however, he recognized that he would have to make findings of credibility in order to render a decision. He elected, instead, to postpone his decision until both phases of the trial were completed. He advised the parties of the change in the proposed procedures, and said that he would accept an application by the CSFY for a mandatory interlocutory injunction.

[102] The judge ultimately heard the application, without a formal notice of motion, and without affidavits. He considered that the evidence he had heard during the first part of the trial was sufficient to decide the issue. After hearing argument, he granted an interlocutory injunction requiring the Government to fund three additional full-time positions for the 2010-2011 school year. The reasons are indexed as 2010 YKSC 34.

[103] The Government contends that the judge made a number of procedural errors in the way that he approached the interlocutory injunction application. It says that the judge should not, himself, have raised the issue of an interlocutory injunction in the absence of a motion by the CSFY. It further argues that the judge ought to have insisted on the CSFY filing a formal notice of motion, and ought to have required affidavit evidence on the issue of irreparable harm. It claims that the judge's ruling that he did not require additional evidence was prejudicial, as the Government had not cross-examined the CSFY's witnesses on the issue of irreparable harm.

[104] In our view, while the procedures adopted by the judge were imperfect, they do not provide any basis for an allegation of bias. The judge's invitation to the CSFY to apply for an interlocutory injunction appears to have been prompted by the CSFY's advice, early on in the proceedings, that it would need to seek interlocutory relief before the summer. At the close of the first phase of the proceedings, there were pressures on the court to deal with the injunction application in a timely manner. The judge had no real choice but to hear the application himself. By the time the application was entertained, the judge had heard a considerable amount of evidence, and would have been in a good position to evaluate the adequacy of the procedure that he proposed. Finally, it is unlikely that affidavits could have been filed and cross-examined upon in an efficient manner, so the judge was faced with considerable pressures to expedite procedures.

[105] We express no opinion on whether the procedure adopted by the judge for the hearing of the interlocutory injunction application was a proper one. We do say, though, that it was not so clearly erroneous as to give rise to, or contribute to, an apprehension of bias.

c) Judge's Encouragement of Settlement

[106] At the end of the first phase of the trial, the judge requested that counsel have their clients present in court. After hearing all of the submissions, he addressed the parties, encouraging them to enter into a settlement. He began his remarks as follows:

> When I was appointed over eight years ago, I was told, my first week when we were doing our training wheels as judges and before you actually get sworn in you go through these little training sessions and sit up with other judges and do all that kind of stuff. But one very senior and was a very well respected judge and this was in Alberta, in Edmonton, came to me, and who I knew before I was appointed, I had appeared before him and said, "One thing that is not wrong and which judges forget and even the lawyers forget is that you should remind people that it's never too late to settle," he said, "There is absolutely nothing wrong with telling people in the middle of your trial, before the trial, even after all the evidence is in, such as the sections that we're dealing with here, arguments are in, you know what, even the lawyers sometimes forget that you can settle. You can take these things out of the judge's hands and not be at the risk of rulings," and he said, "You should tell - - " and that's why I asked Maître Faille and Maître Lepage to have everybody

> here is that sometimes lawyers even forget to tell their clients that and of course, most of the time, clients don't know that.
>
> There is no rule that says you can't settle at any time, even after the evidence is in, arguments are in, until the day the judge drops his decision, you can settle and take it out of the hands of the Court.

[107] The judge then highlighted the public nature of judgments, and suggested that one reason to reach a settlement would be to avoid the publication of findings of fact:

> I realize this sounds a little bit like preaching but settlements in even part of a trial or all of the issues are very sound decisions because it avoids any future litigation, it avoids future appeals, it avoids, quite frankly, the findings of the Court, it avoids findings of Court that become public and in this case, there will be a written decision and I think it won't be an oral one, which means it's permanent, it's in writing.

[108] The judge proceeded with a somewhat disjointed discussion of fiduciary obligations, giving a clear indication that he was inclined to find a breach of fiduciary duty. In the course of concluding his remarks, he said:

> So we can argue until we're blue in the face about this case, about that issue but that seems to be clearly what the trust or the money was sent on that basis and what was expected. So, I invite you to consider that and of course, I specifically referred to this area and I'm very mindful that I still have to deal with this issue of the interim injunction. Obviously, if a settlement were reached in relation to that issue, there would be, obviously, no ruling, nothing in writing regarding conduct in relation to this whole area. But it would also render this interim injunction application moot, meaning there would be no argument to be made that there would be a shortage of funds if that matter were to be settled.

[109] The Government's counsel contends that these remarks were clearly directed at his clients, and were a strong indication that the judge had reached conclusions in advance of the conclusion of trial, including conclusions on the credibility of witnesses. Further, it says that the remarks were inappropriate and designed to put pressure on the Government to settle the case.

[110] Notwithstanding the judge's opening remarks suggesting that an experienced judge recommended reminding the parties, in the midst of trial, that they should consider settlement, we are of the view that the court should exercise considerable

restraint in doing so. Judges should recognize that it is the role of counsel to advise their clients, and should avoid the appearance of giving advice directly to parties who are represented.

[111] Where a judge, in encouraging settlement, refers to evidence and possible rulings, there is a very real possibility that it will be seen as a pre-judgment of issues – see for example *Lloyd v. Bush*, 2012 ONCA 349.

[112] In our view, the remarks that were made in this case did indicate that the judge had reached a conclusion on the fiduciary duty issue. We do not, however, agree with the Government that this indicates pre-judgment or bias. By the time the judge's remarks were made, he had heard all of the evidence on the first phase of the trial, and argument with respect to the fiduciary duty claim had concluded. The judge was entitled, at that time, to reach a conclusion, and the fact that he had done so is not a ground for finding bias.

[113] The Government's argument that the judge's remarks were inappropriate and designed to pressure it into a settlement, however, are well-founded. A reasonable person hearing the remarks would recognize that they were directed at the Government employees who were instructing counsel. The remarks effectively conveyed a threat that, unless a settlement was reached, a judgment that was critical of the conduct of the Government and its employees would be pronounced. Further, the judge emphasized that the judgment would be written and "permanent," and that it could be avoided through settlement.

[114] When read in context it is apparent that the judge's remarks, though made in the presence of both parties, were designed to put pressure on the Government to settle. In placing such pressure on the Government, the judge effectively aligned himself with the interests of the CSFY. This was not appropriate.

[115] Although it does not affect the issue of reasonable apprehension of bias, we would also comment that it is unseemly for a judge to recommend that a public body enter into a settlement in order to keep matters out of the public gaze. Settlements

by public bodies must be driven by the public interest, not political concerns or worries about the reputations of individual government employees.

d) Evidence of Christie Whitley on Special Needs Students

[116] During the second phase of the trial, Ms. Whitley gave evidence with respect to situations in which special needs students may be removed from mainstream classes. She indicated that Government policy saw removal from mainstream classes as a last resort. She stated that the five students that CSFY said needed to be removed from mainstream classes represented a high number, and she expressed the view that it might be explained by a failure by EET to follow the policies of the Department of Education with respect to the steps to be taken before removing special needs children from classes.

