

SUPREME COURT OF YUKON

**Citation: La Commission Scolaire Francophone
du Yukon No. 23 c. Procureure Générale du
Territoire du Yukon, 2011 YKSC 57**

**Date: 20110726
S.C. No.: 08-A0162
Registry: Whitehorse**

Between:

COMMISSION SCOLAIRE FRANCOPHONE DU YUKON NO. 23

Plaintiff

And:

PROCUREURE GÉNÉRALE DU TERRITOIRE DU YUKON

Defendant

Before: Mr. Justice Vital O. Ouellette

Appearances:

**Roger J. F. Lepage
Francis Poulin**

for the Plaintiff

**Maxime Faille
François Baril
Guy Régimbald**

for the Defendant

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[English translation of the judgment]

I. Introduction

[1] The Commission scolaire francophone du Yukon no. 23 (CSFY) has sued the Attorney General of the Yukon (GY). The CSFY alleges that the GY has failed in its duties under s. 23 of the *Canadian Charter of Rights and Freedoms* and the *Education Act*, R.S.Y. 2002, c 61. According to the CSFY, the GY has also breached a fiduciary duty toward the CSFY.

II. Issues in Dispute

[2] In this case, the Court is asked to determine the extent of the rights granted under s. 23 of the *Charter* to the members of the francophone minority in the Yukon, and the resulting duties of the GY.

[3] In order to determine the extent of the rights under s. 23, it is necessary to first determine the number of rights holders. Once this number has been established, it will be possible to determine the degree of management which should be granted to the CSFY in the particular context of the Yukon. The areas of management in question include finances, staff, programs and buildings. The parties disagree as to the definition of “rights holder” and each claims the right to manage the admission of students to the French schools. Also at issue are the duties which the GY has toward the CSFY under the *Languages Act*, R.S.Y. 2002, c 133 .

[4] As well, there is a final question, being whether the GY has breached a fiduciary duty to transfer \$1.9 million to the CSFY.

III. Facts

i) Procedural Context

[5] The trial commenced on May 17, 2010 and finished on February 4, 2011. In fact, the trial consisted of two distinct phases. The first phase, lasting six weeks, dealt with the issues of the number of rights holders, management of finances, staff and programs, and fiduciary duty. The trial continued for three weeks in January and February 2011. The second phase addressed the issue of management of buildings, construction of a separate secondary school building, and management of admissions.

[6] The trial had to proceed in two separate phases because of the unexpected illness of one of the GY's witnesses, which arose a few weeks prior to the commencement of trial on May 17, 2010. The Court denied the GY's request for an adjournment of the entire trial, given the GY's position that the said witness was required only in relation to the issue of building management. The Court decided to hear, during the dates set for the trial, the evidence on all of the other issues.

[7] On June 11, 2010, during cross-examination of the last witness called by the CSFY in the first phase, the GY requested permission delay presentation of its evidence until January 2011. The Court declined the request, for reasons provided during the trial. The Court thereby confirmed that all of the evidence and submissions of the CSFY and the GY would be presented during the first phase of the trial, regarding all of the issues in dispute except for building management, construction and management of admissions. Given the possibility that certain individuals would testify twice, the Court decided that it would render only one judgment following the evidence on building management, construction and admissions, in order to avoid an application for recusal on continuation of the trial.

[8] During the trial, the Court heard 25 witnesses, and the parties filed more than 533 exhibits. The CSFY filed a notice to admit regarding 320 of the documents adduced, as provided for under Rule 31 of the Supreme Court of Yukon. Following a discussion, the CSFY and the GY agreed that the 320 documents would constitute individual trial exhibits, including the deemed admissions of the GY. However, the GY would have the right to request the Court's permission in due course to withdraw any of the deemed admissions. In such case, the Court would decide whether the admissions in question could be withdrawn.

ii) Uncontroverted History

[9] In 1984, the École Émilie-Tremblay (Émilie-Tremblay School, referred to herein as EET) was founded. The francophone program in 1984 provided instruction in all grade levels up to the end of Grade 6. Around two years later, a francophone program for junior high (Grades 7 to 9)

was established. At the time, EET was located within other schools in Whitehorse, Yukon. In 1990, EET moved to its own prefabricated buildings. Following this move, EET began accepting high school students (Grades 10 to 12).

[10] In 1996, the GY created the CSFY by way of departmental order under the *Education Act*. Pursuant to the *Education Act* and the *French Language Instruction Regulation (YOIC 1996/99)*, the CSFY has jurisdiction over French instruction in the Yukon as guaranteed by s. 23 of the *Charter*. In 1996, there were 113 students registered at EET. The same year, EET moved into its new building. In the 2009-10 school year, there were 170 students: 129 in the elementary grades and 41 in junior high and high school. The CSFY has authority regarding French throughout the entire Yukon Territory. Currently, the CSFY has only one school, EET.

[11] There are just over 5 000 students in the Yukon Territory. These 5 000 students attend 14 urban schools and 14 rural schools. Approximately 80% of the students in the Yukon are enrolled in the 14 schools located in the City of Whitehorse. The remaining 20% (around 1 000 students) are scattered throughout the rural schools. At the elementary school level, the Whitehorse schools have between 60 and 400 students, compared to 10 to 130 students in the rural elementary schools. In the junior high and high school levels, each of the three schools in Whitehorse has between approximately 400 and 600 students. The corresponding rural schools have between 1 and 100 students.

[12] The English schools in the Yukon are not governed by a school board. Their school councils have only consultation powers. EET is the only school governed by a school board.

iii) The *Charter* and the *Education Act*

[13] Section 23 of the *Charter* provides:

(1) Citizens of Canada

(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

(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,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(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.

(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

(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 minority language instruction; and

(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.

[14] Section 56 of the *Education Act* provides that students whose parents have a right under s. 23 of the *Charter* to have their children receive an educational program in the French language are entitled to receive that program in accordance with the regulations. The GY designated the CSFY of School District 23 as having responsibility for French instruction in the Yukon. As well, the CSFY has jurisdiction over and administers French language instruction in the Yukon (s. 10, *French Language Instruction Regulation*).

[15] The CSFY is responsible for French instruction outside of Whitehorse by establishing classes where numbers warrant (s. 15, *French Language Instruction Regulation*).

[16] Division 3, Part 7 of the *Education Act* lists the CSFY's powers and functions. The

requisite powers and functions of a school board are detailed in ss. 116(1)a) to t).

[17] As well, the school board under s. 116(1)a) can establish specific hiring selection criteria (s. 19, *French Language Instruction Regulation*):

19. When the School Board exercises its power pursuant to section 116(1)(a) of the Act, the School Board may establish specific hiring selection criteria in accordance with aims and goals of a French first language.

[18] Section 116(2) sets out other powers and functions which may be exercised by the CSFY.

[19] Furthermore, under the *Education Act*, the CSFY must appoint a director of education (s. 124(1)) and secretary-treasurer (s. 127(1)), as well as firm of auditors to verify, annually, the school board's financial operations and accounts (s. 172).

[20] Regarding finances, the CSFY must prepare annually an operations and maintenance budget (s. 174) and submit it to the minister. The minister must review it, consult with the school board, and approve it "subject to the regulations for grants and contributions to School Boards" (s. 174(3)).

IV. Witnesses

[21] Given the significant number of witnesses and evidence adduced during the trial, it is critical to summarize the testimony of each witness individually. Each summary is followed by a brief commentary regarding the witness' credibility and reliability

A. Jeanne Beaudoin

[22] Jeanne Beaudoin has lived in the Yukon since 1982. She lives in an exogamous marriage. Her three children were born in the Yukon.

[23] Since 1982, Ms. Beaudoin has worked in various positions: tour guide, journalist for the French newspaper, employee of the Fédération des franco-yukonnaise, and volunteer. For 12 years, she was the director general of the Fédération franco-yukonnaise.

[24] She has also been involved since 1990 in the education area, first as employee of the Fédération franco-yukonnaise and then as board member of the CSFY, having been elected three times since 1990.

[25] Ms. Beaudoin explained that in 1984, the French school was located in the basement of another school in Whitehorse. In 1984, the French program framework was established. The secondary classes opened in 1986 in the J.A. Jeckell School building. This school eventually

became EET. Ms. Beaudoin explained that following requests for a homogeneous French school, the government arranged for classes in portables. Those classes moved to Riverdale School and portables were then added for the secondary level. The gymnasium was located in a school next to the portables. There was a subsequent relocation to another school in Whitehorse. In 1996, EET was constructed in the Granger neighbourhood in Whitehorse.

[26] In 1990, steps were undertaken with a view to creating a school board. There were negotiations with the Yukon prior to the new *Education Act*, which refers to s. 23 of the *Charter*. In 1995, the new *Education Act* created the CSFY. Ms. Beaudoin was among the first board members appointed, occupying the position of chair.

[27] EET's personnel and assets remained the same after the move to the new school. In 1996, the CSFY hired a director of education ("director").

[28] In 1999, negotiations took place with the Yukon in order to avoid a lawsuit. These negotiations resulted in a document entitled "Partenariat communautaire en éducation" "Community education partnership" (PEC - exhibit 1) containing 14 recommendations. Ms. Beaudoin said that she prepared the PEC, which is in fact a summary of the discussions between the participants. This document identifies the difficulties experienced in the area of recruitment of rights holders, retention of rights holders, and the drop out rate as well as recruitment strategies. Appendix 1 of the PEC is based on Statistics Canada data for 1996. Ms. Beaudoin read all of the supporting documents and cited them. Ms. Beaudoin stated that she drafted

Appendix 2 of the PEC. She explained the history of French education in the Yukon from 1969 to 1999.

[29] Ms. Beaudoin testified that a number of meetings took place over the years with the Yukon Ministry of Education (MEY), as shown in the exhibits adduced in evidence.

[30] According to Ms. Beaudoin, there have always been difficulties with respect to the position of director of education, also known as the director. The problem is one of loyalty: the director is an employee of the CSFY, but is paid by the GY. The director has not always followed the CSFY's directions because the position is paid by the Yukon. For example, the CSFY wished to decide which trips the director could take outside of the Yukon. In fact, the Yukon decided which trips the director could or should take.

[31] Ms. Beaudoin also described problems in relation to financial management. Because the funds did not flow through the CSFY, it was necessary to seek the approval of the MEY for each little need of the CSFY. Planning was difficult without control over the finances.

[32] The CSFY experienced a further difficulty with respect to secondary students dropping out. Ms. Beaudoin explained that the secondary program and the primary program have different needs. As well, the French secondary program did not have the same advantages or tools available to the English program. Ms. Beaudoin also stated that children of pre-school age were a concern of the CSFY, and that it was important to have a kindergarten, and particularly one located on the same grounds as the French school. In fact, a daycare facility was constructed, but

was later destroyed in a fire. It was then rebuilt on the school grounds.

[33] Ms. Beaudoin confirmed that the GY and Canada signed bilateral agreements and that tripartite meetings took place between the CSFY, the GY and Canadian Heritage. She had understood that the funds under the bilateral agreement would cover additional costs incurred by the French education program. However, she stated that the GY used the monies received from the federal government in order to pay the regular salaries of the personnel and not to cover additional costs.

[34] Regarding the number of rights holders, Ms. Beaudoin stated that according to the Statistics Canada census, 4% of the Yukon population is francophone (1,250 people). As well, 11% of the Yukon population is bilingual. She emphasized the importance of expert assistance in determining the number of rights holders. Referring to Statistics Canada data, she stated her belief that there were 417 rights holders in 1999. She was of the opinion that the number of rights holders is growing, given information coming out of Statistics Canada. She noted that there has been an increase in the number of francophones in the Yukon, which lead to the conclusion that there had been a corresponding increase in the rights holders. Ms. Beaudoin cited as a specific example the fact that the program for francophones, “Mères et bébés en santé” (“Healthy Mothers and Babies”), showed an increase in the number of rights holders. In 2009, 19 infants were born to francophone parents in Whitehorse.

[35] In 1994, Ms. Beaudoin participated as a member of the construction committee. She confirmed that the purpose of the document entitled “École française - Devise descriptive,

Ministère de l'éducation – le 15 juin 1994 / French First Language School – Requirements Specifications, Department of Education – June 15, 1994" (exhibit 236) was to demonstrate the requisite size of the school to be built in order to satisfy the needs. She stated that certain needs were not identified in the report, including a public room, an agora, and a dining hall.

[36] Regarding another document, "Canada Yukon Auxiliary Agreement" (exhibit 511), Ms. Beaudoin confirmed that the anticipated cost of the construction was \$6,250,000.00. As for the document "Plan d'école" ("School Plan") (exhibit 512), she explained that changes or cuts had to be made to this plan. In fact, one of the secondary school classrooms and the industrial arts space had to be dropped from the plan in order to facilitate the construction.

[37] As a parent of three children, Ms. Beaudoin is of the view that a separate secondary school is required, even though she succeeded in keeping her children at the francophone school. She stated that it was always a fight and that it was not "cool" for the adolescents to be with the young children. One of her children attended the MAD (Music Art & Drama) program in an anglophone school.

[38] In cross-examination, Ms. Beaudoin testified that she observed an increase between 1996 and 2001 in the number of rights holders. She acknowledged the number of rights holders stated as being 417 in her document, calculated from Statistics Canada data and Angéline Martel's report. The 2001 Statistics Canada document shows 255 rights holders and the 2006 data indicates 190 rights holders. Ms. Beaudoin testified that these statistics are wrong. She noted that

the MEY and the GY themselves considered the Statistics Canada data to be inaccurate, and that they had written letters in this regard.

[39] Regarding financing, Ms. Beaudoin confirmed that there were two budgets: the ordinary budget, submitted by the CSFY to the MEY, and an additional budget. This system rendered it difficult to do long-term planning. Also, if the amounts requested were not granted, the planning was useless. The issue of finances was complicated by the fact that the MEY would send the budget directly to the school instead of sending it directly to the CSFY.

[40] In cross-examination, Ms. Beaudoin stated that school management is also necessary in relation to the trips taken by the director outside of the Yukon. She stated that the CSFY considered that the director had enough work to do in the Yukon, without having to travel elsewhere, as ordered by the MEY.

[41] Ms. Beaudoin explained that the CSFY budget for 1996-1997 was a transitional document and that it was not in fact the budget presented to the GY. The document identified the needs, but not the related costs. Ms. Beaudoin stated that the CSFY was always in reactive mode regarding the budgets, because its requests were often turned down.

[42] Ms. Beaudoin agreed that the CSFY had nevertheless made many significant gains, especially the construction of EET, and had succeeded in establishing over the years many initiatives and activities at the school.

[43] Ms. Beaudoin confirmed that she was consulted regarding the design and location of the school. Despite her participation in relation to the conception, the plan was limited by the budget. Ms. Beaudoin acknowledged the fact that she had been consulted when certain modifications had to be made. She agreed that exhibit 236 (the requirements specification) was a list required for the bidding process. She confirmed that the lowest bid exceeded the budget of \$6,250,000.00 by around \$600,000.00. Following discussions, the decision was made to strike the industrial arts space as well as a secondary school classroom in order to stay within the construction budget of \$6,250,000.00. Ms. Beaudoin confirmed that the GY did not act in a capricious manner in reducing the space, and that the bids caused this unexpected turn of events.

[44] Generally, it continues to worry Ms. Beaudoin that the requirements specification (exhibit 236) contemplated the future construction of eight classrooms for the secondary school, without setting a deadline. In fact, exhibit 236, clause 5 “Layout and circulation”, 1 “General” provides in part: “... The design of the school shall allow for the future addition of up to eight classrooms. These do not necessarily have to be in the same location. The “future addition” shall be indicated on the Schematic Design but need not be included in any detail in the working drawings”.