[117] In cross-examination, Ms. Whitley was asked about EET's following of policies in respect of the removal of special needs students from classes. Counsel for the Government objected, arguing that it would be impossible for the witness to answer the question without examining student files. Given the judge's earlier ruling on the propriety of information in student files being raised in evidence, he argued that the issue could not be fairly canvassed.

[118] After hearing brief argument, the judge indicated that the Government was required to present proof that proper procedures were not being followed, in the absence of which he would find that the procedures followed were proper. The judge then adjourned to allow the Government to consider its position.

[119] When the proceedings resumed, the Government reiterated its objection. Counsel noted that the witness would be able to look at the individual student files, but would not be able to tell the Government's counsel what she found. In the result, counsel said, the Government would have been unable to lead the evidence and it would be unfair to allow it to be led in cross-examination.

[120] The judge engaged in a testy exchange with counsel. Ultimately, he ruled that the witness was required to answer the question as to whether proper procedures

were followed. The judge indicated that he would allow an adjournment to allow the witness to look at the files. The judge also ruled that despite being under cross-examination, the witness should not be prohibited from speaking to counsel. On the question of whether the witness could discuss the contents of the file with counsel, the judge's position was unclear. At one point, he suggested that that was allowed, but later he seemed to resile from that position, and indicated that she could only advise her counsel as to whether or not the procedures were followed, without divulging details of the file. When counsel specifically asked whether he could discuss the contents of the files with his client, the judge refused to give an answer, simply telling counsel: [TRANSLATION] "You know your rights as counsel and your duties as counsel. I am not going to tell you what they are."

[121] During the ensuing adjournment, the witness was able to determine that the CSFY had not made an application to the Department of Education to have the students withdrawn from classes. As this was part of the required procedure, it was unnecessary for her to proceed to examine the five student files. When proceedings resumed, she was able to answer the question put to her in cross-examination by saying that proper procedures had not been followed.

[122] The judge, in his reasons, was critical of Ms. Whitley, finding that she had "intentionally tried to deceive the Court":

> [597] Further, Ms. Whitley intentionally tried to deceive the Court regarding the topic of special needs classes, with the purpose of convincing the Court that no additional space was necessary to meet this need. She said that the number of students at EET was very high. She relied on her interpretation of the Court's order not to share a particular student's file to support her position that she could not check the EET files regarding special needs classes. In spite of the fact that the *Education Act* permits, or even requires Ms. Whitley and her department to undertake such verifications regarding special needs classes, Ms. Whitley refused to look at the student files in question when the Court granted an adjournment for this purpose. Ms. Whitley went on to say, under oath, that the EET had not followed the procedure, without knowing whether or not the procedure had been verified.

[123] There was no basis for the judge's finding that Ms. Whitley had "intentionally tried to deceive the Court" or that she "refused to look at the student files." The judge

also misconstrued the argument put forward by the Government's counsel. Finally, he misapprehended the evidence in saying that Ms. Whitley gave evidence under oath that was outside her knowledge.

[124] By themselves, we would not find that these errors, serious as they are, suggest partiality on the part of the trial judge. A judge may misconstrue evidence without doing so as a result of partiality.

[125] The exchange between the judge and counsel when he raised his objections was one in which the judge displayed impatience and was irritable. We are unable to attribute the judge's reaction to anything said by counsel. Even so, if it stood alone, this incident would not constitute strong evidence in support of a claim of bias. It is, however, of some import in the context of the other incidents raised by the Government.

e) Application to Accept Mr. DeBruyn's Evidence by Affidavit

[126] The Government proposed to call Gordon DuBruyn as a witness at trial. Shortly before the scheduled trial date, he suffered a stroke. The Government applied to adjourn the trial. While the judge did not accede to that request, he ordered the trial to proceed in two phases. Mr. DeBruyn would be a witness only on the second stage.

[127] Unfortunately, Mr. DeBruyn had not fully recovered from the stroke by the time the second phase of the trial commenced. Counsel for the Government was of the view that it would not be appropriate for him to give *viva voce* evidence.

[128] On January 19, 2011, counsel for the Government advised the court that he intended to apply to have Mr. DeBruyn's evidence admitted by way of an affidavit. There was discussion between counsel and the court as to Mr. DeBruyn's condition, and counsel produced a letter from a speech-language pathologist explaining Mr. DeBruyn's condition. That letter said, in part:

> Although Mr. DeBruyn has recovered extremely well, he continues to experience mild residual aphasia. Aphasia is a language difficulty that can affect a person's understanding of spoken and/or written language as well as

> verbal and/or written expression. Mr. DeBruyn continues to make paraphasic speech errors occasionally; that is, he sometimes uses an unintended word related in meaning or form to the intended word.
>
> Feeling stressed or nervous and being presented with questions verbally in a courtroom situation may exacerbate Mr. DeBruyn's communication difficulties during his cross examination. He may hence make aphasic speaking errors. Therefore, it is recommended that Mr. DeBruyn be given questions in writing instead of being questioned in a courtroom. It would also be helpful, if Mr. DeBruyn could write down his responses and review them several times before being asked to submit his answers. This will allow him to confirm their accuracy and correct any potential language errors.

[129] The judge asked counsel a number of questions. He was critical of counsel for not having determined Mr. DeBruyn's condition earlier, and expressed doubt as to whether Mr. DeBruyn was a necessary witness at all. The judge also noted that Mr. DeBruyn had returned to work on a graduated basis, and was giving counsel instructions. In the circumstances, the judge expressed scepticism as to his speech difficulties. He noted, as well, that the difficulties pointed out in the letter were said to be difficulties for cross-examination, not examination-in-chief. The judge indicated that, according to his own observations, counsel for the CSFY was, in his cross-examinations, "neither aggressive nor confrontational, very direct and methodical in his questioning."

[130] The judge indicated that he did not, based on the letter, see a basis for a request for testimony to be given by affidavit. He advised counsel that he could make the application, but gave him a warning:

> [TRANSLATION] [I]f you still want to make your application, you can. But at some point, my friend, you will have to realize that if you engage in delay tactics with letters that say that a person is able to testify, then maybe have some problems in cross-examination, that this sort of application could be seen as obstructive, made simply to cause delay... Sometimes these things are dealt with as questions of costs. And sometimes, if it is viewed not necessarily as the action of the client, but of the lawyer, it can be dealt with as costs against the lawyer personally.

[131] Counsel did not proceed with the application. Ultimately, Mr. DeBruyn did not testify. In his costs ruling after trial (2011 YKSC 80), the judge describes the situation involving Mr. DeBruyn as one of "bad faith" making essentially the same observations that he did during his discussions with counsel on January 19.

[132] In our view, the judge's treatment of this matter is indicative of bias against counsel. There was no basis for the judge's findings that Mr. DeBruyn was not an important witness, nor any basis for criticizing counsel for waiting until January to make the application, given that Mr. DeBruyn's recovery appeared to be ongoing.