[45] During the cross-examination, the topic was raised of her daughter who attended the anglophone school in order to participate in the MAD program. Ms. Beaudoin confirmed that her daughter had no interest in learning industrial arts. She agreed that an industrial arts program requires a certain critical mass of students. She explained that this is the fundamental problem. If there were the necessary students at EET, the program could be offered.

[46] As for the proposition that the MAD program requires no additional infrastructure, Ms. Beaudoin noted that it does indeed rely on infrastructure, as demonstrated by the fact that there was an addition, named “Wood Street Annex”, at the time the MAD program was created.

[47] Jeanne Beaudoin was credible and reliable. However, under cross-examination she demonstrated an impatient and argumentative attitude, in part because of the continual repetition of the same questions. However, her testimony was useful in providing the historical setting of the evolution of French education in Whitehorse and the 1996 construction project.

B. Florent Bilodeau

[48] Florent Bilodeau was qualified as an expert in the following areas:

- 1) the establishment and management of francophone schools in francophone minority environments in the West and North of Canada;
- 2) the establishment and management of school boards of the francophone linguistic minority under s. 23 of the *Charter*;
- 3) the teaching of French first language and French second language at the secondary level;

- 4) maintenance of administrative links, on the one hand between francophone school boards and francophone linguistic minority schools and, on the other hand, between governmental authorities and the majority school boards;
- 5) representation of the interests of the minority in the midst of the majority school system;
- 6) representation of the needs of the francophone minority and support for the establishment of French services in the provincial or territorial government ministries.

The Yukon recognized Mr. Bilodeau's expertise in the above areas.

[49] Mr. Bilodeau adopted the content of his report dated February 11, 2010, as well as his curriculum vitae, both filed as exhibit 35.

[50] Mr. Bilodeau presented his opinion by way of recommendations, with supporting reasons.

[51] Regarding the proposed management model, Mr. Bilodeau indicated that he did not take into consideration the current number of students, approximately 171, in the Yukon. However, he did confirm that the proposed management model would be possible and desirable even with

171 students. He went on to say that the proposed model is, in effect, applicable throughout Canada because it is necessary in order to meet the needs of the rights holders, regardless of the number of students attending the school. He testified that he formulated the recommendations in his expert report based on his professional training in education and his 43 years of experience as an educator, school manager, and government employee.

[52] Mr. Bilodeau asked the following question in order to formulate his recommendations: What has been the linguistic minority's experience over the last 40 years, and particularly since the *Mahe* decision in 1990, regarding the evolution of francophone school management and the importance of exclusive management by francophone school boards?

[53] Regarding the legislative framework, Mr. Bilodeau made the following recommendations: [TRANSLATION]

i) That the Yukon government is falling behind most other provincial/territorial governments in the area of management in applying, in a proactive manner, its statute which allows it to transfer exclusive school management to the francophone school board (ss. 116-155 et ss. 174-184 of the Yukon *Education Act*).

ii) That the Yukon government amend s. 124 (director) and s. 170(1) (the provision regarding hiring staff) with the goal of transferring to the francophone school board the responsibility for hiring, managing and firing its personnel.

[54] The following are his recommendations concerning the administrative structure:

[TRANSLATION]

i) That the Yukon government grant to the francophone school board the responsibility to hire and manage the contract of its director who would become its own employee and not the employee of the ministry. The school board then delegates to it the management of its educational, cultural and community programs, the human and financial resources and its capital assets.

[55] Mr. Bilodeau made the following recommendations regarding school management:

[TRANSLATION]

i) That an annual operational budget be granted to the francophone school board and that this budget meets the needs identified by the school board in order to allow for more rational and efficient planning over the medium and long term;

ii) That the annual operational budget be predictable from year to year and that the school board has exclusive management of its budget to allow it to respond to needs in the areas of administration, financial planning, human resources, educational, cultural, artistic and community programming, and the capital assets of the school board;

[56] The following recommendations deal with management of human resources:

[TRANSLATION]

- i) That the Yukon government transfers exclusive responsibility to the francophone school board for management of its personnel while conforming to law of general application and regulations thereunder;

- ii) That the francophone school board be legally authorized to ensure that the collective agreement between the government and the teachers contains specific clauses addressing the specific needs identified by the francophone school board or, alternatively, that the francophone school board be legally authorized to have a subsidiary collective agreement with its teachers in order to take into account the specific needs of the francophone school board;

[57] The following is the recommendation concerning management of programs:

[TRANSLATION]

- i) That the Yukon government transfers to the francophone school commission entire responsibility for management of the educational program in the schools (academic, cultural, linguistic, artistic, sport, community and civic) while conforming to the laws of general application and regulations regarding education.

[58] Concerning management of facilities and capital assets, Florent Bilodeau's opinions and recommendations are contained in paras. 34 to 37 of exhibit 35: [TRANSLATION]

34. Management of facilities and capital assets

Management by a francophone school commission of its facilities and capital assets forms an integral part of the full francophone educational management given that:

- i. The francophone educational programming, in all of its facets, requires that the school facilities be conceived, planned and built taking into account the range of academic, cultural, linguistic, sport and other program that it must accommodate five days of the week, after school and often on the weekend;
- ii. the school board's facilities have a school-community function;
- iii. the francophone school board's facilities must be the springboard for the development of young francophones' pride and sense of identity;
- iv. only the francophone school board has the capacity to determine the value, importance and timing of building independent/separate educational facilities for its elementary and secondary students;

- v. the type of educational facilities and their quality have a significant effect on parents' decisions to register their children in a francophone school.
35. A school board's exclusive responsibility for management of its facilities and its capital assets has the following result:
- i. it ensures that the "design" of francophone schools is in keeping with the pedagogical approach of francophone education;
 - ii. it encourages a school-community partnership (school/community centre) in the construction and use of schools;
 - iii. it contributes to the development of a sense of identity for the students and a sense of belonging to the francophone community;
 - iv. it encourages the pride and self-confidence of the students and parents, regarding who they are and what they can become as Canadian citizens and francophones;
 - v. it allows the school board to decide what school facilities are required in order to be comparable to those in the surrounding community, including separate school facilities for elementary and secondary school;

- vi. it facilitates the recruitment and loyalty (retention) of the students.
36. When a francophone school board is not given full management of its facilities and capital assets, the following results;
- i. its school buildings do not satisfy the demands of its educational program;
 - ii. the teaching spaces, when comparable to those of the majority, correspond to the current number of students instead of the potential number of students;
 - iii. the facilities for the francophone secondary level rarely include full science laboratories, a music room, workshops for trades and visual arts, a room for dramatic arts, and others...;
 - iv. the parents and students often transfer to schools belonging to the majority where the facilities allow for instruction in all areas - academic, technical and artistic;
 - v. the parents and students are led to believe that they are second class citizens, that the education provided to them is of a lesser quality than that provided to the majority;

37. Recommendations regarding management of facilities and capital assets;
- i. that the Yukon government recognizes that school board's exclusive power to identify its own needs concerning school building and facilities, including their expansion if needed and that the government grant to the school board the necessary budget in these areas which would be exclusively managed by the board;
 - ii. that the Yukon transfers to the francophone school board the existing physical building and facilities and the corresponding operational, maintenance and renovation budget;
 - iii. that the Yukon grant to the francophone school board a capital budget for construction of new facilities which meet the needs identified by the school board.

[59] Mr. Bilodeau stated that the school is an institution with respect to which there is a sense of belonging. He said that there is a link between the institution and attendance. He explained that management of facilities (see recommendations in para. 35) is necessary in order to facilitate the school's *raison d'être*. He also stated that the facilities have a community mandate in relation to the francophone community. Facility management allows identification of the board's own needs. He explained that there must be facilities comparable to those of the majority, and in fact the majority demand comparable facilities as between each other. A

comparable minority establishment can assist with recruitment. Mr. Bilodeau is of the opinion that there is a link between facilities, for example a gymnasium, and recruitment, but it is only one factor.

[60] Mr. Bilodeau identified the results of a lack of full management in para. 36 of his expert report. He went on to say that without full management, the final decision is often made by another person and based on whatever is the norm for the majority. He gave as example the student/teacher ratio, which is used by the majority to establish the number of classrooms. Further, Mr. Bilodeau emphasized that the link between facilities and the potential number of students who attend the francophone school is very important from the point of view of reparation. He pointed to école Mathieu, explaining that it is important not only to build for the present for also for the future. He also referred to the experience of the schools in Alberta. Regarding comparable facilities, he stated that it is necessary to offer the same services to students throughout the region.

[61] Mr. Bilodeau explained that the Alberta and Saskatchewan school boards have title to their buildings.

[62] Mr. Bilodeau indicated that all of his recommendations are directly related to the reparation issue. The francophone school board's mandate includes the power to satisfy specific needs with specific submissions, and financing is needed to do so.

[63] In cross-examination, Mr. Bilodeau agreed that there are variations in school management in minority environments in Canada, just as there are in the majority setting. He recognized that the circumstances differ between provinces or territories. He stated that s. 174 of the *Education Act* already provides for the kind of financial management which he recommends. He agreed that the provision in the Yukon statute resembles provisions in the corresponding Alberta and Saskatchewan statutes.

[64] Mr. Bilodeau noted that s. 124 of the *Education Act* provides that the CSFY chooses the director of education. However, he pointed out that s. 124(2) provides that the director of education is a Yukon government employee. He recognized that the nomination of the director in other jurisdictions, such as Alberta or Saskatchewan, must be approved by the government, as is the case in the Yukon. However, he emphasized that the director is not a government employee, but rather is employed by the board.

[65] Mr. Bilodeau stated that the following three factors must be part of the administrative structure in order to guarantee the francophone minority's exclusive control of its school board (see para. 17 of his report):

- i) election of school board members;
- ii) hiring of a director;
- iii) hiring of a secretary-treasurer.

[66] Mr. Bilodeau agreed that the *Education Act* already provides for the first factor, election of board members. However, regarding the hiring of a director and secretary-treasurer, he noted that even if the statute seems to give the CSFY this power, the individuals in these positions are government employees, and not CSFY employees. He concluded that the CSFY has neither the management of nor control over these employees.

[67] Mr. Bilodeau admitted that the recommendation regarding collective agreements in relation to management of human resources was poorly expressed. He explained that he wanted to underline the importance of including francophones in the negotiations, and not that they would exercise exclusive power in this regard.

[68] Mr. Bilodeau went on to state that the Alberta and Saskatchewan management models work well because they are controlled and managed by francophones. Further, the francophone facilities must be comparable to those of the anglophone majority.

[69] Mr. Bilodeau agreed that the francophone majority's budgets are roughly equivalent to those of the anglophone majority. However, he noted that other jurisdictions, such as Alberta and Saskatchewan, recognize the importance of small schools. In fact, special grants are included in the budgets, above and beyond the regular budget, of these small schools.

[70] Mr. Bilodeau recognized generally that it is not necessary to be an owner in order to manage. He submitted, however, that school management must include the right and the power to decide. He believed that the MEY exercises the power in the Yukon. His recommendation was

based on reparation but his other comments were based on information provided in the plaintiff's claim. Generally speaking, he was not aware of the facts specific to the Yukon. He reiterated that his recommendations are based on his many years of experience and relate to reparation. Mr. Bilodeau stated in relation to management: "You either have it or you don't". Further, he emphasized that it is validating for a community to have its own school.

[71] He was asked again if all of the powers could be given to a school board without the board having title to the school property. Mr. Bilodeau disagreed, referring to s. 23 of the *Charter* which was specifically intended to redress the wrongs of the past.

[72] The Court finds Florent Bilodeau, as expert witness, credible and reliable. When it appeared that one of his recommendations was untenable, he did not try to justify it. Rather, he admitted that it was not well founded.

[73] The Court accepts Mr. Bilodeau's recommendations. They can be summarized as follows: school management does not come from the provisions found in the *Education Act* but through real application of the statute. The application which he recommends would give the CSFY real management, and not through the MEY.

C. Edmond Ruest

[74] Edmond Ruest worked for the CSFY as board member from 1996 to 1999. From 1999

until his retirement in 2006, he was director of the CSFY.

[75] One of his responsibilities as director was renewal of the 2005-2006 bilateral agreements. He acted as resource person and consultant. Mr. Ruest had discussions with Gilbert Lamarche, coordinator of the French programs at the department of education.

[76] Mr. Ruest testified that he had never seen the letters sent by Gilbert Lamarche to Canada Heritage, including exhibit 36 which appears to be the draft of a letter dated January 23, 2006 and sent by Gilbert Lamarche to Hubert Lussier, Director General of the Ministry of Canada Heritage - Office of the Director General, Official Languages Support Programs. Mr. Ruest confirmed that he had not seen the letter despite the fact that the draft indicates a carbon copy was sent to Edmond Ruest. Further, he stated that he had never seen exhibit 37 in 2006, a letter dated January 30, 2006 sent by Gilbert Lamarche to Guylain Thorne, Director of operations and regional coordination of Canadian Heritage's program in support of official languages.

[77] The letter dated January 30, 2006 (exhibit 37) is identical to the one dated January 23, 2006 (exhibit 36), except for the date, the addressee, and the addition of a c.c. to Barbara Perron, "Senior Programs Officer" Canadian Heritage. Mr. Ruest testified that he had not seen the January 30, 2006 letter until the commencement of this lawsuit. The subject of the January 30, 2006 is: "Multi-year transfer between linguistic objectives specified under additional funding". The text of the letter provides:

Using clause 6.4.3.3 of CMEC'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.

Transfer per year:

-	2005-2006:	\$384,025
-	2006-2007:	\$513,401
-	2007-2008:	\$528,401
-	2008-2009:	\$528,401

[78] Mr. Ruest testified that no one, including Gilbert Lamarche, ever consulted him regarding the transfer of funds from the French first language program to French second language. He stated that if he had been consulted regarding such a transfer, he would certainly never have approved it. He stated that it would be ridiculous to accept the transfer of monies to the second language program which were provided by the federal government and specifically designated as additional funds for minority francophone education. Further, if he had known that there were monies from the federal government intended for the French first language program,

he could have used it to meet needs and additional projects.

[79] Mr. Ruest indicated that he had never seen the letter from Canadian Heritage to Gilbert Lamarche dated February 6, 2006 (exhibit 38) until the court proceedings. It should be noted that the letter confirms the transfer of \$1,954,228.00 over a period of four years, from 2005 to 2009, for the continuation of new initiatives in the French second language program.

[80] However, the letter indicates that the transferred funds would be reimbursed prior to the conclusion of the bilateral agreement. The author of the letter wrote:

In that regard, I understand that discussions have been held between you and representatives of the official languages support programs branch about evaluating the relevancy of compensating for these transfers of additional funds before the conclusion of this agreement, so as to restore balance among investments in the linguistic objectives of Canada's action plan for official languages.

[81] Mr. Ruest said that he had never been consulted regarding any evaluation, nor how the funds would be returned to the French first language program.

[82] Mr. Ruest confirmed that he sent a letter to MEY dated September 15, 1998, requesting more services in French and referring to the difficulties in hiring CSFY employees. The MEY responded that the *Languages Act* and the *Yukon Governments Languages Policy 1.7* provide

that English “is the sole administrative language of work”, and that “[for all other tasks associated with the hiring process, the working language is English”. Mr. Ruest believed, after receiving this letter, that the requests for employment had been translated.

[83] In cross-examination, Mr. Ruest confirmed having received an e-mail dated June 29, 2005 with respect to the 2005 to 2009 bilateral agreement and related budget. He said that the budget was only a draft but the table attached to the e-mail had been prepared by the ministry. The document is entitled: “Draft split for bilateral funding between board/association/department”. He agreed that the draft reflected, to a large extent, the requests of the CSFY and the community. The amount suggested by the CSFY was \$715,500.00 for 2005-2006 (exhibit 39).