[133] While it appears that the proposed application to have Mr. DeBruyn's evidence presented by way of affidavit was a weak one, and might well have been rejected, the judge's treatment of counsel was improper. There was no basis for accusing counsel of engaging in delaying tactics, and certainly no basis to threaten counsel with an order of costs. In our view, the exchange between the judge and counsel on January 19, 2011 provides strong evidence of a reasonable apprehension of bias.

f) Refusal to Allow a Reply to Costs Submissions

[134] As we have indicated, following the release of reasons, the trial judge gave each party 14 days to make submissions as to costs. It appears obvious to us that the CSFY had been the substantially successful party, so the usual practice would have been for it to make its submissions first.

[135] The CSFY costs submission was extraordinary in several respects. First, it claimed not only "solicitor and own client" costs, but also an equal amount for "punitive costs." Further, it claimed costs back to 2002, well before the claim was filed. As well, the submission set out the amount of the expenditures ($969,190), and sought to have the judge endorse the amount as fixed costs rather than having them assessed by the registrar.

[136] The CSFY submission took the Government by surprise, and the Government sought leave to file a response. The judge ultimately refused to allow the Government to respond. Before doing so, however, he asked the Government to provide him with an affidavit setting out details of its own fees and disbursements, despite the fact that it was not claiming a right to those costs. He also requested that the Government provide "the details and schedule regarding the concessions which

it is still prepared to grant the Plaintiff." The Government declined to fulfill those requests.

[137] In a scathing judgment (2011 YKSC 80), the judge awarded the CSFY costs in a lump sum of $1,453,785.

[138] We are of the view that the procedure followed by the judge in awarding costs was grossly unfair. Because the Government could not have reasonably foreseen the extraordinary costs claim put forward by the CSFY, it could not have been expected to address it in its original costs submissions. The judge's demand for documentation from the Government that appears, on its face, to have had no relevance to the issues is hard to understand.

[139] Indeed, the judge's departures from usual procedures with respect to costs and the unfairness of the procedure that he adopted are so manifest that we are unable to attribute them to mere error in the judge's analysis or approach. We are driven to the conclusion that the judge's approach to the costs issue gives rise to a reasonable apprehension of bias.

[140] We acknowledge that a reasonable apprehension of bias with respect to the costs proceeding does not necessarily equate to a reasonable apprehension of bias at trial. We are of the view that there are sufficient other indicia of a reasonable apprehension of bias in respect of the trial, however. Accordingly, it is not necessary for us to explore the question of whether the judge's conduct of the costs proceedings might be indicative of bias on the trial, as well.

2. Inconsistent Evidentiary Rulings

[141] The Government takes the position that the judge's rulings on evidentiary issues were inconsistent, and that they favoured the CSFY.

[142] First, it notes certain passages of the judgment in which the judge characterizes cross-examination by Government counsel as "aggressive" or as being "personal attacks". No such criticism was made of counsel for the CSFY.

[143] We are not able to accept the suggestion that the judge's comments in this respect evidence bias. First, it is difficult for this Court to fully evaluate the judge's characterizations of the various cross-examinations on the basis of the transcripts, as the degree to which they may have been "aggressive" depends not only on the words that were used, but also on the timing and tone of the questioner. We do note that the judge, at various places in his judgment and in the transcript, criticized counsel for the defendants for "repetitive" cross-examination. In most cases, we are unable to agree with the judge's characterization. That said, none of those comments rise to a level suggestive of bias.

[144] The Government also points to various rulings on the admissibility of documents that were not disclosed in a timely manner, the admissibility of hearsay, and the admissibility of lay opinion evidence. We have examined the various rulings referred to by the Government. While we agree that there are some discrepancies in the judge's rulings (particularly in respect of opinion evidence), we are not persuaded that the judge's approach to the admissibility of evidence was indicative of bias.

[145] Finally, the Government complains that it was not allowed to call Mr. Lamarche as a witness, on the basis that it was unable to produce him until after the close of the first phase of the trial. It seems to us that the judge's ruling was a discretionary one that was open to him. We are unable to find that the ruling was tainted by bias.

3. Interlocutory Rulings in Favour of the CSFY

[146] The Government also draws the court's attention to rulings by the judge allowing witnesses to give evidence as to why many students leave EET at the secondary level. The Government objected to the evidence, arguing that it was hearsay or opinion evidence.

[147] The Government took the position that in order to establish that students left EET for other secondary schools because of EET's lack of facilities, the CSFY had to call individual students who had left, or the parents of those students. The judge

was concerned as to the number of witnesses who might need to be called. He was also of the view that it would not be appropriate to have children testify on the issue.

[148] The judge heard extensive argument on the admissibility of various pieces of evidence. In many cases, he allowed the evidence to be presented, but in others, he did not.

[149] The Government contends that the rulings made by the judge failed to apply the principled exception to the hearsay rule, and that he was manifestly wrong in allowing any of the evidence to be presented. It says that this Court should infer partiality on the part of the judge.

[150] We are of the view that the judge's various rulings on this subject do not assist the Government in demonstrating a reasonable apprehension of bias. The judge heard extensive argument on the subject, and provided brief reasons for his rulings. The transcript leaves us with the impression that the judge gave serious consideration to the issue of the admissibility of the evidence. Whether or not his rulings were correct, we are not of the view that a reasonable and dispassionate observer would see them as evidencing bias.

4. Disparaging Remarks Directed at Counsel

[151] The Government points to a number of instances during the trial where, it says, the judge disparaged its counsel or made sarcastic remarks.

[152] This is a difficult matter to review on the basis of the transcript alone, as it is often difficult to discern the tone of the proceedings from the words used.

[153] In some instances, it is clear to us that the remarks made by the judge are not objectionable. For example, counsel for the Government complains that the judge, on a number of occasions, commented that counsel's cross-examination was a waste of time. He cites *Shoppers Mortgage & Loan Corp. v. Health First Wellington Square Ltd.* (1995), 23 O.R. (3d) 362 (C.A.), for the proposition that such comments are objectionable. We would observe that much depends on context. For example,

one of the instances cited by counsel occurred during a cross-examination that had continued much longer than anticipated. Counsel had cross-examined the witness on a number of emails. The judge made the following observation: [TRANSLATION] "Counsel, to read the emails and then to repeat them in French seems to me to be a bit of a waste of time."

[154] We see nothing at all objectionable in this sort of intervention. While it is mildly critical of the manner in which counsel posed his questions, it is not a personal attack, nor is it a comment on counsel's professionalism. Indeed, it appears to us that it may well have been intended simply as a suggestion for speeding up the proceedings.

[155] Other events that occurred at trial are of greater concern. On January 26, 2011, the day after Ms. Whitley gave her evidence, the judge opened proceedings by admonishing counsel for the Government for the position he had taken. The judge said that counsel's submissions "lacked conviction and/or sincerity." The admonition does not appear to us to have been justified.

[156] On June 3, 2010, counsel for the Government interrupted his cross-examination of a witness in order to request that the judge not grimace in response to his questions. The respondent asserts that it was reasonable for the judge to react negatively to the questioning. We have carefully reviewed the relevant portion of the transcript, and are unable to agree that any negative comment from the judge was called for. In any event, we doubt that a grimace can be characterized as an appropriate method of judicial comment.