[84] Mr. Ruest explained that this document stated that the proposed requests in relation to the projects had been approved. He never saw the final budget which was sent by the GY to Canadian Heritage in relation to the bilateral agreement. He confirmed that he had never received a copy of the bilateral agreement which was eventually signed and approved by the GY for 2005-2009.

[85] Mr. Ruest confirmed that the *raison d’être* of the bilateral agreements was the financing of minority first language education needs.

[86] Mr. Ruest was asked whether the CSFY received all of the monies which it had requested and if so, why the CSFY was not content. Mr. Ruest responded that MEY employees told him

that the norm under the agreement which the CSFY could expect was an increase of 10% over the amounts under the bilateral agreement which ended in 2004. The proposed budget was formulated in consultation with government employees based on this advice.

[87] Mr. Ruest stated that had he known there were further monies available, he would have submitted requests for other projects for the CSFY, including the purchase of a building for the daycare. Mr. Ruest reiterated numerous times that the submitted projects and budgets were prepared based on what he believed to be the available funds.

[88] Mr. Ruest went on to say that the amount anticipated by the Yukon for francophone programming for 2005-2006 was \$1,099,525.00. He noted that the CSFY requested \$715,500.00 for programs and projects in the 2005-2006 budget. He observed the difference of \$384,025.00, being the exact amount requested by the GY from Canadian Heritage as a transfer for 2005-2006 in the letter of January 30, 2006 (exhibit 37). He further noted that the bilateral agreement and the draft for 2005-06 showed two columns under "Additional Funds" : one for the francophone minority and the other for the second language program. The column for French minority language indicates funds received in the amount of \$1,099,525.00. The column "Additional funds second language" indicates only around \$29,000.00 and not \$384,025.00.

[89] Mr. Ruest acknowledged that the government, during the normal course of its operations, would seek a way to spend monies under the bilateral agreement rather than return funds. However, he took the position that instead of diverting the funds to the second language program, the government should have given them to the CSFY for the French minority language

program, as approved in the bilateral agreement.

[90] Mr. Ruest was strongly and aggressively questioned as to whether he did not feel responsible because he had not asked to see the final budget submitted to Canadian Heritage, nor to have a copy of the bilateral agreement. He responded that he did not feel responsible in any way, but felt rather tricked (victimized). He stated that the agreement was not between the CSFY and Canadian Heritage, but he expected that the French first language program would receive the funds approved by Canadian Heritage.

[91] Mr. Ruest confirmed that he had prepared, as director, the 2005-2006 reports (exhibit 40, 2005 and exhibit 41, 2006) and adopted their content. He also adopted the content of the CSFY's strategic plan, prepared in October 2005 (exhibit 42). Mr. Ruest stated his agreement with the statements contained therein. Mr. Ruest confirmed that the CSFY's financial statements for the year ending June 2005 (exhibit 43) showed a surplus of \$30,674.00, and that there was \$117,334.00 in the bank at the end of the financial year. He also confirmed that there was \$209,583.00 in the bank at year end June 2006 (exhibit 44).

[92] I find that Mr. Ruest is credible and reliable. Mr. Ruest was able to maintain his composure in spite of attacks in cross-examination. Moreover, I accept his testimony that he had never seen the carbon copies of the letters dated January 23, 2006, January 30, 2006 and February 6, 2006. I also accept that he was never consulted. His testimony on this point is completely logical: had he been consulted or requested to approve the transfer of \$1,954,228.00 to the second language program, funds which were earmarked for the minority language

program, he never would have given his approval. I accept his evidence that there were and continue to be needs and various projects requiring additional funds in order to address the difficulties which the CSFY faces. Further, I accept Mr. Ruest's evidence to the effect that he did not have the authority in any event as director to approve such a transfer, and that only the CSFY, at an Annual General Meeting, could have approved such a diversion of funds, and that this never took place.

D. Rodrigue Landry

[93] Dr. Rodrigue Landry was qualified as an expert in the following areas:

1. educational psychology
2. socio-linguistics
3. social and linguistic psychology
4. ethnolinguistic vitality of francophones in a minority environment
5. education in a minority environment
6. identity and language abilities
7. number of rights holders in the Yukon.

[94] The Yukon accepted Dr. Landry's expertise in the above areas. Dr. Landry's curriculum vitae is 52 pages long. He has written 160 publications and research papers, 170 articles prepared for scientific and professional conferences or congresses, 200 workshops and conferences for

various organizations and has received 75 individual and group research grants. Further, he was hired by Statistics Canada following the 2006 census, and is part of their committee. He completed a study/report for Statistics Canada on the 2006 census with respect to all of the provinces and territories. This report was submitted to Statistics Canada in May 2010. The report includes as appendices 1,000 individual tables concerning various francophone minority communities throughout Canada having more than 10 rights holders.

[95] Dr. Landry adopted the content of his expert report (exhibit 46). He underlined the importance in this litigation of the ideologies of language and treatment of minorities. He explained the importance of control over the facilities in the minority environment. (See paras. 20 to 41 and Appendix A of exhibit 46).

[96] Further, Dr. Landry described (para. 42) the concept of cultural autonomy (see paras. 42 to 62 and Appendix B of exhibit 46): [TRANSLATION]

Cultural autonomy is a concept which applies to linguistic minorities who wish to take control of their collective destiny within an existing State.

The concept has three components: civil society (institutional completeness); state and citizens (ideological legitimacy); and community (collective proximity).

[97] Dr. Landry testified that the school is the most important institution to the survival of the official linguistic minority. The school becomes the cornerstone of the community. It is the place

where young people live.

[98] Referring to para. 78 of his expert report, Dr. Landry explained the school's role in relation to community vitality. He stated that the minority must manage the school. He provided in para. 85 of his report a summary of the school's role.

[99] Dr. Landry in paras. 96 to 108 of his report deals in particular with the issue of the number of rights holders. He explained that Statistics Canada uses two formulas: 80% of the population receives the short form census which contains no questions regarding language and the other 20 % receives the long version. Dr. Landry explained that the problem of quantification is magnified in small communities, for example in the Yukon where there are already few francophones within a small community. He cited as example Statistics Canada's problems stating that "rights holder parents would have more children who know French (245) than they have children (210)" (para. 8, exhibit 46).

[100] Dr. Landry testified that the Statistics Canada census are not reliable. First, only 20 of the small minority population completes the long version of the census which asks a number of questions regarding identification with language and other relevant topics. Secondly, the questionnaires do not ask about the education of the parents and other factors relevant to s. 23 of the *Charter*. Further, there are many indicators of problems with the census. He also noted that the census does not ask any questions regarding grandparents.

[101] Dr. Landry explained the number of rights holders must be doubled if one relies on the

20% of the population who filled out the long version. Moreover, Statistics Canada saw no usefulness in presenting the statistics of the Yukon, Northwest Territories and Nunavut separately. These three territories are grouped together as though they formed only one region.

[102] Dr. Landry noted other shortcomings in the databank resulting from the census. In para. 102 of his report, he describes three factors which lead to underestimates by Statistics Canada of the number of rights holders.

[103] In paragraphs 109 to 122, Dr. Landry explains his opinion regarding the CSFY's situation. He testified that all of his recommendations and opinions depend on the accuracy and reliability of the facts and declarations contained in the plaintiff's claim and Mrs. Taillefer's testimony. He testified that the Yukon appears to have adopted a minimalist approach. According to Dr. Landry, there are two possible approaches, the first being linguistic development. He cited, as an example, the Ontario ministry which provides significant support, for example, by encouraging annual conferences, investing in research, and continually seeking to improve the system, and in supporting each of the school boards. The second approach is administrative control. Dr. Landry determined that the MEY in the Yukon micromanages. It tries to solve problems from a distance. He is of the view that this approach undermines motivation and kills creativity. It is important, rather, to respect the board's autonomy.

[104] In Dr. Landry opinion, the registration of 150 students in a new francophone secondary school is achievable in the near future. He explained that he arrived at the number 150 (see para. 107) taking into account various factors, particularly exogamous relationships. Regarding para.

108, Dr. Landry confirmed that the decision to open a new school is always a complex undertaking and he was not aware of studies on this topic. He called his opinion expressed in para. 108 an “impression”. He explained that the model adopted in para. 117 reflects society as we know it. This would be the most egalitarian and efficient model to facilitate a transition.

[105] In para. 118, Dr. Landry wrote : [TRANSLATION]

It is also very important that the school board can take control of everything related to pedagogy: the pedagogical material, the pedagogical approaches, the training of personnel and putting in place of necessary facilities ... With respect to pedagogy at the secondary level, the number of students is lower than that of anglophone schools, but the slogan “Small is beautiful” has its full significance in such contexts; such a school can show its benefits in terms of quality.

[106] Dr. Landry underlined that importance of a school board taking charge of establishing the necessary facilities. He explained that the relationship between facilities and retention is not clear. However, he stated that the proposed model would not only be more equivalent, but also would tend to revitalize the secondary level. By “Small is beautiful”, he wanted to convey the idea that it would always be more efficient for the CSFY to make changes. He stated that the success of a secondary school depends in part on a marketing plan, added community elements and proximity to a primary school.

[107] According to Dr. Landry, it is necessary for the board to retain its clientele, which promotes the vitality of the community. The board has to avoid transition to the anglophone

community. It is extremely important to a small linguistic group like the Yukon francophone community, that the CSFY receive assistance in recruiting and retaining its school clientele until the end of the secondary level. He writes at para. 114 : [TRANSLATION]

In my view, the government would have an interest in interpreting the definition of children of rights holders in a broader fashion if it really wants to take a “pluraliste” approach and support the development of the francophone community.

[108] Along the same lines, Dr. Landry noted the high level of immigration to the Yukon. In his view, the francophone immigrants should not all end up in the anglophone educational system. He believes that these immigrants could even aspire to trilingualism. He described this as a question of fundamental justice.

[109] Dr. Landry was of the opinion that many school boards already accept the ancestors category. In other words, they admit students even if their grandparents did not attend a francophone school. As well, he suggested that francophiles should be permitted to register, if they so wish.

[110] Dr. Landry testified regarding the relationship between the school and the institutional completeness (see para. 9), citing as an example the situation in Nunavut where school finishes after the Grade 9. He explained that the facilities allow young persons to live in community to contribute to the community’s vitality, which should reduce the rate of linguistic and cultural

assimilation. Facilities also play a role in socialization and the institution itself is fundamental in this regard (see para. 118).

[111] In cross-examination, Dr. Landry agreed that there are many factors which could explain Statistics Canada's numbers. He reiterated that the results of Statistics Canada's census are not really reliable. He gave the following example at para. 98 of his report. Statistics Canada claims in a report that there were 115 rights holders, but in the same report it states that 245 children understand French. He explained that this inconsistency results largely from rounding up or down. However, the rounding principle does not explain the difference between the figures 115 and 245. Rounding up or down could explain, for example, a difference of ten children. Other relevant indicators include the number of francophones in the Yukon and the total number of children in the Yukon, but these figures are disputed.

[112] Dr. Landry agreed that the results of the Statistics Canada census, collected from a sample of 20 % of the population (exhibit 47), provides better data than that which existed previously. However, he added that better data would be obtained from a sample of 100 % of the population. As a result, he testified that Statistics Canada's data are inadequate when it comes to determining the number of rights holders.

[113] Dr. Landry disagreed with the suggestion that the student population in the school system would be equivalent or less than Yukon's francophone population, around 4 % or 200 rights holders. He stated that francophone children only represent some of the rights holders. He agreed that the number of school aged francophone children would be a relevant factor. He explained

that exogamous families make up around 80 % of the Yukon population. Yet, these homes identify only one child in four or 25 % as speaking French. All of this leads to the conclusion that there is an unexploited potential.

[114] Dr. Landry recognized that it is impossible to determine the exact number of rights holders.

[115] As for the 2006 census (exhibit 47), Dr. Landry reiterated the problems resulting from the sample of only 20% of the population. The 2006 census identifies 190 rights holders. The 2006 census identifies 145 children between 5 and 19 years old. Dr. Landry testified that one must at least double this figure to 290 rights holder children. Dr. Landry confirmed that he has undertaken research studies on this specific issue, stating that the potential is underestimated in the territories. Dr. Landry confirmed that the number of rights holders would be between 200 and 400, but he was of the view that the number is close to 400.

[116] Dr. Landry disagreed with the suggestion that an expert can not draw conclusions from impressions. He stated that even preliminary study can have a certain value.

[117] Dr. Landry proposed in his report that there could be up to 150 secondary students. He drew this conclusion from data on the number of immigrants and francophiles. He stated that the success of a secondary school depends on the elementary school. Although there is no guarantee that all of the elementary students will end up in secondary school, the number of students in the elementary grades will have an effect on the registration in the secondary grades. He referred to

the figure of 150 as optimistic. This number requires a rate of attendance of approximately 70 to 80% of the rights holders.

[118] As for the saying “Build it and they will come”, Dr. Landry stated that the facility is only one factor in the equation. He acknowledged that there has been no study which establishes that facilities alone are sufficient to attract students. He also acknowledged that there is no study on marketing, although he noted that there has never been a formal national campaign.

[119] Counsel for the GY had previously had the opportunity to question Dr. Landry in a lawsuit in the Northwest Territories. Dr. Landry explained that he has written a report since that time clarifying the position he took in 2006. Referring to the results in his expert report of September 25, 2006 (exhibit 106), Dr. Landry confirmed that migration of students is a relevant factor in the complex context of French education in the Yukon. He said that his 2006 report did not focus on the issue of buildings or facilities. He stated that since that report, the student population has almost doubled. He states in his report at p. 22: [TRANSLATION]

Physical separation: Regarding physical separation of programs, the principle of territorial concentration leads us to propose that the secondary program be located within the current EET building or if an expansion of the facility is necessary, as a wing of that school. The secondary students which we consulted did not attribute great significance to such a separation. For them, it is more important that the distinction between elementary and secondary students lie in the flexibility of a code of conduct in the school. They do not want to be treated as babies.

[120] Dr. Landry explained that there were only 100 students in EET in 2006. Further, those students were still in the francophone school. He acknowledged that he had not done a follow up study on this issue.

[121] Dr. Landry confirmed that an attendance rate of 100% would be rare. He believes, however, that an effective national campaign could very well increase the rate. In his view, it would not be unreasonable to expect an increase of 20% following such a campaign. Dr. Landry questioned why around 50% of the elementary students did not pursue their secondary studies at the francophone school.

[122] Dr. Landry is co-author of a book, published in 2002-2003, entitled “Éducation et droit collectif au-delà de l’Article 23 de *La Charte*”. This text refers to an indicator called effective participation. According to Dr. Landry, the rate of effective participation would be higher in the Yukon, due to the high number of exogamous families. He emphasized that the effective participation factor is only one among many. Dr. Landry cautioned that one cannot strictly apply this factor, as he described in his 2002-2003 book. One must take into account not only the actual attendance, but also the potential, again due to the high rate of exogamous families. For him, the key factor is the actual potential.

[123] Dr. Landry repeated that s. 23 warrants a generous interpretation. Under a restrictive interpretation of s. 23, an immigrant from France who does not yet have permanent resident

status, could not attend a francophone school, and it would follow that all immigrants would be in the non-francophone system, regardless of their language.

[124] On the issue of building a separate secondary school, Dr. Landry recognized that there are not unlimited funds available. However, the purpose of the school is revitalization. He repeated that the 2006 study was done more or less for educational purposes, and that the situation has evolved since 2010. He concluded in stating that another compromise should be avoided.

[125] At the end of cross-examination, the Court asked Dr. Landry one question. Statistics Canada's 2006 census shows that there were 190 rights holders in the Yukon and that there were 146 students at EET in 2006, or 76% of the rights holders in the Yukon. The Court asked if any Canadian jurisdiction had succeeded in attracting 76% of its rights holders to francophone schools. Dr. Landry testified that no other jurisdiction, aside from New Brunswick, had succeeded in attracting 60% of its rights holders to francophone schools. Next to New Brunswick, Ontario has the highest rate at 50%.

[126] In spite of aggressive attacks during cross-examination, Dr. Landry responded clearly and substantively to all questions. He was able to justify all of his positions and opinions because of his considerable experience and expertise and, obviously, his work for Statistics Canada.

[127] Dr. Landry was credible and reliable. The Court accepts his opinions. He demonstrated very well that one cannot rely on the figures coming out of the Statistics Canada census without

undertaking a more thorough analysis. He supported this conclusion by referring to his numerous research studies. The Court also accepts his opinion that the number of rights holders is undoubtedly double or more the number identified by Statistics Canada's census, for the reasons set out above and presented in his report.

[128] I accept Dr. Landry's opinion on the control, management and micromanagement.

However, I note as Dr. Landry did, that his opinions depend on the accuracy and reliability of the information which was provided to him, especially regarding the actions of the Yukon.

Regarding the issue of a new secondary school, Dr. Landry's opinion appears to be supported, even if he did not undertake any study regarding this particular issue.

E. Marc Champagne

[129] Marc Champagne has been the principal of EET since June 2009. He started his teaching career in 1988 in Whitehorse, Yukon. Since 1988, he has worked at EET for eleven years, sometimes as classroom teacher. He also taught split or combined classes. He taught in both the elementary and secondary levels.

[130] Mr. Champagne listed six factors affecting EET's success. First, he noted a lack of French resources in the Yukon. He gave the examples, of English videos which do not exist in French, and teacher guides which are not translated, even if the corresponding manual has been.

[131] Secondly, Mr. Champagne noted difficulties in relation to teacher training. Most of the training in the Yukon takes place in English. The teacher must translate the information. He gave the example of training in math. The new training provides an excellent evaluation tool, but the document is not available in English. EET teachers who took the training had to translate the evaluation tool. Mr. Champagne said it took him around 60 hours of his personal time to do this translation.

[132] Third, EET has a dual mission. The school must not only teach the curriculum, but also transmit the French language and culture.

[133] Fourth, Mr. Champagne stated that EET is the only Yukon school which is required to teach the French language as first language, and English also as first language (s. 42, *Education Act*). Yet no funds are given by the Yukon to the school to address this problem. As a result, CSFY has had to pay for a teacher's aide position in the past to cover this gap.

[134] Fifth, Mr. Champagne expressed his concerns regarding split or combined classes. He said that he had to teach combined classes in 10 out of his 11 years of teaching at EET. He explained that it can be very difficult to manage such a class, however no additional resources are provided to deal with the situation. He confirmed that there would be combined classes in 2010-2011 from Grade 4 to Grade 12. It is preferable for a teacher to only teach one grade, because of the time required and management demands of a combined class. He recognized that combined levels are taught because of the numbers of students.

[135] Finally, Mr. Champagne referred to problems with facilities management, a lack of space and the need for a separate secondary school.

[136] Mr. Champagne noted a particular need in relation to pre-school. He confirmed that there is a full time kindergarten for 4 and 5 year old children. In his experience, the pre-school program prepares the children for elementary and secondary school. Mr. Champagne explained that 75 to 80% of the rights holder families are exogamous and these children do not learn much French at home. In his view, playschool is closely related to full time kindergarten. The playschool is essential to the survival of the school. He explained that the children can be enrolled in playschool from the age of 6 months. He suggested that kindergarten can be offered to children from the age of three years, given the lack of daycare resources in the Yukon. He also said that there is a lack of space. Mr. Champagne went on to say that pre-school and daycare can facilitate contact with exogamous families, educate them and offer them activities in French. Playschool supports recruitment and retention of rights holders.

[137] Mr. Champagne stated that the relations between the school principal and the MEY are complicated and difficult. He noted that he receives e-mails directly from the MEY, and that the MEY makes arrangements for his participation in training sessions, despite the existence of the school board. Mr. Champagne added that there are also difficulties in the area of finances which the MEY micromanages. As school principal, Mr. Champagne is responsible for managing certain budgets from the CSFY. However, he said that he also receives a budget directly from the MEY, for example Budget 2009-2010 (exhibit 48). Mr. Champagne confirmed that he was not consulted with respect to that Budget. Regarding the MEY budgets, the MEY keeps the funds

and Mr. Champagne sends it receipts for expenses in order to be reimbursed. As well, he explained that he does not have authority to transfer funds from one budget item to another in the case of a deficit.

[138] Mr. Champagne testified to the frustration he experiences as school principal as a result of the situation. As an employee of the MEY, he must attend meetings of principals scheduled by the MEY. He always tells the CSFY which responds sometimes saying that his attendance at these meetings is irrelevant. For example, EET began its 2009-2010 school year one week earlier than the other schools in the Yukon. During this week, the MEY called meetings, but he did not attend because his school year had already commenced.

[139] According to Mr. Champagne, there is also a problem regarding human resources. The CSFY does not choose the employees and those who work at EET are employed by the Yukon. The MEY pays the salaries. When an employee is absent, he or she must send the MEY an English form.

[140] The CSFY can fire a principal, however it is in fact by way of a recommendation by the CSFY to the deputy minister of education. Mr. Champagne stated that the school principal positions in the Yukon schools are usually permanent positions. In his view, it would be better if the position was for a limited term. He explained that it is difficult to make changes when the position is a permanent one. Because there is only one school, it is impossible to transfer a principal to another school, as is possible elsewhere in the Yukon. Mr. Champagne stated that it

would be better if he were an employee of the CSFY so that there would not be conflicting loyalties to the CSFY and the MEY.

[141] Mr. Champagne stated that those who work at EET are francophones, working in French with a mandate to transmit the French language and culture. Yet the MEY refuses to provide information and to communicate in French, but does so only in English. This is incongruous for these employees who are required to work in French.

[142] Mr. Champagne explained that there is a separate division in the MEY for special services. Everything at EET is done in French. However, the requests of MEY for these services must be made in English. Each school has a specialist such as an educational psychologist. The educational psychologist at EET was an anglophone and the language she worked in was English. Some teachers found that difficult. Mr. Champagne also explained that one of the educational psychologist's tasks is to sit in the classroom to observe the child during class, which is difficult if the psychologist does not understand the language in which the course is being conducted. Mr. Champagne stated that the MEY, when it hires, does not require that these individuals be bilingual.

[143] Mr. Champagne spoke about the resource room or special needs ("alternative class"). This program exists in the English schools, but not at EET. EET's request was denied even though five students were designating as requiring such a class.

[144] Mr. Champagne explained that the requests for new hires are sent to the MEY. Then the documents are sent to the CSFY who chooses the candidate and the MEY sends the offer by way of a letter in English. He gave another example of micromanagement, being the fact that the CSFY cannot choose its own substitute teachers. Again, it has to go through the MEY.

[145] Mr. Champagne stated that most of the training in the Yukon is done in English. Training in French would better meet the specific needs of the francophone school. He explained that the MEY allocates a budget of around \$360,000.00 to the Yukon Teachers' Association (YTA). Within this association, there is a committee which decides how to distribute the funds for training. However, none of the funds are specifically reserved for the francophones. Mr. Champagne testified about the importance of training in French for the courses which are taught in French. He recognized that such training would be more expensive.

[146] According to Mr. Champagne, the CSFY does not have control over teacher training. In the Yukon, only three days per year are set aside for this training. The CSFY found it necessary last year to add five days to the calendar for a total of eight days of teacher training, but the MEY refused. As a result, the CSFY had to make other arrangements to ensure that the personnel received the eight days of teacher training. Mr. Champagne stated that the MEY continues to prevent the CSFY from adding additional days for teacher training.

[147] Mr. Champagne recognized that the new funding formula provides for an increase of 15% for the francophone school. However, in his view this increase does not address the school's needs. Even with this new formula, the CSFY had to cut a position in the secondary

level and two positions at the CSFY. Mr. Champagne stated that the francophone school loses around two thirds of its students between Grade 6 and Grade 12. He explained, giving personal examples, why the secondary school is necessary to the survival of the francophone school. He also noted that the MEY's draft strategic plan for 2010-2015 (exhibit 49) makes not reference to French as a first language.

[148] Mr. Champagne cited problems with facility management. For example, EET had to convert a music classroom in September 2009, due to an increase in the number of students. It took eight to ten months for the window renovations in this room to be completed. The MEY managed the work and EET had no control over the situation. Mr. Champagne did not have the right to speak directly to the contractor.

[149] Mr. Champagne confirmed that the collective agreement provides for a teacher-student ratio of 1:20 for kindergarten 5. This ratio is problematic and unacceptable for kindergarten 4, because many of the children are only 3 years old at the beginning of September. The Yukon statutes with respect to daycare prescribe a ratio of 1:8. The CSFY created a directive that the ratio would be 1:12 for kindergarten 4.

[150] The document entitled "École Émilie-Tremblay Use 2010-2011" (exhibit 504) explains the use of each room in EET. He explained that there is an insufficient number of lockers for the school and there are not enough walls on which to place lockers. The work stations, for example for francization and reading, are often located in the school hallways. The English classroom has been in the computer room for the last three or four years. The separate English classroom is

necessary because of the students' various levels of understanding. The music course is currently in the library, which restricts the usefulness of the library. The science laboratory has become a multi-use room for technology, industrial arts and special projects, which creates particular problems, such as dust, glue, etc.

[151] Five students are in the special needs program. These students are in Grades 2, 5, 8, 9 and 10. The alternative class is located in storage room 201. Mr. Champagne is of the view that the two younger students with special needs should be separate from the other three who are in secondary.

[152] As in all Yukon schools, there is a room where the dentist sees students. Mr. Champagne stated that the dentist uses a class at EET which is otherwise used full time for the custodian, the specialists and the francization program. When the dentist is at the school, alternative spaces has to be found. There is not enough space in the gymnasium for storage and some equipment is kept outside the school in another storage facility. The school added a dividing curtain in the gymnasium in order to maximize its use, especially for elementary level classes.

[153] Referring to the document entitled "Prévision pour 2011-2014" ("2011-2014 Forecast") (exhibit 505), Mr. Champagne indicated that EET needed two portables for the following year. He testified about how important it was to start offering a half-time kindergarten 3 to meet the need for francization. He noted that EET is the only secondary school in the Yukon which does not have an industrial arts facility. The original plans included an industrial arts room. He said that the MEY suggested asking other schools for space, but the other schools could not

accommodate the request. He was of the view that it was not fair in any event, for pedagogical reasons, to have to use another school's rooms. He gave the example of the time lost, approximately one hour, in transporting the students each time they would need to go to a school such as F.H. Collins. The temporary needs for 2011-2012 also included two rooms for alternative classes, one for elementary and one for secondary, possibly portables. Exhibit 506 is the school plan showing possible use of the rooms for 2011-2012.

[154] Regarding the admission policy for non rights holders, Mr. Champagne stated that the CSFY follows a process whereby the principal meets with one or both parents. Next, the family completes a form and meets with a committee. The committee makes a recommendation to the CSFY which makes the final decision. Three categories of non rights holders can request admission : immigrants, such as francophones from France; those with francophone ancestors, which is to address with the remedial aspect; and anglophones who wish to attend the francophone school. Mr. Champagne explained that where a request is denied, the parents receive a notice stating that they can appeal the decision to the CSFY. In 2010-2011, EET's population was made up of 92% rights holders, 1% immigrants, 3% "ancestors" and 4% (or 7) anglophones students (see exhibit 508). The distribution was similar in 2009-2010. In Mr. Champagne's opinion, the presence of non rights holders, such as immigrants, is very enriching for the school.

[155] Mr. Champagne explained that a school which houses kindergarten to Grade 12 faces many management challenges, including the issues of a code of conduct, the codes of discipline, sharing of space, and different expectations.

[156] Mr. Champagne confirmed that the school lost 13 secondary students last year. Two left to travel, one moved to Montreal, and 11 left for anglophone schools. Eight of those eleven students transferred to F.H. Collins in the science and math program, “Wood Street”, two went to Porter-Creek and one went to Vanier.

[157] Mr. Champagne reiterated that the secondary facilities are completely unacceptable. Among other things, there is no music room, industrial arts room, cafeteria, or meeting place for the students. In his view, the students should not be disadvantaged in attending the francophone school.

[158] In cross-examination, Mr. Champagne acknowledged that EET employs a full-time educational counsellor for program development. However, this counsellor does not have the time to respond to specific needs in this area. Mr. Champagne agreed that split or combined classes are common in the north, but they are not effective, as demonstrated by the number of students who leave. Combined classes are more demanding on the teachers. As well, the difference between the weaker and stronger students becomes even more marked.

[159] Mr. Champagne confirmed that the GY ensures the financing of kindergarten for the 4 and 5 year old children. He recognized that EET is the only school which receives funds for kindergarten for 4 year old children. These funds are calculated on the basis of a teacher-student ratio of 1:20.

[160] Mr. Champagne confirmed that the CSFY alone evaluates the principal. He also agreed that the CSFY establishes the school calendar, subject to approval of the MEY.

[161] Mr. Champagne disagreed with the suggestion that there would be less employment security if his contract was not permanent. Further, the duration of the contract, whether permanent or not, is not a key factor in the recruitment of principals. Mr. Champagne was prepared to become an employee of the CSFY so long as he received the same salary and benefits as he does presently.

[162] Regarding special needs, Mr. Champagne agreed that no one in the Yukon was qualified to do comprehensive student evaluations. The resource person in specialized teaching, Mrs. Desrosiers, is from Vancouver and works in French. However, only comes for one week at a time to do evaluations. She does not do the follow up mandated by the evaluation. She is not the person who does the work of the educational psychologist in the classroom. That person should also be bilingual.

[163] Mr. Champagne disagreed with the suggestion in cross-examination that the collective agreement dictates the number of pedagogical days. He believed that the school legislation provided for the three days currently imposed by the Yukon.

[164] Mr. Champagne explained that the new staffing formula providing for a 15% increase to assist francophones in a minority situation appears, at first glance, to result in an increase from 18.2 to 21 positions. According to him, it actually results in a reduction, given that the CSFY did

not have enough money in its budget to pay for the positions that it previously paid for. The CSFY had to cut a position at the secondary level.

[165] According to Mr. Champagne, the current admission protocol plays an important role with respect to reparation. He confirmed that the use of facilities might be another important factor. He also agreed that when an anglophone student is admitted, the school is required to allow admission, as rights holders, of all other members of the same family. He confirmed that exhibit 509 shows the categories of rights holders, and non rights holders, as does exhibit 508. Mr. Champagne explained numerous times that errors were discovered in exhibit 509. Exhibit 508 is the corrected version.

[166] Exhibit 505 is a prediction of the number of students in the future up until 2014. According to Mr. Champagne, these are realistic figures. There was a long cross-examination on this point, effectively becoming a personal attack of Mr. Champagne and his integrity in relation to this forecast.

[167] Mr. Champagne maintained that the calculations by MEY regarding use of space are neither accurate nor realistic. He confirmed that two classrooms were used for kindergarten 4 that year, one for ten students and the other for eleven. The CSFY decided, for pedagogical reasons, that a class of 20 or 21 students in kindergarten 4 would be inappropriate and consequently established a teacher-student ratio of 1:12.