[157] It is difficult to know whether the grimacing event of June 3 (which is clearly documented) was an isolated one. In an affidavit filed by the Government in support of its recusal application, the Director of Policy of the Department of Education deposed that:

> 27. Throughout the trial, the trial Judge engaged in behaviour that appeared highly unprofessional including looking at CSFY's counsel and visibly mocking and laughing along with CSFY's counsel while evidence was being presented, and grimacing and mocking in relation to legitimate points

> being presented on behalf of counsel for the GY. There were numerous occasions throughout the trial when the Judge could be seen shaking his head, as if in disbelief, or laughing at evidence being presented by witnesses for GY. While I understand judges are entitled to react to evidence, I was dismayed that the Judge reserved his obvious scorn exclusively for the evidence and submissions of GY....

[158] In the judge's ruling on the recusal application (2011 YKSC 1), he said:

> [43] ... [T]he YG alleges that I mocked the YG, grimaced during the YG's presentation of arguments, and laughed together with the CSFY's counsel. It is important that judges be reserved, calm and moderate. However, they cannot be expected to remain completely impassive, particularly during long trials. It should be noted in this respect that phase one of the trial lasted six weeks. Both counsel before the Court are very experienced. They advance their cases with passion and are very familiar with the adversarial system.
>
> [44] In short, it is essential to read the entire transcript to fully appreciate the context of the entire proceeding. As well, oral reasons in their entirety must be taken into account.
>
> [45] Once again, the threshold for a successful allegation of perceived judicial bias is high. Having carefully considered the YG's arguments, I find that a reasonable, right-minded and well informed person would not have an apprehension of bias on the part of the Court.

[159] It is difficult for this Court to come to grips with this matter. If the judge was, "throughout the trial," engaging in the conduct deposed to by the Government's witness, it would raise a reasonable apprehension of bias. While we agree with the trial judge's comment that a judge "cannot be expected to remain completely impassive," we would observe that frequent and overt displays of derision towards a party or its counsel are not acceptable.

[160] We have, as recommended by the trial judge, read the entire transcript and the oral reasons. Even with this material, there are difficulties in evaluating what occurred at trial. It is rare for the judge's facial expressions to be the subject of comment in the transcript, and it is impossible to know whether the judge was, during questioning, making eye contact with the CSFY's counsel, or laughing. We note that while the affidavit provided by the Government's witness is not contradicted, it is also not the evidence of an independent witness. In the circumstances, we are reluctant to place too much emphasis on it.

[161] Quite apart from issues of facial expressions or laughter, however, we are of the view that the judge treated counsel for the Government with a lack of respect on many occasions during the trial. This treatment does not appear to be the result of any misconduct by counsel during the trial, nor is there reference in the transcript to anything in the pre-hearing proceedings that may have precipitated the judge's treatment of counsel. In the circumstances of this case, we are of the view that the judge's treatment of counsel must be taken into account in considering the question of whether there is a reasonable apprehension of bias.

5. The Judge's Background

[162] The final factor that the Government points to as giving rise to a reasonable apprehension of bias is the judge's historical political involvement in the minority francophone community in Alberta and his ongoing status as a governor of the Fondation franco-albertaine ("FFA").

[163] The trial judge is a judge of the Alberta Court of Queen's Bench (appointed in 2002) and a deputy judge of the Supreme Court of Yukon (appointed in 2005). Before his appointments, he was deeply involved with minority language education in Alberta. He played a key role in the creation of l'École du Sommet in St. Paul, Alberta. In 1994, he was recognized for his efforts in that regard by l'Association canadienne-française de l'Alberta ("ACFA"). Thereafter, he served as an elected school trustee on the Conseil scolaire Centre-Est de l'Alberta from its inception in 1994 until 1998.

[164] From 1999 until 2001, he served as a member of the executive of the ACFA, an organization that lobbies on behalf of and promotes the Alberta francophone community. Among its several mandates is the encouragement, facilitation and development of French language instruction.

[165] The evidence shows, as well, that the trial judge was, at the time of the trial, a governor of the FFA. The foundation's mission statement indicates that it is dedicated to [TRANSLATION] "an autonomous, dynamic and valued Albertan francophonie." The philosophy of the foundation was described as including the

following statement [TRANSLATION]: "[W]e have had to fight the same fights many times, for schools, for services, for the simple right to exist. For us, nothing has ever been obtained once and for all."

[166] The Government says that a reasonable apprehension of bias arises from the judge's history of involvement with minority language education in Alberta, from his former position with ACFA, and from his current position with the FFA.

[167] The CSFY disputes the suggestion that a reasonable apprehension of bias arises from the judge's participation in any of these organizations. As a preliminary matter, however, it argues that the Government did not raise its objections based on the judge's background in a timely manner. It says, therefore, that the objections should not be entertained. We accept that, in general, allegations of bias should be raised at the earliest practical juncture. In this case, the issue of bias was not raised until the break between the first and second phases of the trial.

[168] The CSFY says that the judge's background was a matter of public record. It also notes that counsel for the Government appeared before the same judge, sitting as a deputy judge of the Supreme Court of the Northwest Territories, in a s. 23 case in 2005. It says that the Government must have been aware of the judge's background.

[169] We are not persuaded by this argument. The mere fact that counsel had previously appeared before the judge in another case does not lead to an inference that he knew the judge's personal history.

[170] The suggestion that the Government knew of the judge's background prior to trial is not made out in the evidence. The affidavit of Cyndy Dekuysscher indicates that she became aware of the judge's background only after the close of the first phase of the trial. Nothing in the evidence casts doubt on that statement, and nothing suggests that other persons guiding the Government's case had knowledge earlier than Ms. Dekuysscher.

[171] The contention that the Government ought to have known of the judge's background is also without merit. In saying that the judge's background is a matter of public record, the CSFY simply means that the Government could have researched it on the Internet. No doubt that is true – the evidence produced by the Government on the recusal application was derived from a variety of websites that are open to the public. But the fact that the Government could have done the research earlier does not mean that it had a duty to do so. A party appearing in front of a judge is not expected to research the judge's antecedents. Parties are entitled to assume that a judge will disclose anything in his or her background that might cause concern for the fair trial of a case.

[172] We turn, then, to the substance of the complaint. The complaint concerning the judge's association with francophone community organizations prior to his appointment to the bench raises different issues from those that are raised by his current association with the FFA. We will, therefore, begin our analysis by considering the associations that pre-date the judge's appointment to the bench.

[173] It is clear that, in deciding whether a judge is disqualified from sitting on a matter, the criteria is one of "reasonable apprehension of bias." The Supreme Court of Canada has affirmed that the test is identical to the test for disqualification of a tribunal member articulated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. In *Wewaykum*, the court said:

> [60] In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:
>
> > ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

[174] In *Wewaykum*, the court noted that the question of whether there is a reasonable apprehension of bias is fact-driven, and that a close examination of context is required:

> [77] [T]his is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

[175] The judgment in *Wewaykum* clearly indicates that there is a strong presumption of judicial impartiality. In order to show that a judge is tainted as a result of some previous association, there must be a reason to suspect that the association has so deeply affected that judge that he or she will be unable to overcome bias. There is a strong presumption that a judge will be true to his or her oath to decide cases impartially: *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176 at para. 30; see also the comments in *D.M.M. v. T.B.M.*, 2010 YKSC 68 at para. 6, which this Court specifically endorsed at para. 40 of its judgment on appeal (2011 YKCA 8).

[176] Though it is an obvious one, it is worth emphasizing the point made by Cory J. in *R.D.S.* at para. 115:

> [115] ...it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

[177] The mere fact that, prior to being appointed to the bench, the judge was a leader within the francophone minority community in the area around St. Paul, Alberta does not raise any credible concerns that he is biased.

[178] As a member of the executive of ACFA prior to his appointment to the bench, the judge may have expressed views on language issues. If he did, those views would not disqualify him from sitting on cases involving language rights. In *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, the respondent argued that Bastarache J. should recuse himself, on the basis that he had, in his writings before being appointed to the bench, expressed strong views on language rights in Canada. Bastarache J. dismissed the application. After quoting the passage from *R.D.S.* that we have already referred to, he said his capacity to reach a decision based on the evidence was not affected by any opinions or beliefs that he had previously expressed with respect to language rights.

[179] The judge's past activities in respect of l'École du Sommet and the Conseil scolaire Centre-Est raise somewhat more complex issues. We are prepared to assume that the judge's roles in the establishment of l'École du Sommet, and as a trustee of the Conseil scolaire Centre-Est must have involved him intimately in issues similar to those that were before the court in this case. A reasonable observer apprised of all relevant background facts would certainly expect that the judge's past personal involvement in those issues would affect his perspective on them.

[180] Having a unique or unusual perspective on a matter, however, is not the same thing as being biased. The Supreme Court of Canada, in *R.D.S.*, has clearly indicated that the Canadian judicial system should welcome different perspectives. Canadian culture values diversity of background and experience. It is important for the development of the law – particularly in areas of fundamental rights – that the courts not approach matters from exclusively majoritarian perspectives.

[181] The fact that the judge in this case had experience in the provision of minority language education was, in fact, a positive attribute. He was able to approach the issues with important insights gained from his experience.

[182] There is no evidence to suggest that the judge's experience with l'École du Sommet or with the Conseil scolaire Centre-Est left him unable to bring an open mind to the issues of minority language education. Particularly given that ten years had passed between his term as a school trustee and the opening of trial, and that his personal experiences in s. 23 education were not in this jurisdiction, it is our view that no reasonable apprehension of bias arises solely by virtue of the judge's past involvement with minority language education.

[183] This does not, of course, mean that the judge was free to pre-judge the case or to ignore procedural norms. Whatever a judge's perspective or background, he or she must conduct hearings in an impartial, judicial manner.

[184] In his judgment on the recusal application, the judge said:

> [51] I am the product of my social experience, my education, and the contact I have had with those around me. When I became judge, I swore an oath of office not to forget all of this experience, but rather to carry out my duties in a loyal and honest manner and to the best of my abilities. In my view, a reasonable and right-minded person would find that my community involvement enables me to "take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community". Given that the Supreme Court itself has set this objective, I do not find that this ground, by itself or combined with the others, gives rise to a reasonable apprehension of bias.

[185] We accept that the judge was aware that he could not allow his personal experiences to interfere with his impartiality in weighing evidence. He was also aware, and emphasized, that he was not required to jettison his general knowledge of the situation of francophone minorities in Canada in assessing the case before him.

[186] The judge's past involvement in s. 23 education may have created special challenges for him. He had to carefully consider whether he was able to hear and decide the case in front of him in an impartial manner. While it was acceptable (and potentially beneficial) to have a judge whose perspective had been shaped by experience, the judge had to be careful not to pre-judge the case or fail to follow fair procedures. In particular, the judge had to ensure that he did not align himself with

one side or the other. The fact that the judge had first-hand experience with s. 23 education did not transform the trial into an inquisition, nor did it enlarge the scope of judicial notice. To some extent, then, the judge had to compartmentalize his own experiences.

[187] Given the strong presumption of judicial impartiality, we are prepared to assume that the judge had the ability to appropriately compartmentalize his experiences. We are therefore of the view that the judge's background in s. 23 education did not form the basis for a reasonable apprehension of bias.

[188] The judge's continuing involvement as a governor of the FFA raises somewhat different issues. While the law will generally assume that a judge is able to overcome any biases evidenced by past associations, it is more reluctant to dismiss the effect of ongoing ties.

[189] The reason for this is straightforward: a person who is involved in the ongoing management or control of an organization has ongoing duties to uphold the organization's principles and to advance its philosophies. Those duties can potentially conflict with the duty to approach cases with an open mind. A person whose association with an organization is in the past will not be subject to the same potential conflicts.

[190] Judges must, therefore, exercise caution in continuing to be associated with organizations after they are appointed to the bench. The dangers are sufficiently great that ethical principles have developed requiring people to sever their ties with certain types of organizations immediately upon being appointed.

[191] The necessity for a judge to sever political ties upon appointment to a court is emphasized in J.O. Wilson, *A Book for Judges* (Canadian Judicial Council 1980). The judge would have been provided with a copy of the book upon appointment to the bench. At p. 7, the book addresses the issue:

> The requirement of complete severance from all political associations is absolute. No intelligent and thoughtful man can be expected, on appointment to the bench, suddenly to shed all his interest in the affairs of his community

> and his country, or to avoid retaining old political opinions or acquiring new ones. But he must not at any time be associated with any political group and he must refrain from the public expression of political opinions.

[192] The ethical principles that apply to associations that are not "political" are less rigid. Nonetheless, judges are required to exercise considerable caution in respect of such associations. In *Ethical Principles for Judges* (Canadian Judicial Council, 1998), judges are given the following advice at p. 33:

> The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge's involvement may, in some cases, jeopardize the perception of impartiality or lead to an undue number of recusals. If this is the case, the judge should ... avoid the activity.

[193] The FFA appears to be largely a philanthropic organization rather than a political group. Its goals are primarily charitable rather than partisan. We accept, therefore, that the judge was not absolutely required to sever his ties with the foundation upon appointment to the bench. That said, the organization's mission statement and philosophy shows that it has a particular vision of the francophone community. In continuing to be a governor of the organization, the judge was, in effect, publicly declaring his support for that vision.

[194] While it was not unethical for the judge to continue his association with the FFA after being appointed to the bench, he was required to exercise caution to ensure that he did not sit on cases in which issues touching on the foundation's visions might be raised.

[195] The Government likens this case to that of *In re Pinochet*, [2000] 1 AC 119, 1999 UKHL 1. In that case, the House of Lords was called upon to set aside one of its own decisions on the basis that Lord Hoffmann's ties to a charitable organization raised a reasonable apprehension that he would be biased against Senator Pinochet.

[196] There are some distinctions to be drawn between this case and *Pinochet*. In *Pinochet*, the charitable organization of which Lord Hoffmann was a director was closely connected with a political organization that had intervened in Senator Pinochet's appeal. The House of Lords found, in effect, that Lord Hoffmann could be characterized as having been "a judge in his own cause."