[168] Mr. Champagne was asked a number of times about the use of classrooms, for example whether admission of non rights holders created problems in this respect. Various scenarios of split and combined classes were put to him. This continued questioning amounted to a direct attack of Mr. Champagne regarding optimal use of the space at EET. Mr. Champagne directly responded to each accusation with reasonable explanations.

[169] Regarding classroom 328, which is reserved for the pedagogical advisor (the “Seminar Room”) , he was asked in cross-examination whether EET is the only school in the Yukon where the pedagogical advisor has his or her own classroom. However, it came out that most of the pedagogical advisors have offices at the MEY from where they provide services to all of the anglophones and other schools in the Yukon. Mr. Champagne explained why it is helpful to have the pedagogical advisor in-house. He acknowledged that it was possible for the pedagogical advisor to have his office within the CSFY. However, he was of the view that the current approach worked best given the close work between the pedagogical advisor and the staff with respect to special needs at EET.

[170] Mr. Champagne disagreed with the suggestion that there are no special needs classes in other schools nor that they are a last ditch solution. He noted that the MEY had started a similar program in December 2010.

[171] During cross-examination on Wednesday, January 19, 2011, Mr. Champagne answered questions regarding the admission policy for non rights holders and the admission forms, specifically whether such forms existed.

[172] Mr. Champagne was asked whether he was prepared to provide the admission forms. He said that he was, but indicated that they were in each of the individual student files and that it would take some time to gather them. After the plaintiff finished its evidence, the defendant's counsel stated that he had not received the admission forms. Furthermore, he stated that if he did not receive them prior to commencing the cross-examination of the Director General of the CSFY, Lorraine Taillefer, he would have to re-examine Marc Champagne in this regard. It should be noted that on January 21, the plaintiff provided all of the admission forms requested by counsel for the defendant. The Court gave counsel time to review the documentation prior to cross-examining Lorraine Taillefer. It is important to note that he did not ask Lorraine Taillefer or Marc Champagne any questions regarding the admission forms. I find that the personal attack on Mr. Champagne and his honesty was not justified. He was truthful regarding the existence of the forms, and seemingly their content, given the lack of questioning in this respect.

[173] I find that Marc Champagne was credible and reliable. He appropriately identified the problems and difficulties and his explanations were not undermined on cross-examination.

F. Lee Kubica

[174] Lee Kubica was qualified in the following areas as an expert witness, with no objection on the part of the GY:

- (i) establishing the curriculum in Yukon secondary schools;
- (ii) scheduling of the courses offered in secondary schools in Whitehorse;
- (iii) prerequisite courses in order to graduate in the Yukon.

[175] The GY disputed Mr. Kubica's expertise concerning the factors affecting retention of secondary level students. Following a voir dire, the Court decided that Mr. Kubica did have expertise in this area. It should be noted that Mr. Kubica has been involved in the Yukon school system since 1971. From 1971 to 1991, he taught at the secondary school, F.H. Collins in Whitehorse. One of his responsibilities during this period of time was to interview students who were leaving F.H. Collins, in order to learn why they were leaving. From 1991 until 1994, he was assistant principal at F.H. Collins where one of his most important responsibilities was to monitor the students' attendance and retention. From 1994 to 1998, he worked at the MEY as consultant regarding graduation programs for all Yukon schools. His mandate was to learn how the various schools responded to issues of retention.

[176] From 1999 until 2001, Mr. Kubica was principal of F.H. Collins. He returned to the MEY in 2001, where he worked until 2005 as director of program services. In this role, he looked at the issue of retention. From 2005 until 2007, he was assistant deputy at the MEY. During this time, he worked on the retention issue, and established new programs such as "The Master Timetabling", and a tutorial program. As well, he succeeded in obtaining increased financing for industrial arts programs.

[177] In short, Mr. Kubica has more than 39 years of experience in the educational system in the Yukon, specifically in Whitehorse. His expert report and his curriculum vitae form exhibit 50.

[178] Mr. Kubica explained that the following factors have an impact on retention:

- i) diversity of programs;
- ii) diversity of courses;
- iii) staff;
- iv) financing;
- v) social attractions.

[179] Mr. Kubica explained that programs must be comprised of series of courses and not just individual courses. In the Yukon, such programs could focus on science, outdoor pursuits, music, culinary arts, etc. He observed that EET has only one program: Académie Parhémie.

[180] Mr. Kubica explained that the diversity of courses is important both from the point of view of number of courses and how often they are offered. An example of diversity of courses would be industrial arts. Regarding staff, Mr. Kubica indicated that students want to have a choice of teacher. A greater number of teachers gives the students more variety and opportunity. He stated as well that financing affects which courses can be offered. For example, an orchestra program is more expensive than a social studies program. As for the social aspect, he stated that

there is a “gravitational pull” toward the larger schools. Mr. Kubica noted that the government exercises influence over all of the factors he identified, except for social aspects and the “gravitational pull”.

[181] According to Mr. Kubica, EET must offer more choice to its students in order to improve the retention rate. However, in order to be able to offer a greater selection of courses, more staff would be required, which would in turn require increased funding. Mr. Kubica was of the view that students are able to identify the courses they wish to take.

[182] It bears noting that Mr. Kubica has closely studied the three other secondary schools in Whitehorse, as well as two rural secondary schools. According to Mr. Kubica, the major advantage of the anglophone secondary schools lies in the choice of courses. He explained that the schools in the Yukon offer fourteen programs. Each of these programs is comprised of a group of courses focussing on a specific area of study, such as the environment, outdoor pursuits, music, science, etc. Students who attend the other secondary schools can choose among thirteen programs and range of courses. Unfortunately, the EET students can only access additional programming offering them the choice of a range of programs and courses if they leave EET for the anglophone system. In the rural context, the issue of transport comes into play, however, there is nothing preventing a student from leaving EET and attending an anglophone school.

[183] There is only one program at EET: Académie Parhélie. This is a linguistic program. It is restricted by the limited number of students in the secondary level. Mr. Kubica noted that there

is less program choice in the Yukon's rural schools. However, the rural schools do not face the same retention challenges, due to geography, familiarity, and other factors.

[184] Mr. Kubica equated EET to a Yukon rural secondary school in terms of the variety and number of courses offered. He gave the example of the Physics 11 and 12 courses. These courses are prerequisites for math and science programs in post-secondary institutions. The requirements in the Yukon in this respect are the same as those in British Columbia. Yet, these courses are not offered at EET, nor through distance learning. Mr. Kubica stated that the basic prerequisites often do not suffice for entrance to university or other specialized post-secondary schools. It is therefore important to offer a variety of courses in order to respond to the demands of post-secondary programs. As well, the laboratories required for these courses are very rare or inexistent. In fact, Mr. Kubica explained that EET offers only 55 courses, adding: "As in the limited program choices, the limited courses offered make it harder to retain students at EET who can easily access these programs or courses at one of the other English high schools in Whitehorse".

[185] Mr. Kubica summarized the issue of courses as follows: "Courses, like programs, are dependant upon student numbers. Typically, the more students, the more courses offered. This can be moderated by increased staffing and smaller class sizes. A diversity of courses enables a greater opportunity for students to be able to select those that are both in areas of interest as well as to provide needed entrance requirements to post-secondary institutions".

[186] Mr. Kubica showed the decrease over the last six years in the number of students

registered in Yukon schools. However, EET's number of students increased over six years, except for the secondary school, which followed the same trend as the general population (p. 12, exhibit 50). EET students often choose to go to anglophone secondary schools in Whitehorse, and particularly to the French immersion program at F.H. Collins. According to Mr. Kubica, EET must retain elementary level students in order to retain them at the secondary level.

[187] Mr. Kubica showed that the three other secondary schools in Whitehorse and two rural secondary schools retain almost all of their students from kindergarten to Grade 12 (table, p. 13, exhibit 50). However, EET's retention rate from elementary to secondary is only 15%. Mr. Kubica clearly concludes that the anglophone schools retain more of their students than does EET. According to Mr. Kubica, once a francophone student goes to an anglophone school, it is unlikely that he will return to EET. Mr. Kubica observed that EET's increase in elementary students has not resulted in an increased retention rate at the secondary level.

[188] Mr. Kubica maintained that EET tried two initiatives to increase its retention. First, it diversified its programming, including outdoor activities, fine arts, etc. (Académie Parhélie). EET students must, however, participate in the entire program, regardless of their personal interests.

[189] Secondly, EET increased the number of staff. Mr. Kubica explained that it is easier for a larger school to create a timetable given the greater number of teachers. As well, Mr. Kubica noted that EET had to reduce the variety of courses it offered, because there are only two secondary teachers for three classes: 7-8, 9-10, et 11-12.

[190] Mr. Kubica explained that the retention issue and related solutions are complex and varied. The factors include gaps in buildings, programming, course diversity and social pressures.

[191] To summarize, Mr. Kubica's expert opinion is that: "The primary goal of the commission scolaire francophone du Yukon No. 23 is to have a vital and dynamic francophone school from K4 to Grade 12. In order to accomplish this goal, EET must be competitive in regards to facilities, programming, and course offerings with the three anglophone secondary schools in Whitehorse" (p. 32, exhibit 50).

[192] Mr. Kubica is of the view that it is necessary to increase the number of students in order to be in a position to provide better programming and choice of courses. Due to EET's efforts in programming, the number of secondary students has stayed stable over the last two years. However, the next step of the process must be undertaken, which is to expand the programming and courses offered, in order to meet students' individual needs. Mr. Kubica testified that as long as there is a big difference between the number of students in the francophone and anglophone schools, there will be a migration of francophone students toward the anglophone schools, because of programming and for social reasons.

[193] Mr. Kubica found EET's facilities to be comparable to the two rural schools in his study. As is the case with EET, these two school offer a program from kindergarten to Grade 12. Table 2 at p. 15 of his report shows simply that when the student population of a school increases, the

space per student decreases. However, having more students allows for better use of the space. Mr. Kubica gave the example of the ideal situation of 25 students per class. When there are 125 students in Grade 8, only five classrooms are required due to the teacher-student ratio set out in the YTA's collective agreement. A school with fewer students could well use the same number of classrooms, none of which would be filled to capacity.

[194] There are three categories of rooms or spaces in a school: classrooms according to the number of students, areas designated as special rooms, and other rooms. The number of classrooms and special rooms is dictated by the number of students. At the elementary level, special classrooms are not identified as available to be used as classrooms. However, in the case of a K-12 school, a special class at the secondary level can be used as a classroom. Mr. Kubica explained that schools offering K-12 have a number of shared rooms, which is not the case in autonomous secondary schools.

[195] Table 3 at p. 17 of his report shows that there are usually two special rooms in elementary schools, the gymnasium and the multi-purpose room. Each elementary school also has another room in the "other" category, the library. EET has eight classrooms at the elementary level, two special rooms and two other rooms (table 4, p. 17). At Clark School, there are four classrooms, seven specialized areas and three other rooms. At Tantalus School, there are four classrooms, six specialized spaces and five other rooms. In fact, starting October 31, 2010, EET had 157 students at the elementary level, or from kindergarten to Grade 7. Table 5 shows the number of teaching spaces for the secondary level, either as classrooms, special rooms, or others, for EET, Clark, Tantalus, and the three secondary schools in Whitehorse: F.H. Collins,

Porter-Creek and Vanier. The three Whitehorse secondary schools do not share space with the elementary school as is done at EET. Mr. Kubica noted that the special rooms in the Yukon schools are not used to teach regular classes. Shared use raises significant issues. At page 18, Mr. Kubica wrote: “Due to the sharing of room space in K4-12, schools’ utilization of specialty rooms is different from both schools, which house only secondary or elementary students. Specialty rooms designed for specialty courses (science) must be available during those times that secondary students are timetabled into those rooms. They are then not available for elementary students or secondary students at other grade levels, therefore, sharing a space between elementary students and secondary students results in timetabling difficulties not experienced within schools which house separate secondary and elementary schools”.

[196] Mr. Kubica, referring to tables 6 and 7, noted that EET does not have an industrial arts room. Mr. Kubica at page 19 of his report states: “École Émilie-Tremblay’s lack of music room, computer lab, industrial art shops, a weight room, distance education space, special needs space, seminar room space are important concerns when the retention of secondary students is an issue”. Further, there is a kindergarten 4 at EET in Whitehorse and also in several rural schools. This program relies on financing from the GY. The addition of kindergarten 4 at the school takes away one classroom which would otherwise be available to the other levels.

[197] Mr. Kubica identified three capacity tests (see p. 20-21): raw capacity, ideal capacity, and practical capacity. “Raw capacity” is calculated by dividing the number of rooms by the maximum student capacity as provided for in the YTA collective agreement. This manner of determining capacity is unacceptable. The second test, “ideal capacity”, involves applying a

multiplier to the figure obtained under the raw capacity calculation. Generally, the lower the number of students at the secondary level, the greater the multiplier. A multiplier of 0.6 is currently used for EET. The “practical capacity” approach reflects what actually occurs inside a school. New exhibits were added to exhibit 50: 50A, 50B, 50C, 50D, 50E. Most of these new exhibits are intended to update the figures in the first report. Mr. Kubica went on to say that the “practical capacity” calculation is aimed at determining where the student will be located when he enters the school.

[198] According to Mr. Kubica, one of the reasons for the student migration from EET to other secondary schools in Whitehorse is because of the lack of space or facilities (pp. 29-32).

[199] Revised table #4 regarding the retention rates, shows that EET has a low retention rate, but if a student stays until Grade 8, he will probably stay for the duration. Along the same line, revised table #7, which populated with data from the MEY, shows that if all of the current students stayed at EET, there would be 118 secondary students in 2018. The secondary student population in 2010 was 40 students. Mr. Kubica noted that, contrary to what occurs in the provinces, there is no standard for school construction in the Yukon. The construction parameters for a new school in the Yukon are determined by taking into account various factors, including the estimated number of students, the grades taught at the school, the number of students in each grade, as well as the needs identified by the community. He gave the example of the rural Clark School, where the community succeeded in building a larger gymnasium with a weight room.

[200] In his expert report, Mr. Kubica explains that the “raw capacity” and “ideal capacity” tests are done simply to ensure that the schools can accommodate the anticipated number of students. At the time of construction of EET in 1995, it was to be a K-12 school, but not with kindergarten 4. Mr. Kubica stated that EET does not currently have enough classrooms. As a result, more special rooms are used for other purposes. According to Mr. Kubica, at EET “practical capacity is the problem”. He added (p. 30): “In addition to the alternate use of the music room, the library and computer lab, École Émilie-Tremblay does not have an industrial arts shop, a weight room, a cafeteria, dedicated special-needs space or a dedicated distance education space as do all the Anglophone schools in Whitehorse (table 4)”.

[201] In his conclusions as expert, Mr. Kubica wrote (p. 32) : “A minimum facility requirement is necessary to be competitive. Without an industrial arts facility, an accessible music room, adequate gymnasium space, a full-time library and a multi-use space for special-needs students, distance education and seminar rooms, École Émilie-Tremblay will not be able to compete with the Anglophone secondary schools and therefore will continue to fail to retain secondary students in a French environment”.

[202] Mr. Kubica recommended the construction of a new francophone secondary school on the same grounds as EET. He referred to Watson Lake where there is a school housing kindergarten 4 through Grade 7 with around 119 students, and a secondary school from Grade 8 to Grade 12 with around 99 students. Mr. Kubica reiterated certain concerns (para. 33 of his report) : “As long as there continues to be a great discrepancy between the numbers of Anglophone students and francophone students, there will be a gravitational pull from École

Émilie-Tremblay to the Anglophone secondary schools due to a lack of facilities, limited programming and social reasons. Once again, being able to increase secondary student numbers within École Émilie-Tremblay becomes critical for francophone education in the Yukon”.