[197] We recognize that the FFA operates in Alberta and not in Yukon. The foundation is not directly involved with the community whose rights were being determined in the current litigation. There is no suggestion that it, or any organization that it is affiliated with, was implicated in the trial. In that sense, the judge cannot be said to have been "a judge in his own cause."

[198] We also recognize that the *Pinochet* decision is not binding on us, and that it has not been unequivocally embraced in Canada. Nonetheless, we find that it does provide some guidance.

[199] The parallels between the situations of s. 23 rights-holders in Alberta and those in Yukon are direct and obvious. Further, the expressed visions of the FFA would clearly align it with some of the positions taken by the CSFY in this case. We are unable, therefore, to accept that the judge's position as governor of the FFA was innocuous.

[200] We are of the view that "reasonable and right minded persons" looking at the situation dispassionately, would have a reasonable apprehension of bias in this case, and would think that the judge should not have sat on it, given his position as a governor of the FFA.

6. Conclusions on Bias

[201] Unfortunately, we are, therefore, of the view that both the judge's association with the FFA and his conduct at the trial raise a reasonable apprehension of bias. To the extent that his findings depend on questions of fact or on questions of mixed fact and law, they cannot be upheld. The matter will have to be returned for a new trial.

[202] We are aware that the parties have expended considerable resources on this case, and that a great deal of time has elapsed since the commencement of the trial. We do not take the decision to remit this matter for a new trial lightly.

[203] We have carefully considered whether it is possible to resolve some of the issues in the litigation on the appeal, and have reluctantly come to the conclusion that there are very few issues that do not depend, in one way or another, on the findings of facts.

[204] For that reason, we will confine our further discussions to three self-contained issues that we see as pure issues of law.

B. Principal's Contract of Employment

[205] At trial, the CSFY argued that its unique circumstances require it to have the ability to engage a school principal on term contracts rather than as a permanent employee. The judge accepted that proposition, and also interpreted the *Education Labour Relations Act* as allowing for term contracts.

[206] The question of whether the circumstances of the CSFY place it in a special position with respect to the term of the principal's contract will have to be determined by the judge on a new trial, as will the question of whether the ability to negotiate the term of the contract is essential to the CSFY's powers to manage and control its school. We are able, however, to comment on the proper interpretation of the *Education Labour Relations Act*.

[207] The key provision of the statute, for our purposes, is s. 105, which is as follows:

105(1) A principal shall be on probation for two years from the date of appointment.	105(1) La période de stage des directeurs d'école est de deux ans à compter de la date de leur nomination.
...	...
(3) At any time during the probationary period, the superintendent may terminate the appointment of the principal on giving 30 days prior written	(3) En tout temps pendant la période de stage, le surintendant peut mettre fin à la nomination au poste de directeur d'école, à la condition de remettre à l'intéressé un

notice to the principal specifying the reasons for the termination.	préavis motivé de 30 jours.
(4) Any principal who is terminated by a superintendent during a probationary period shall have the right to appeal the decision to the deputy minister and not pursuant to section 63 of this Act.	(4) Le directeur d'école licencié par le surintendant pendant la période de stage a le droit d'interjeter appel de la décision au sous-ministre et non sous le régime de l'article 63 de la présente loi.
(5) A principal who is on probation shall be evaluated during the first year of probation and shall be evaluated in the second year of probation on or before March 31 of that year.	(5) Le directeur d'école stagiaire fait l'objet d'une évaluation de rendement durant la première année de stage et au cours de la seconde année, au plus tard le 31 mars.
(6) On the termination of the appointment of a principal who was employed as a teacher immediately before the appointment as principal, the principal shall be entitled to remain employed as a teacher.	(6) Le directeur d'école qui était employé à titre d'enseignant au moment de sa nomination a le droit, lorsqu'il cesse d'exercer ses fonctions de directeur, de conserver son poste d'enseignant.
(7) When no notice of termination is given during the probationary period, the contract of employment of the principal shall continue until and unless terminated in accordance with this Act.	(7) Lorsqu'aucun avis de licenciement n'est pas donné durant la période de stage, le contrat d'embauche du directeur d'école devient permanent; il ne peut y être mis fin qu'en conformité avec la présente loi.

[208] Section 106 of the statute deals with employment of "employees." The word "employee" is defined in the statute as excluding persons employed in a "management capacity;" thus, it does not apply to principals. The terms of s. 106 largely parallel those of s. 105. Section 106(7) and (8) are as follows:

106(7) When no notice of termination is given during the probationary period, the contract of employment of the employee shall continue until and unless terminated in accordance with this Act.	106 (7) Lorsqu'aucun avis de licenciement n'est donné durant la période de stage, le contrat d'embauche de l'employé devient permanent; il ne peut y être mis fin qu'en conformité avec la présente loi.
(8) When an employee has been employed on a temporary basis in one teaching position for an entire school year and is on probation for the next school year, the temporary employment period shall be counted in the calculation of the probationary period.	(8) Lorsqu'un employé a travaillé à titre temporaire pendant toute une année scolaire et est en stage pour l'année scolaire suivante, la période d'emploi à titre temporaire est assimilée à la première année de stage.

[209] Section 109 deals with "temporary" employment of employees:

109(1) An employee may be employed on a temporary basis during part or all of a school year as may be agreed to by the employee and the superintendent and the employment may be renewed for part or all of the next school year.	109(1) Un employé peut être embauché à titre temporaire durant une partie ou la totalité d'une année scolaire selon l'entente qu'il peut conclure avec le surintendant; le contrat d'emploi peut être renouvelé pour une partie ou la totalité de l'année scolaire suivante.
(2) Despite subsection (1), the period of employment for an employee who is employed on a temporary basis may be renewed for more than 2 consecutive school years by the deputy minister in exceptional circumstances.	(2) Malgré le paragraphe (1), le sous-ministre peut, dans des cas exceptionnels, renouveler la période d'emploi d'un enseignant qui est embauché à titre temporaire pour plus de deux années scolaires consécutives.
(3) Any employee who is employed on a temporary basis shall be evaluated at least once in each school year by either the principal or the superintendent.	(3) L'employé qui est embauché à titre temporaire fait l'objet d'une évaluation de rendement au moins une fois par année scolaire par le directeur d'école ou le surintendant

[210] The scheme of the statute is clear. Teachers and other ordinary employees may be employed on a "term" or "temporary" basis, but only for a limited time. Unless there are "exceptional circumstances" they must become permanent employees after two consecutive years. Because the statute deals with term employees exhaustively in s. 109, it is apparent that s. 106(7) cannot be read as dealing with anything other than permanent employment.

[211] The language used in s. 105(7) is identical to that used in s. 106(7), and it must therefore be interpreted as having the same meaning. Thus it also provides for permanent, and not term employment.

[212] The intent of the legislature not to allow principals to be employed on a term basis is clear. There is no section equivalent to s. 109 dealing with principals.

[213] Accordingly, we hold that the judge's interpretation of s. 105 as allowing for the employment of principals on term contracts is a misreading of the statute.

C. Admission of Children of Non-Rights-Holders

[214] The judge interpreted s. 23 of the *Charter* as giving the CSFY a constitutional right to choose whether to admit into EET children of persons who do not hold s. 23 rights. He therefore struck down portions of the *French Language Instruction Regulation* that purport to limit admission to CSFY schools to the children of s. 23 rights-holders and other limited classes.

[215] The judge acknowledged that no Canadian court had, to date, suggested that s. 23 management rights extend to allowing minority language school boards complete autonomy in determining who should be admitted to their schools. The judge nonetheless found that management rights do include that right, subject only to an obligation on governments to ensure that the right is not exercised in such a way as to transform s. 23 schools into institutions that are no longer identifiable with the linguistic minority.

[216] The judge's basis for this finding was the proposition – articulated in *Mahe* and in the decision on the merits in *Arsenault-Cameron* – that the minority language community is entitled to manage and control linguistic and cultural aspects of its schools.

[217] We are unable to find any support in the case law or in academic commentary for the proposition that s. 23 of the *Charter* gives the linguistic minority a general right to recruit children of people who are not s. 23 rights-holders into their schools, with the exception of a single decision of the Northwest Territories Supreme Court rendered after the hearing of this appeal. That case, *Commission Scolaire Francophone, Territoires du Nord-Ouest c. Procureur Général des Territoires du Nord-Ouest*, 2012 CSTN-O 44 (English version cited as 2012 NWTSC 44e), is, itself, under appeal. Its analysis of the issue is closely tied to specific evidence that was before the court, and we have considerable doubt that it can be generalized. For reasons that follow, we are, in any event, not persuaded that the reasoning in that case should be followed.

[218] As a general rule, legislative authority in respect of education in Canada lies with the Provinces (and, by virtue of legislative extension, the Territories). It is generally acknowledged that, subject to s. 23, that authority extends to the language of instruction:

> There is little doubt that a province has the necessary jurisdiction to impose the language of instruction upon non-entitled parents who choose to have their children educated in publicly funded schools.
>
> (Marc Power and Pierre Foucher, "Language Rights and Education" in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2005) 1095 at 1124.

[219] The question is whether, and to what extent, s. 23 of the *Charter* has narrowed that jurisdiction.

[220] The language rights of the *Charter* have been described as a "political compromise." Early jurisprudence suggested that those rights should be construed more narrowly than other *Charter* rights – see for example *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549 at 578. In *Mahe* at 364, the Supreme Court retreated from that position, and gave broader scope to language rights. Later, in *R. v. Beaulac*, [1999] 1 S.C.R. 768, the Court enunciated the modern approach to interpreting the *Charter's* language protections:

> [25] Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see [*Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839] at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. [Emphasis in original.]

[221] The language of s. 23 does not support the proposition that the linguistic minority is to have the right to admit whatever students it wishes. Section 23 sets out very specific categories of students who are entitled to education in minority language schools. On its face, the specificity indicates a deliberate drawing of the

line between constitutionally protected rights and continuing Provincial legislative jurisdiction.

[222] In *Gosselin (Tutor of) v. Quebec (Attorney General),* 2005 SCC 15, an attempt by parents who did not hold s. 23 rights to force the province to allow their children to attend s. 23 schools was unsuccessful. The Supreme Court noted:

> [2] If adopted, the practical effect of the appellants' equality argument would be to read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible....

[223] There is a considerable body of case law that has developed under s. 23 concerning the rights of particular categories of students to attend minority language schools. The cases are notable for their close concentration on and adherence to the precise language of the section: see for example *Abbey v. Essex County Board of Education* (1990), 42 O.R. (3d) 481; *Solski (Tutor of) v. Quebec (Attorney General)*; *Nguyen v. Quebec (Education, Recreation and Sports)*. None of these cases suggest that minority language school boards are entitled to unilaterally enlarge upon the categories of students entitled to attend their schools. All concentrate on the language of s. 23, together with the language of provincial legislation on admissibility.

[224] Applying a purposive approach to the interpretation of s. 23 does not support the CSFY's argument. Section 23 is not a provision designed to ensure that those who belong to the linguistic majority are encouraged to learn the other official language; its focus is not on bilingualism. Rather, it is primarily concerned with the right of the linguistic minority to be educated in its own language.

[225] In *Mahe*, the Supreme Court of Canada commented at length on the importance of seeing language as an aspect of culture. It emphasized that s. 23 schools must not only be schools where children of the linguistic minority are taught, but must also be schools that are managed and controlled by that linguistic minority. By ensuring that the linguistic minority has its own schools, s. 23 serves to safeguard the minority culture, and protect it from assimilation.

[226] Given that powers of management and control are included in s. 23 primarily to ensure that the minority linguistic group is not overwhelmed by the majority and gradually nudged onto a path of assimilation, it is difficult to understand why those powers would include the authority to bring children who do not belong to the linguistic minority into the school.

[227] We fully understand that not all s. 23 rights-holders will belong, culturally, to the linguistic minority. Section 23 includes practical solutions to accommodate families with existing connections to education in the minority language, even where those families might not form part of the linguistic minority. The fact that s. 23 provides practical accommodation of those families, however, does not alter the basic underpinnings of the provision.

[228] We are of the view that s. 23 of the *Charter* does not give the linguistic minority a constitutional right to unilaterally set admission criteria so as to accept children of persons who are not rights-holders.

[229] In reaching this conclusion, we focus on the specific arguments that the CSFY has presented, which were directed at showing that s. 23 unconditionally grants the linguistic minority the right to manage and control the admission of non-rights-holders into its programs. We do not wish to be taken as precluding the CSFY from arguing, in future, that the admission criteria in the *French Language Instruction Regulation* must be relaxed in order to ensure that EET remains viable, and we make no comment on whether such an argument might be sustainable.

D. The *Languages Act*

[230] Relying on the *Languages Act*, the judge made an order requiring all communications between the Government and the CSFY to be in French. As we have indicated, the judge relied on the *quasi*-constitutional nature of the *Languages Act* and on its similarities to certain provisions of the *Charter* in reaching his conclusions.

[231] We agree that the *Languages Act* is *quasi*-constitutional in character, and its parallels to the provisions of the *Charter* are of considerable importance: see *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12.

[232] That said, the *Languages Act* does not have the effect of making the language provisions of ss. 16 and 20 of the *Charter* directly applicable to Yukon. There are important differences, in particular, between s. 16 of the *Charter* and s. 1 of the *Languages Act*. We set out the provisions for ease of reference:

Section 16 of the Charter:	*L'article 16 de la Charte :*
16(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.	16(1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.
(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.	(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.
Section 1 of the Languages Act	*L'article 1 de la Loi sur les langues*
1(1) The Yukon accepts that English and French are the official languages of Canada and also accepts that measures set out in this Act constitute important steps towards implementation of the equality of status of English and French in the Yukon.	1(1) Le Yukon accepte que le français et l'anglais sont les langues officielles du Canada et accepte également que les mesures prévues par la présente loi constituent une étape importante vers la réalisation de l'égalité de statut du français et de l'anglais au Yukon.

[233] Section 1 of the *Languages Act* does not, in its terms, make French an official language of Yukon, nor does it affirm that French and English have "equality of status" in Yukon. Rather, it indicates that the measures in the *Languages Act* constitute "important steps *towards* the implementation of the equality of status" of the two languages.