[203] In cross-examination, Mr. Kubica confirmed that he had seen the Hold Fast report dated March 31, 2010. He acknowledged that the tables identified at page 14 reflect the right figures starting March 31. Further, he confirmed the accuracy of the EET teacher-student ratio. Mr. Kubica agreed that the student retention rate is not surprising, given the factors he identified in direct examination. Mr. Kubica recognized that all schools have retention concerns. For him, the size of the school, and not the social aspect, explains to a large extent EET’s low retention rate. Mr. Kubica admitted that he had not done exit studies with EET parents or students, nor studied the results of interviews with those students. However, he stated that the data demonstrate that the three anglophone secondary schools in Whitehorse attract EET’s secondary students and that many of these students enroll in “Wood Street” at F.H. Collins High School. He repeated that the programming and choice of courses are the most important factors in relation to migration of EET students toward the larger anglophone schools. He based his opinion on the figures presented in his report. Mr. Kubica said he did not take into account the issue of exogamy and the potential impact of this factor on his opinion.

[204] Mr. Kubica had never before seen the CSFY’s strategic plan for 2005-2010 (exhibit 42). Page 29 of that plan sets out the following three factors, drawn from a national study published in 2005, which have an impact on Yukon parents’ decisions as to whether or not to register their children in a French language school: [TRANSLATION]

- i) parents are not aware of the consequences of registering their children in a majority school;
- ii) parents lack confidence in their own French abilities;
- iii) parents believe that the education in the majority schools is of a higher quality or offers a better chance of facilitating post-secondary studies.

[205] According to Mr. Kubica, these factors explain why students register at a school, but not why they leave: “This deals with why students are coming to the school but not why students leave the school”.

[206] Mr. Kubica read another excerpt from the strategic plan (p. 30, exhibit 42):

[TRANSLATION]

First, according to the Simbal study: “Parent of exogamous families are not necessarily intent on the schools producing francophones. These parents want their children to identify not only with the French community, but with their family heritage, which is mixed”. Certain studies have found that people in exogamous situations tend to choose an immersion school as a compromise.

Mr. Kubica agreed that the existence of the immersion program at F.H. Collins High School has an influence on students and parents at EET. He stated: “The immersion program makes it easier because they wouldn’t lose all their French and get course diversity. The purpose of my report is how to deal with the students going to immersion”.

[207] Mr. Kubica admitted that he had not done a literary study nor examined literary reports concerning retention. He confirmed that he compared EET and the anglophones schools in the Yukon. He did not do a comparison with other francophone schools. He agreed that the number of courses and programs, depends in part on the number of students. He confirmed that he supported the establishment of the Académie Parhélie program. However, it is only one program. According to Mr. Kubica, there should be more programs at EET to respond to students’ interests. For example, when programs and courses were established at Vanier School, an anglophone secondary school in Whitehorse, the retention rate increased and new students registered. He referred specifically to the Spanish course.

[208] Regarding the calendar, Mr. Kubica maintained that establishing a school calendar, semestered or continuous, i.e. for the entire year, has no impact on the number of courses offered by the school.

[209] Mr. Kubica explained that Gilbert Lamarche was an employee of MEY under his direction as assistant deputy minister. However, he did not approve the bilateral agreements with the federal government. That was the responsibility of the director of finances. He confirmed

that the CSFY would have identified its needs to the GY, but that the CSFY did not participate in the negotiations.

[210] Mr. Kubica confirmed that he received the letter from Canadian Heritage dated January 18, 2006 (exhibit 51). He agreed that Canadian Heritage questioned the transfer of funds under the bilateral agreement from the French first language program to the French second language program.

[211] Mr. Kubica denied having seen the letter sent by Gilbert Lamarche to Canadian Heritage, dated January 30, 2006 (exhibit 37). He noted that the letter did not list his name as recipient of a carbon copy. That letter stated that the CSFY agreed with the transfer of \$1.9 million from the French first language program to the French second language program. Mr. Kubica stated: “Mr. Lamarche was getting approval from finance, not me. The letter should not have gone out without my approval... It didn’t get my prior approval”.

[212] He acknowledged that the factors having an impact on retention apply equally to anglophone and francophone schools. Yet francophones face an additional variable. He drew on his personal experience in forming the opinion regarding the effect of facilities on retention. He confirmed in cross-examination that F.H. Collins, Vanier and Porter-Creek Schools are 13 to 15 times larger EET in terms of students at the secondary level.

[213] Mr. Kubica agreed that school plans have changed significantly over the last 20 years. There is a modern tendency to conceive schools with more multi-use space. Half of the rooms

are still used as classrooms and the other half as special classes. He stated that the traditional industrial arts or trade classrooms are again in vogue. Mr. Kubica disagreed that there has been a reduction in industrial arts in the Yukon.

[214] Again in cross-examination, Mr. Kubica explained that the special classes in the schools identified in his study have always served as special classes, except for a classroom at Porter-Creek School. He noted that the two rural schools have their own particular problems. However, the issue of retention, or migration, is not a major concern, given geographic and other barriers. Mr. Kubica found that split or combined classes are rare for core courses in the anglophone schools.

[215] Mr. Kubica answered questions on timetabling, one of his areas of expertise. He explained that timetabling involves designation of facilities and teachers, according to the students' needs. He is aware of "curriculum mapping, which means flowing students to resources". Mr. Kubica confirmed that his report does not discuss timetabling nor curriculum mapping at EET. According to him, timetabling is not relevant at for the elementary grades, given the greater number of students.

[216] Mr. Kubica confirmed that the teacher-student ratio at EET is very low, as it is in all Yukon schools. He emphasized the importance of more staff, but noted that there still have to be facilities to house that staff. He explained that course choice is not always related to facilities. Mr. Kubica agreed that the staff-teacher ratio has an impact on the manner in which the rooms are used. He confirmed that there will always be a difference between anglophone schools in

Whitehorse and EET, due to the difference in size. Mr. Kubica also agreed that year over year programming could encourage diversification create a certain amount of flexibility.

[217] Mr. Kubica confirmed that the Académie Parhémie experiential program requires less in terms of facilities. He also confirmed generally that programs where the student acquires credit for work experience outside of the school system are less dependent on facilities. He agreed with the suggestion that an industrial arts course outside of EET could occur through an agreement with other schools. He added, however, that such an arrangement would raise transportation and language issues.

[218] Regarding special needs classes (“resource rooms”), he stated that despite the trend toward integration, each Yukon school has an alternative class for special needs children.

[219] I find that Mr. Kubica is credible and reliable. He testified in an impartial manner. He did not exaggerate. He is very qualified in his area of expertise, given his close involvement since 1971 in education in the Yukon and particularly in later years as assistant deputy minister. Accordingly, I attribute considerable weight to his observations and recommendations.

[220] I accept Mr. Kubica’s testimony to the effect that he had never seen the letter dated January 30, 2006 sent by Gilbert Lamarche to Canadian Heritage, and that he never would have approved such a letter. It is important to underline the fact that the Yukon never called Gilbert Lamarche. The Court was informed during the trial that the GY believed, following something that arose during the trial, that Gilbert Lamarche would be a useful witness. However, the GY

confirmed that it had no intention of calling him prior to that time. The Yukon never identified the triggering event. The Statement of Claim filed by the Plaintiffs clearly implicates Mr. Lamarche.

G. Jean-François Blouin

[221] Jean-François Blouin has a Bachelor of Education and a Master of Education. He started his teaching career in 1991 at EET. Since 2008, he has been the pedagogical advisor for all grade levels.

[222] M. Blouin recalled that in 1991 EET was located in Riverdale in six portables connected by hallways. At that time, he taught mostly Grade 7, 8 and 9 science, outdoor activities, and other courses. Further, EET used the gymnasium, the industrial arts facilities, and other services of the neighbouring school. Two portables were added at Riverdale to meet the needs of the secondary levels.

[223] The first Grade 12 class at EET graduated in 1996 at the new school. The number of Grade 12 graduates has varied from year to year, but it has never been more than 10.

[224] According to Mr. Blouin, student retention at the secondary level is always a problem. EET offers outdoor activities to compete with other schools. Further, the number of options offered at EET was increased. To improve retention, the school accepted immersion students and

EET students went to anglophone schools in Whitehorse for specialized courses, such as Physics 12. In Mr. Blouin's opinion, this arrangement has not been advantageous for EET.

[225] Mr. Blouin explained that EET cannot offer a program similar to "Wood Street" due to a lack of staff and money. The Académie Parhélie program was created to retain students and prevent their migration to the Wood Street program. Académie Parhélie started in September 2007 and the current Grade 7-8 class is the largest in EET's history. Mr. Blouin explained that the Académie Parhélie program is based principally on sports/nature and the arts. Still, the students cannot choose their options. Mr. Blouin suggested that a possible solution to the retention problem would be to offer another option. Again, there is a lack of staff and funds. Mr. Blouin underlined that importance of a physical separation between the elementary and secondary levels.

[226] Mr. Blouin's tasks since 2008 as pedagogical advisor include, among other things, research and purchase of resources, teacher training, experiential courses and new trends in teaching. No other school has its own pedagogical advisor. However, there are numerous employees at the MEY who are specialized pedagogical advisors. One of the jobs of a pedagogical advisor is to provide manuals. Mr. Blouin noted that the French tools are not as comprehensive as those available in English, and it is often necessary to create the resources. Too often, he spends his day translating English resources and looking for French documents.

[227] Mr. Blouin is the father of three children: a son, 17 years old, and twins, 15 years old. He explained that his son of 17 years and one of the 15 year old twins have special needs. The eldest

is adopted. He suffers from foetal alcohol syndrome. He has multiple needs. When he was in Grade 9, he considered suicide. Mr. Blouin and his wife decided that EET could not provide the programs, resources or staff required to meet their son's special needs. They registered him in the "Flex" program at F.H. Collins School.

[228] His twin son suffers from Aspergers syndrome as well as other difficulties. The parents registered him, as well in the Flex program at F.H. Collins School. Mr. Blouin stated that he and his wife had to make a difficult decision. They wanted their children to continue to attend a francophone school, but they had to give priority to the children's health.

[229] Mr. Blouin stated that there are currently five classrooms available to the secondary level: three classrooms, a science laboratory and a home economics classroom. The secondary level also uses the school hallways and the alternative classroom. Four of these rooms are dedicated exclusively to the secondary level: three classrooms and the science laboratory. However, there are six grade levels from Grade 7 to Grade 12.

[230] According to Mr. Blouin, there are not enough classrooms to satisfy the curriculum demands. It is necessary to separate certain secondary grades. For example, it is not possible to teach Math 10 and 11 together. It is possible to combine Grades 7 and 8, but not for math and science. Two alternative classrooms are required because of developmental differences. In other words, one classroom is not adequate, given the differences between children in Grade 2 and Grade 10.

[231] Mr. Blouin explained that the lack of space creates scheduling problems. There are not enough rooms available for the secondary to do a rotation, as is done in the other secondary schools. Further, certain rooms are shared between elementary and secondary. The gymnasium cannot be used when the stage is being used to drama, and vice versa.. The stage and the gymnasium are employed by both the elementary and secondary levels.

[232] In cross-examination, Mr. Blouin confirmed that EET offers a basic education and that the students do well. He confirmed that Académie Parhélie is a required program for all students. EET is not able to offer more optional courses. Mr. Blouin added that the students have attended various courses and programs when they have had the opportunity to do so.

[233] Mr. Blouin confirmed that EET had to opt for linear or annual programming in order to ensure flexibility, given the number of secondary students and the number of available teachers.

[234] Regarding his 17 year old son, Mr. Blouin confirmed that MEY offered a teachers aide following an evaluation of his son in British Columbia. He reiterated that EET was not in a position to offer the required services. In cross-examination, Mr. Blouin confirmed that his 17 year old son had a number of behavioural problems and that a psychologist had sent him to the MEY for a consultation and to seek some solutions. Mr. Blouin acknowledged in cross-examination that his 15 year old twin son left EET in part due to bullying. In any event, EET did not offer the services required to meet his needs.

[235] Mr. Blouin replied to questions regarding the document entitled “Questionnaire pour les parents et/ou les élèves quittant EET” (“Questionnaire for parents and/or students leaving EET” (exhibit 53). His twin son’s questionnaire undoubtedly is among these questionnaires. Mr. Blouin was not aware of this questionnaire but he accepted that his son participated. The first question was the following: [TRANSLATION] “Can you give the principal reason which led you to choose another school for your child?” The questionnaire provides several options, and the one chosen is the following: “Specific problem occurred (please provide details in the space below)”. Nothing is written in the space indicated. The second question is the following: “What could have been done to avoid this departure from the school?” and the answer “Support service” is checked off. In the space for an explanation, are the words: “Bouléring rien de fait” (“Bullying nothing done”). The third question is: “At EET, what in your opinion was the quality of: ...”and there are a number of choices, but regarding the support services, teacher support and principal support, the level of quality is identified as being “weak”.

[236] Mr. Blouin acknowledged that split or combined classes are not an unknown phenomenon in small schools and especially in rural schools. He confirmed that there is no clear solution regarding the question whether to separate or combine the secondary grades.

[237] Mr. Blouin confirmed that the secondary level has access to three classrooms on a full-time basis. The stage, the gymnasium and the science laboratory are not always available. The library and the home economics room are not always available, and these two classrooms are not appropriate for use as classrooms.

[238] Regarding the alternative classroom, Mr. Blouin agreed that there is a trend toward integration. Nevertheless, sometimes segregation is the best solution to ensure the wellbeing of the students and a school will do everything possible for the wellbeing of its students.

[239] Mr. Blouin's testimony was convincing and credible. He was able to provide practical information regarding EET's history and operations.

H. André Bourcier

[240] André Bourcier has been chair of the CSFY since the spring of 2006. He has also been a board member of the CSFY since 2004. He is a linguist, specializing in aboriginal languages.

[241] Mr. Bourcier is of the view that a pre-school program is essential in a minority milieu such as the Yukon (see exhibits 64, 65, 67, 68 et 69). The 2005-2010 strategic plan attests to this fact (exhibit 42).

[242] According to Mr. Bourcier, the pre-school program must be followed with kindergarten for 4 year olds, in order to increase their use of French. He believes that the CSFY should offer kindergarten for 3 year olds, which is part of the long term plan. There is a similar half-time program in British Columbia and a similar pilot project in the anglophone school system in Whitehorse. He maintained that a kindergarten for 3 year olds should be added despite the

problems it might create in terms of space. Currently, there is not enough physical space for such classes.

[243] Mr. Bourcier confirmed that the CSFY asked for a separate secondary school in 2007. In the winter of 2008, the CSFY hired an architectural firm to prepare a conceptual drawing. This plan provided for the construction of a school on EET's grounds (exhibit 490). In the 2009-2010 budget, the CSFY proposed estimated construction costs of around \$14 million.

[244] Mr. Bourcier stated that the CSFY seeks full financial management, as provided for under the *Education Act*. In the past, the CSFY has not managed much of the funding, the largest budget being around \$715,000.00. In fact, the CSFY sent a letter to the MEY in 2007 (exhibit 70), emphasizing that the *Education Act* provides that the CSFY will be responsible for financial management. Mr. Bourcier noted that the MEY studied the Yukon's *Education Act* between 2002 and 2004. This study resulted in a educational reform project outlined in a final report (exhibit 71), which states in part (p. 79):

It is recommended that the Department of Education make structural and organizational adaptations to allow the board — and future school boards — to meet their mandates.