[234] In noting these differences, we do not suggest that the *Languages Act* should be interpreted narrowly, nor do we wish to signal any retreat from this Court's pronouncement in *Halotier* at para. 48 that "the purpose of the *Languages Act* is to commit the Yukon to official bilingualism." That said, the court's statement (in the same paragraph) that "[w]hile the *Yukon Act* does not declare French an official language of the Yukon, its impact in the legislative, central government and judicial spheres is the same" must be read in context; it is a reference to the specific guarantees set out in the *Languages Act*. As the court made clear in para. 51, "a broad, purposive interpretation does not permit the court to disregard the ordinary rules of statutory interpretation."

[235] It should also be recalled that the *Languages Act* does not include a provision equivalent to the saving provision of s. 1 of the *Charter*. This difference in legislative context may result in some differences between the interpretation of the provisions of the *Languages Act* and the interpretation of parallel provisions of the *Charter*.

[236] With that by way of introduction, we move to consideration of the particular provision of the *Languages Act* in issue in this litigation:

6(1) Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French....	6(1) Le public a, au Yukon, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions de l'Assemblée législative ou du gouvernement du Yukon ou pour en recevoir les services....

[237] This provision is a broad guarantee that individuals in Yukon will be able to communicate with their government and obtain government services in French as well as in English.

[238] The main question that arises in this case is whether communications between the CSFY and the Government are communications by a "member of the public." The Government contends that CSFY personnel, as employees of the Government, do not qualify as "members of the public" for the purposes of s. 6.

[239] We are unable to accept that argument in the stark form in which it is presented. CSFY personnel engage in various types of communications with the Government – e.g. communications over their terms of employment, communications relating to their functions with the CSFY, communications concerning relations between the CSFY and the Department of Education, and communications directed at the general direction of governmental education policies. In some of these communications, we are inclined to think that employees are "members of the public" – for example, we expect that an employee of the CSFY would be entitled to communicate with the Government in French concerning such matters as the employee's job description, remuneration, and other terms of employment. On the other hand, there may be considerable doubt as to whether the *Languages Act* gives an employee of the CSFY an absolute right to communicate in French in all dealings with the Government.

[240] In short, it is doubtful that the question of whether employees of the CSFY are "members of the public" (as the English version of the statute says) or are within the meaning of the words "le public" (the expression used in the French version of the statute) has a simple answer. The arguments in this case, which treat all communications between the CSFY and the Government as equivalent for the purposes of the *Languages Act*, ignore the possibility that the statute recognizes rights in a nuanced fashion. Whether a particular communication is covered by s. 6 may depend on both the capacity in which a person is communicating with the Government and on the nature of the communication. The question may involve a subtle evaluation of statutory purpose.

[241] The current litigation represents a blunt instrument for the interpretation of this very important legislation. We do not think that it is an appropriate vehicle for an examination of the issues.

[242] Part of the problem, we believe, is that the arguments have focused on the rights of the CSFY vis-à-vis the Government rather than on the rights of individual employees. Section 6 of the *Languages Act* affords rights to "members of the

public," not to institutions. We would interpret the section as setting out individual rights. It is apparent to us that the CSFY is not, itself, a "member of the public" or within the contemplation of the phrase "le public."

[243] This litigation is brought by the CSFY. It does not purport to be brought on behalf of individual employees. We are therefore of the view that this case is not a suitable vehicle for determination of rights under s. 6 of the *Languages Act*. We note that summary proceedings for determination of rights are available under s. 9 of the statute:

9 Anyone whose rights under this Act have been infringed or denied may apply to a court of competent jurisdiction to obtain any remedy the court considers appropriate and just in the circumstances.	9 Toute personne, victime de violation ou de négation des droits que lui reconnaît la présente loi, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[244] It would not be difficult for representative employees of the CSFY to have their rights to engage in specific types of communications with the Government determined in proceedings dedicated to that issue. We are of the view that that would be the most expeditious and appropriate manner for rights to be delineated. Accordingly, we have determined that the *Languages Act* claims are not appropriately part of this litigation.

E. Other Parts of the Trial Judge's Order

[245] In our view, all of the other determinations made by the trial judge were dependent on assessments of the facts. The reasonable apprehension of bias finding precludes reliance on any of the facts found by the judge.

[246] It would not be appropriate for this Court to attempt to make findings of fact based on the transcript and exhibits. We therefore refrain from commenting on the other issues in the litigation.

F. Costs

[247] The ordinary practice of this Court is that costs of the appeal are awarded to the party that has enjoyed substantial success. That practice is not, however, invariable.

[248] Our sister court, the British Columbia Court of Appeal, has affirmed that, where there are concerns about the justice of awarding costs against an unsuccessful party, there is discretion not to award costs to a government in litigation concerning issues of genuine public importance: *Barclay (Guardian ad litem of) v. British Columbia (Attorney General)*, 2006 BCCA 434; *L'Association des parents de l'école Rose-des-vents v. British Columbia (Minister of Education)*, 2014 BCCA 40. Indeed, in very exceptional cases, courts have even gone so far as to award costs to the unsuccessful party: *William v. British Columbia*, 2013 BCCA 1; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42.

[249] The claims being brought by the CSFY raise important issues of public importance. While the CSFY has its own interest in those issues, we accept that there is also a strong public interest in having them determined. We note, as well, that this appeal has been primarily concerned with the issue of reasonable apprehension of bias – a deficiency in the judicial process not attributable to either party.

[250] This case is an unfortunate one in which one public institution is suing another with a view to determining the scope of constitutional rights. The resources available to the CSFY are limited, and they should, in the ordinary course, be directed to the provision of education.

[251] While this is not the sort of very exceptional case that would justify an award of costs to the unsuccessful party, it is one that engages the court's discretion to deny the successful appellant its costs. We order that each party bear its own costs of the appeal. The costs of the first trial, in our view, should be left to the discretion of the judge who hears the second trial.

G. Interim Measures

[252] This litigation is not at an end, and it is essential that EET be operated in an orderly fashion while the litigation proceeds. The trial judge's order has been in place for some time, as much of it was not stayed by the court pending appeal. The order of this Court now sets aside the trial order. We are hopeful that the parties will be able to work out interim arrangements pending a new trial. If they are unable to reach accommodations on all interim issues, the courts are, of course, able to impose interim arrangements.

[253] This matter is being returned to the trial court, and it is that court which will have jurisdiction over all matters. We recognize, however, that there may be a short period in which it is impractical for the parties to appear before that court to deal with interim relief. This Court will maintain its jurisdiction to make orders ancillary to the appeal until the parties are able to appear before the Supreme Court to deal with any interim measures that need to be put in place pending a new trial.

V. Conclusion

[254] The appeal is allowed. The order of the trial court is set aside, and the matter is remitted for a new trial. Costs of the original trial will be in the discretion of the judge who hears the second trial. Each party will bear its own costs of this appeal. This Court retains the power to make interim orders until such time as the parties are able to appear in the Supreme Court of Yukon to deal with such matters.

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Bennett

The Honourable Madam Justice MacKenzie