[245] The report contains recommendations to increase the CSFY autonomy. In this regard, the report states (p. 79):

These recommendations are meant to create the conditions which would permit CSFY to realize and exercise their rights and responsibilities as outlined in the *Education Act*.

[246] In addition to the question of financial management, the educational reform project identified the following issues regarding personnel and administration (p. 87):

Although CSFY is a school board as described in the Education Act and is fully prepared to meet its mandate, it has not been able to do so. This is due in large part to the organizational structure of the board. Three aspects of this structure provide barriers to CSFY's autonomy:

- lack of control over funding;
- the board's relationship to its employees; and
- the administrative relationship between the board and the department.

[247] Mr. Bourcier noted that the first recommendation of the educational reform project would result in the transfer from the MEY to the CSFY, of all funding (recommendation 1, p. 82). Mr. Bourcier stated that this has still not occurred. Exhibits 72-78 are letters mentioning the failure of the MEY to transfer funds to the CSFY, as well as the difficulty in presenting a complete budget, given the MEY's failure to provide financial data. In a letter from the CSFY to the MEY dated April 30, 2008 (exhibit 78), the CSFY indicated that the budget was late, due to the MEY having failed to provide financial data.

[248] Mr. Bourcier explained that the effect of the budget allocated by the MEY for the 2008-2009 financial year was to grant the CSFY \$716,800.00. These funds came from the bilateral agreement. He noted that the CSFY requested other funding in the amount of \$623,817.00 at page 3 of this budget (exhibit 81). However, the MEY wrote at page 3: “No funding available in department”.

[249] On July 3, 2008, the MEY and the CSFY signed a memorandum of understanding regarding the annual operating grants for 2008-2009, in the total amount of \$716,000.00, and new financing totalling \$623,817.00 (exhibit 82). As provided under the agreement, the CSFY received the sum of \$716,800.00. Mr. Bourcier confirmed that the CSFY never received the supplementary financing of \$623,817.00. Further, he received no reply to his related demand letter dated July 8, 2008 (exhibit 83).

[250] The proposed budget for 2009-2010 (exhibit 84) included the operating budget totalling \$1,447,000.00. The CSFY only received \$515,000.00. According to Mr. Bourcier, the MEY never explained the reduction in the budget from \$1,447,000.00 to \$515,000.00. The MEY did not give \$200,000.00 for Académie Parhémie.

[251] Mr. Bourcier described the financial co-management by the CSFY and MEY as being extremely difficult. The MEY always made quarterly payments under the bilateral agreements, instead of a global amount (see exhibit 85). This practice created problems. The CSFY was never able to manage its own resources. He gave the example of the budget which the CSFY

proposed to the MEY for 2010-2011. This budget provided for salaries for a secretary-treasurer and director of education, positions required under the *Education Act*. The MEY never approved this budget. Therefore, these positions do not exist. According to Mr. Bourcier, the CSFY's financial position is tenuous and it is not able to meet its financial obligations and programming expenses which amount to \$1,065,000.00. The CSFY has no choice but to cut positions.

[252] Further, there are a number of letters and exchanges regarding insurance for activities outside of the school and directors' liability insurance (exhibits 54, 87-90). The *Education Act* requires the CSFY to be insured, which costs around \$9,600.00. For several years, the MEY paid the insurance premiums. However, in 2008, the MEY advised the CSFY that the CSFY must cover the additional costs for the activities, i.e. the insurance in question. The total budget approved by the GY for 2008-2009 (exhibit 81) indicates \$84,300.00 under the heading "operating budget (excluding insurance)". The budget for the financial year 2009-2010 indicates \$120,000.00 as "operating budget". This amount includes the insurance premiums. The MEY reduced the budget from \$1,447,000.00 to \$515,000.00. Mr. Bourcier explained that this reduction prevented the CSFY from paying for its insurance.

[253] The MEY wrote to the CSFY on July 11, 2008 (exhibit 90), explaining that the CSFY, under the *Education Act*, has "full and sole responsibility...to obtain commercial insurance for any and all assets owned by CSFY, and for liability of the Board members and any of the Board employees". Mr. Bourcier understood that the CSFY was required to maintain insurance coverage as provided under s. 116(1)(s) of the *Education Act*. As a result, the CSFY included the

amount for the insurance premiums in its 2009-2010 operating budget, failing which it would have run a deficit.

[254] Mr. Bourcier is of the view that the staffing formula puts all of the small schools at a disadvantage. He recognized that 15% is granted to the francophone school. In his opinion, the choice of 15% was arbitrary. No one ever explained how it was chosen.

[255] Mr. Bourcier stated that he was not aware of the MEY's transfer of funds from the French first language program to the French second language program. He only became aware of this in February 2008, when Lorraine Taillefer showed him the letters in question (exhibits 36, 37, 38, 39). After reading them, Mr. Bourcier called Gilbert Lamarche to discuss the matter. Following this conversation, Mr. Bourcier verified the documents and the transfer. This is how he became aware of the reductions. Mr. Bourcier testified that he also checked in all of the CSFY archives to see whether the CSFY had ever received the January 30, 2006 letter (exhibit 37). He asked Edmond Ruest if he had received the letter. He also asked all staff at the branch who would have been involved whether anyone had ever seen this letter.

[256] In April 2008, Mr. Bourcier sent a letter to Guylain Thorne, director of Canadian Heritage, regarding the transfer of \$1.9 million (exhibit 96). He sent copies to Mr. Patrick Rouble of the MEY and Gilbert Lamarche, among others. In this letter, Mr. Bourcier described Mr. Gilbert Lamarche's letter of January 30, 2006 as being a falsehood or lie. Further, he asserted that neither the community nor the CSFY had been consulted about the transfer. Mr.

Bourcier also indicated that he had never received a request for a tripartite meeting between Canadian Heritage, the CSFY and the MEY, as mentioned in Canadian Heritage's letter dated December 15, 2008 (exhibit 99).

[257] Mr. Bourcier stated that the CSFY did not participate, from 2005-2006 to 2008-2009, in the negotiations surrounding the Canada-Yukon Agreement on Minority-Language Education and Second Official Language Instruction 2005-06 to 2008-09 (exhibit 56). He noted that the Canada-Yukon bilateral agreement, at page 10 of Appendix 2, provides for financial support from the GY to the CSFY in order to cover additional costs related to minority language education. Further, Mr. Bourcier noted that the GY acknowledged, in the preamble on the first page, the concept of additional costs, as recognized by the memorandum of understanding, and that this is one of the basic principles relied on by Canada in offering financial support to the GY. Further, para. 7.1 on page 6 of Schedule 1 - Administrative Terms and Conditions, reads as follows:

Yukon has assured Canada in the preamble of its action plans (Schedule 2) that the interested associations and groups of the territory, including representatives of the school board, were consulted while developing its action plans (Schedule 2).

[258] Regarding Académie Parhélie, Mr. Bourcier stated that the MEY and the CSFY signed an agreement in 2007 (exhibit 59) which was to end on June 30, 2010. Preamble B reads in part:

This project is in addition to the action plan 2005-2009. If the number of students enrolled warrants the continuation of the new Fine Arts and Sports/Nature Program following the above three year period, the new Framework Agreement shall include permanent provisions for this additional FT.

[259] “FTE” means “Full Time Equivalent”. The discussion of the program is found at Appendix B (p. 7):

It is essential for young francophones in Yukon to enjoy the same educational opportunities as their peers in the English stream so that the francophone community can continue to thrive. Young franco-Yukoners need quality tools to become engaged, feel a sense of belonging, and put down roots while remaining true to their heritage. Many of the francophone children in Yukon are not at École Émilie-Tremblay, and it is hoped that this project will enable the Board to offer a dynamic, enriched curriculum that would help them repatriate many of the students who have gone to other schools.

[260] Regarding the length of the project, Appendix B, p. 7 states:

The Yukon Francophone School Board has set a five year objective for this project (2007-2012). It is of the upmost importance to offer a strong curriculum

all through high school. Students, parents and school staff need to understand the long term vision of the project in order to want to invest themselves in it.

[261] Financing for this project is provided for at page 8 of Appendix B. For the first two years, Canadian Heritage and the MEY agreed to pay \$200,000.00 and \$375,000.00 respectively. The third year, \$375,000.00 was to come solely from the MEY. Mr. Bourcier emphasized that the CSFY recommended that this project continue until 2012, as provided under the bilateral agreement. However, there was no funding in place for 2010-2011.

[262] Mr. Bourcier indicated that exhibits 110-114 demonstrate the uneasiness which exists regarding the co-management and the position of director general (see also exhibits 116-117).

[263] Mr. Bourcier expressed the view that the teachers and support staff should be CSFY employees. Currently, there are conflicting loyalties, given that their salaries are paid by the GY. Further, the collective agreement is only available in English. He went on to state that the CSFY should have its own professional development budget, given the particular needs of the francophone program. According to Mr. Bourcier, services and communications from the MEY create difficulties. He noted that French is the CSFY's working language, as provided in the regulations under the *Education Act*, and it follows that communications between the MEY and the CSFY should also be in French. All of the relevant documents should be available in French.

[264] Exhibits 120-127 show the difficulties in establishing the school calendar. The CSFY decided to add days to the school calendar to allow the teachers more time for professional

development, as provided under the *Education Act*. As a result, the 2009-2010 school year at EET started one week earlier. Difficulties arose regarding transportation, because the MEY manages transportation. Mr. Bourcier stated that this situation demonstrates again the problems of co-management. The CSFY wishes to establish its own calendar, which is made difficult by the fact that it does not have control over transportation.

[265] Regarding management of rights holders, Mr. Bourcier recalled that the CSFY made a request to the MEY in 2006 for drafting of a general policy manual. The government provided the monies necessary for creation of such a manual (see exhibit 514). One of the policies contained in this manual deals with admission. The CSFY sent it to the MEY who had it translated. The CSFY had discussions with Gilbert Lamarche concerning this policy, and he said that everything was fine. There were subsequent changes to the admissions policy, the last being in January 2010 (exhibit 517). Mr. Bourcier explained that a number of factors had an impact on the policy regarding admission of non rights holders: that fact that the community is small, the immigration situation, particular cases, the pluralistic environment and ancestors. All of these factors are important in relation to the remedial aspect.

[266] In this regard, Mr. Bourcier indicated that the MEY first requested declarations as provided for under s. 6 of the *French Language Instruction Regulation* (exhibit 518) on May 17, 2010, which was the first day of trial. The letter on that date (exhibit 519) indicated that the MEY would be enforcing the admission policy regulation, as provided in the 1991 regulations.

[267] According to Mr. Bourcier, the transfer to the CSFY of the title to the school and grounds would make for more efficient management. He noted that problems arose regarding “joint use agreements” with the City of Whitehorse, and use of the rooms by the community after 4:00 p.m.

[268] In cross-examination, Mr. Bourcier confirmed that his son went to F.H. Collins mainly for the outdoor pursuits and industrial arts courses. He also confirmed that Académie Parhémie now offers a similar course.

[269] Regarding the discussions with Gilbert Lamarche about the admissions policy for non rights holders, Mr. Bourcier had nothing in writing. He stated that there were discussions between the CSFY and the MEY regarding the regulation governing admissions policy. The MEY did not wish to amend the *Education Act* pending the study on the larger issue of educational reform. According to Mr. Bourcier, facility resources could have an effect on admission of non rights holders.

[270] Mr. Bourcier stated that the transfer of title from the GY to the CSFY should not require any additional payment, given that all CSFY financing comes from the MEY. Mr. Bourcier said he was confident that CSFY would be able to take care of problems which might arise in managing. Regarding economies of scale, Mr. Bourcier could not say one way or the other whether there were currently economies of scale. He suggested that the insurance premiums might be an additional expense.

[271] It appears that the MEY proposed to EET that it might withdraw from “joint use agreement” between the Yukon and the City of Whitehorse (exhibit 521-522). According to Mr. Bourcier, there was no follow up on this issue.

[272] According to documents in relation to a meeting on December 19, 2008 (exhibit 8), Gilbert Lamarche said that he would interpret from French to English and vice versa. Mr. Bourcier was asked to explain why he requested an interpreter, in light of this offer. He responded that Gilbert Lamarche is not an interpreter and it was not a solution. He went on to say that the CSFY operates in French, as provided for under statute, and that the MEY should have other bilingual positions.

[273] Mr. Bourcier confirmed that the CSFY should have unfettered spending power, subject to legislation, collective agreements, directives, and any other restriction which the law imposes. Mr. Bourcier rejected the suggestion that the CSFY, in demanding management, is seeking to avoid accountability. He cited as example ss. 174(2) and 118 of the *Education Act* explaining the various obligations and budget items.

[274] Mr. Bourcier confirmed that what the CSFY demands are the rights as provided under the *Education Act* and described in the 2008 letter to the MEY (exhibit 77). Mr. Bourcier stated that the budget prepared by the CSFY and sent to the MEY is based on the CSFY’s needs. The MEY decides what amount will be granted and approves the budget as it sees fit. Mr. Bourcier did not agree with the suggestion that the CSFY already exercises management powers because it can

make changes within the budget. According to Mr. Bourcier, the CSFY must always ask the MEY.

[275] Mr. Bourcier agreed with the federal Auditor General's (exhibit 131) showing that the teacher-student ratio is not very high. Mr. Bourcier noted, however, that the data show that this is true of all schools throughout the Yukon, and not only EET.

[276] Mr. Bourcier recognized in cross-examination that Académie Parhémie is a value added model. This program was created in 2005 following a recommendation in the consultant's final report (exhibit 106). Mr. Bourcier agreed with most of the paragraphs of the report read by counsel in cross-examination, but he pointed out that these recommendations led to the creation of Académie Parhémie.

[277] Mr. Bourcier was asked whether he agreed that the MEY had no obligation to consult the CSFY regarding the bilateral agreements. He did not agree because the funding from the federal government is in fact for French first language education. As for the bill for insurance premiums, Mr. Bourcier repeated that the CSFY is required to be insured. The CSFY obtained insurance and included the amount of \$120,000.00 which appears under the heading "Budget opérationnel de CSFY" ("CSFY Operations budget") in the 2009-2010 budget (exhibit 84).

[278] I find that Mr. Bourcier is credible and that he has a good understanding of the CSFY. He was able to clearly explain the difficulties arising as a result of co-management. In spite of an unremitting cross-examination, Mr. Bourcier demonstrated the weaknesses in the suggestions

and propositions put to him in relation to school management. In summary, his testimony is reliable and was not undermined in cross-examination.

I. Roger Paul

[279] Roger Paul is the director general of the Fédération nationale des conseils scolaires francophones du Canada (FNCSF). Mr. Paul testified regarding admission of non rights holders.

[280] Mr. Paul explained the official position of the FNCSF as being that the school boards have the right to manage the admission of non rights holders. He provided a document entitled "Données sur les non ayants droit et les politiques d'admission des 31 conseils et commissions scolaires francophones du Canada, préparé le 4 octobre 2010" ("Data on non rights holders and admission policies of 31 francophone school boards and commissions in Canada, prepared on October 4, 2010") (exhibit 510). The data collection method considers three categories of non rights holders: immigrant, anglophone and francophone ancestors (for example, grandparents).

[281] In cross-examination, Mr. Paul acknowledged that the figures resulting from the poll are only as reliable as is the data on which they are based. He stated that there was no verification of the documents on which the school boards relied in responding to the poll. Mr. Paul confirmed that the issue of reliability may be more related to the issue of interpretation. However, he maintained that one thing is clear: non rights holders are admitted by each of the 31 francophone school boards in Canada.

[282] Mr. Paul confirmed that there is no distinction based on generation in the “ancestor” category. Mr. Paul agreed that the definition of “ancestor” varies from school board to school board. Some limit it to one generation. Others extend it to the fifth generation. He confirmed that the report does not enable one to determine whether the schools operate at full capacity.

[283] Mr. Paul is credible. His testimony and exhibit 510 show that each of the francophone school boards in Canada has a policy setting out criteria for admission of non rights holders. Further, these policies vary from school board to school board. The poll and the data collected demonstrate that the percentage of rights holders admitted varies substantially, from 1% to 49%, depending on the school board. It must be remembered that the reliability of these data cannot be confirmed. Further, they address only the first two years of study.

J. Lorraine Taillefer

[284] Lorraine Taillefer was hired in 2006 as director of education at the CSFY. She had previously taught and worked as a principal in the Northwest Territories. She lives in an exogamous family. She has two daughters, one in Grade 8 and the other in Grade 10. Starting in the 2009-2010 school year, she had to fill a position at the secondary level in the Académie Parhélie, because of a lack of staff. Starting in 2010, she worked full-time as director of education.

[285] In 2006, the CSFY's staff consisted of the director of education and an administrative assistant. In 2007, a communications agent was hired to help raise visibility. The same year, a position was created which was considered "vital" for pre-school children from exogamous families. This person meets with all of the families in this category.

[286] Ms. Taillefer recalled that the CSFY's mandate is not limited to the City of Whitehorse, but rather encompasses the entire Yukon territory. She stated that there was a request for a francophone program in the City of Dawson. This resulted in creation of a 1.5 position at an existing school.

[287] Ms. Taillefer explained the role of the director requires participation on national committees, as well as trips outside and within the Yukon. At the local level, the director must work on school management and be accountable to the CSFY, and prepare ministry reports. As director of education, Ms. Taillefer attends meetings and monitors the school's program development. She occupies the vacant position of secretary-treasurer. She has duties in the human resource and finance areas.

[288] In July 2009, the CSFY received from the MEY a bill for \$15,950.16 for publicity for promotion, recruitment and student registrations (exhibit 133). This was the first time that Ms. Taillefer had received such a bill. The CSFY's budget did not anticipate this expense. The MEY reduced the last quarterly payment by the amount of the bill.

[289] Further, the MEY reduced the last budget payment to the CSFY in March 2010 by \$40,000.00. Ms. Taillefer explained that until 2010 the MEY paid the equivalent of one full-time position for the secondary program, Académie Parhémie. However, without consulting the CSFY, it decided to reduce this position to 0.5, which led to a \$40,000.00 reduction of the last budget payment. The CSFY had to request bridge financing and a full-time position for Académie Parhémie (exhibit 135).

[290] Ms. Taillefer confirmed that she asked the MEY to calculate the cost per student at EET. This calculation is important and necessary in order to have an overall understanding of the financial situation and to for planning (exhibit 136). This calculation was never done.

[291] According to Ms. Taillefer, she is at the mercy of the GY regarding the number of teachers and funding (exhibit 137). Because the MEY does not give her the list, she is not aware of the allocation and is always in reaction mode.

[292] Ms. Taillefer had requested that the deputy minister of the MEY provide a list of the children of rights holders in the immersion and anglophones schools in Whitehorse. She also asked for permission to speak to the teachers (exhibit 137). The MEY has not yet responded to this request. A request was made of the MEY in order to determine the number of rights holders (exhibit 138). Again, there was no response. Ms. Taillefer stated that the MEY sent a form to all students asking that they indicate aboriginal ancestry if applicable. The CSFY asked that a box be added to the form with questions relevant to s. 23 of the *Charter* and francophone education.

[293] Ms. Taillefer noted that the teacher-student ratio is low throughout the Yukon, at around 1:10. She confirmed that the ratio at EET is 1:8, and even lower in the secondary levels.

According to her, programs such as Académie Parhélie can take several years to become established. The Wood Street program, which has been around for 20 years, took some time to become established. These programs are expensive at the outset because they are not able to take advantage of economies of scale.

[294] Ms. Taillefer confirmed that EET has student retention problems. She would like to see an industrial arts program starting in September 2010 in order to keep certain students who are thinking of leaving the school. A temporary solution would be, at a minimum, to employ an industrial arts teacher. However, this course would have to take place in a workshop in one of the anglophone schools, which raises the issue of transportation.

[295] Regarding financial management, Ms. Taillefer explained that the school budgets allocated by the MEY go directly to EET who does not exercise any control in that respect. According to her, the school principal should communicate directly with the director of education instead of the MEY. She stated that the school principal and other individuals at the school received credit cards from the MEY. She confirmed that the annual budget is based on the number of students. It does not take into account EET's exceptional needs.

[296] Ms. Taillefer explained that EET has two bank accounts: one for the funds coming directly from MEY under the school budget, and the other for funds from fundraising activities. The MEY indicated that EET "is part of YG (Yukon Government) and full accounting on trust

accounts is required” (exhibit 139). The CSFY advised the MEY that it would not be submitting any further reports regarding the bank accounts, given that the CSFY is not part of the YG (exhibit 140).

[297] Ms. Taillefer stated that the MEY’s new staffing formula, attributing 15% to the francophone school, was created without consultation and without taking into account the francophone school’s concerns. She had written a letter requesting a particular formula for EET, but the decision had already been made (exhibit 141). According to Ms. Taillefer, the number of students continues to increase while the staff decreases. The provinces, in making staffing decisions, take into account not only the number of students but also the cost per student.

[298] Ms. Taillefer raised a number of problems with the document entitled “Teaching Staff Based on September 2010 Projected Enrollment” (exhibit 52). These problems are identified in the document sent to the MEY in April 2010 (exhibit 141). She noted that there is no allocation to EET in the category “Vulnerability, Transition and Stability”. Further, there is no allocation for kindergarten 4, secondary school, pre-school, or for exogamous couples. There is no provision for EET under the heading “SRP (Shared Resource Program)” (exhibit 52). Ms. Taillefer noted as well that the MEY granted 0.28 FTE (“full-time equivalent”) under “FSL (French Second Language)”. According to her, there should be an allocation for English as a second language, because at EET both English and French are first languages.

[299] Regarding management of staff, Ms. Taillefer explained that she was selected by the CSFY, while the terms of her contract are established through the MEY. For her, this situation

raises an issue of loyalty. She submits that the CSFY should manage her contract. The communications on all questions regarding her terms of employment occur only in English. Ms. Taillefer said that she was ready to become an employee of the CSFY, so long as she receives the same benefits.

[300] There are often delays, due to translation, in the provision of French services and human resources. She explained that the MEY's website and telephone answering is all in English.

[301] Ms. Taillefer stated that the CSFY claims management of transportation for a number of reasons, including the ability to modify routes, to provide French music in the bus, and to be able to determine its own particular school calendar. Currently, the MEY, without consulting the CSFY, manages the company which provides the transportation.

[302] Ms. Taillefer discussed how the budgets are created. The CSFY studies the needs. The budget is prepared based on this information, and sent to the MEY. The MEY decides, without consulting the CSFY, whether or not the budget amounts will be approved. According to her, the MEY does not take into account the CSFY's needs arising from s. 23 of the *Charter*.

[303] The CSFY only directly receives around 10% of the total budget of approximately \$3.4 million approved by the MEY (exhibit 81). Ms. Taillefer explained that the CSFY often must negotiate additional funds in order to meet its particular obligations. This situation makes planning difficult, especially regarding the staff which the CSFY has been allowed to purchase from the MEY. By the end of 2008-2009, the CSFY had not yet received a response from the

MEY regarding the budget. The MEY then informed the CSFY that there was no need to pay supplementary salaries. Ms. Taillefer did not believe that the CSFY was going to receive a bill for the additional salaries for 2010-2011, but in fact the MEY did send one.

[304] In October 2009, the CSFY requested an additional teaching position, due to gaps created by the new staffing formula. The MEY refused, and undertook instead an evaluation of needs, without consulting the CSFY. Further, the MEY advised the CSFY that the personnel bank was empty, so it would be impossible to purchase an additional position.

[305] According to Ms. Taillefer, the agreement between the CSFY and the MEY regarding Académie Parhélie (exhibit 59) again demonstrates financial management problems. This document indicates that the MEY would make a contribution of \$375,000.00 over three years. However, the CSFY has never received the \$375,000.00, as contemplated by the agreement.

[306] On May 12, 2010, seven days before the trial commenced, the MEY sent a letter to all parents of EET students (exhibit 149) which reads in part: “I want to emphasize that in recognition of the challenges facing a French First Language school (for rights holders under Section 23 of the *Canadian Charter of Rights and Freedoms*) in a predominantly English environment, an additional 15% staff lift was included in the formula for EET that resulted in additional FTE resources...As a school board, the Commission scolaire francophone du Yukon (CSFY) has the power to make their own decisions as to how to allocate these resources”. The writer goes on to say that the new staffing formula increased the number of full-time equivalent teaching positions. Ms. Taillefer testified that the MEY never advised nor consulted the CSFY

prior to sending this letter. According to Ms. Taillefer, the letter implies that the CSFY received the \$375,000.00 per year. Page 2 of the letter states: “While that Canadian Heritage pilot funding has now run out, the Department has continued to support the program with funding as agreed to at the inception of the pilot project”.

[307] Ms. Taillefer maintains that the new computer system containing student information (YSIS) shows, again, a lack of understanding on the part of the MEY in the area of French services. E-mail exchanges set out the difficulties with respect to accents and cédilles (exhibit 150).

[308] Ms. Taillefer is of the view that the library budget is inadequate for a double mission school, i.e. French and English instruction from kindergarten to Grade 12. For example, the MEY does not have any bilingual employees who can code French books. As a result, there is a delay in coding and delivery of books to the school. She stated that it takes a long time for French services to eventually be provided which renders them less useful. Often, it is impossible to wait for the MEY to translate documents prior to responding. As a result, many communications with the MEY take place in English, whether by e-mail or telephone. For example, Ms. Taillefer referred to an e-mail exchange concerning “Yukon Public Service Week - June 14-18”. Only the poster announcing this week was not translated by the GY. The MEY gave Ms. Taillefer the following explanation: “I have made an inquiry to the public service commission with regard to your question about poster translation. They have responded that the poster has not been translated because it is aimed solely at Yukon government employees and the language of work for Yukon government employees is English” (exhibit 151).

[309] Ms. Taillefer discussed the fact that documentation for EET and the CSFY is only available in English. French literacy in the “School Growth Plan” must be done in French. However, there were numerous problems in the translation of the “School Growth Plan” containing the literacy program (see e-mail exchange, exhibits 146 and 152-158). The e-mails to parents and CSFY staff concerning documentation, training, the school report card, the “pandemic planning update” and literacy must be in French. However, the MEY responded: “The administrative language of the Yukon government is English” (exhibit 155).

[310] The CSFY requested human resources in order to adapt the British Columbia programs to the needs of the CSFY in the Yukon. Ms. Taillefer explained that the CSFY does not expect the Yukon to recreate all of these programs in French, but often the British Columbia materials do not address the needs of the Yukon. The CSFY wishes to be able to get resources from other provinces and territories.

[311] Ms. Taillefer could not say exactly when she had first seen the January 30, 2006 letter, but she remembered that Gilbert Lamarche had given her a copy, telling her to keep it confidential. He stated that the letter could help the CSFY in its negotiations with the GY. Mr. Lamarche added: [TRANSLATION] “You’ll have the government by the balls”. Ms. Taillefer then initiated an inquiry at the CSFY, but the letter was not found. Further, Ms. Taillefer obtained a letter from all board members and employees, confirming that they had never received a copy of the letter. Following a meeting with Mr. Kubica, Anita Simpson and Gilbert

Lamarche, Ms. Taillefer received from Ms. Simpson the other letters dated January 18, 2006 and February 6, 2006.

[312] Ms. Taillefer confirmed that the CSFY's press release of April 27, 2009 (exhibit 160), was drafted in response to the MEY's comments to the Legislative Assembly which implied that school boards are useless bureaucracies.

[313] In cross-examination, Ms. Taillefer maintained that the 0.28 FTE for French second language in the staffing formula does not meet the needs of the CSFY and of EET, which is a French first language school. Ms. Taillefer agreed that the CSFY would have the right to transfer the 0.28 FTE to another area, but she emphasized that it was illogical for the GY to allocate a French second language position to a French first language school.

[314] Ms. Taillefer did not agree that the CSFY should be responsible for translating the report cards or other documents, or for verifying the MEY's translations. She underlined the fact that the activities are very time consuming.

[315] Ms. Taillefer noted that the CSFY has no policy regarding the school principal's use of the credit card, given that the cards come from the MEY and not from the CSFY.

[316] Ms. Taillefer recognized that CSFY representatives had attended meetings and that she was present during the discussion regarding the 15%. Further, she acknowledged that the personnel bank and the purchase of personnel is treated in the same manner for all Yukon

schools. Counsel suggested to Ms. Taillefer that the piecemeal negotiations were due to a lack of planning by the CSFY. Ms. Taillefer agreed that it is important to live within approved budgets. However, she emphasized the importance of determining and taking into account the cost per student, the additional costs related to the French program, and the duties under s. 23 of the *Charter*.

[317] Ms. Taillefer denied knowing that the MEY had decided not to send a bill to the CSFY in 2008-2009 for the teacher position because the MEY had made a mistake.

[318] Ms. Taillefer explained that EET previously had a computer classroom. However, when a classroom was needed for English instruction, the computer classroom had to be used. The MEY provided, later, a portable.

[319] Ms. Taillefer agreed that the staffing formula does not address funds for special needs, which are determined based on the particular needs of the individuals in question. Ms. Taillefer stated that the MEY provides descriptions of the jobs of hired employees or staff, and that the CSFY revises them. Manuals are recommended reading, not required. She confirmed, however, that the teachers rely on the manuals.

[320] Ms. Taillefer was questioned regarding the comments of the Minister of Education, M. Rouble, to the Legislative Assembly (exhibit 168), in particular whether she believed that his comments were aimed at the francophone school, given the CSFY's press release of April 27, 2009 (exhibit 160).

[321] Ms. Taillefer acknowledged that there were improvements in the kindergarten 4 program in 2006. She agreed that there have been improvements in the secondary program and the right to purchase staff. She confirmed that her position has been evaluated by the CSFY since 2007.

[322] According to her, Gilbert Lamarche told her to send the MEY the bill for the publicity for the registration. That year, the MEY decided not to pay the bill, but rather to subtract it from the CSFY's monies.

[323] Ms. Taillefer stated that the CSFY requested additional amounts for Académie Parhémie because it was known that the agreement would soon come to an end.

[324] Ms. Taillefer was subjected to a lengthy cross-examination regarding the agreement between the CSFY and the GY with respect to Académie Parhémie (exhibit 59). Counsel suggested to Ms. Taillefer that the MEY had clearly advised her, in an e-mail on June 19, 2009, that the CSFY would be responsible for the additional teaching position for Académie Parhémie (exhibit 171). Ms. Taillefer disagreed with the interpretation proposed by counsel for the GY.

The document states:

- YG (Yukon Government) will continue to pay the teacher you've hired for the FTE not covered until the new action plan takes effect;

- YG will invoice YFSB (Yukon Francophone School Board) for the salary costs;

- If this is a YFSB priority, YG would expect the funding of the FTE would be identified in the new action plan, and other expenditures adjusted accordingly to remain within the contributions allocated by Heritage Canada.

[325] Ms. Taillefer maintained that the CSFY had no money in its budget for the purchase of this position and she understood that the GY was going to pay for it. The June 16, 2009 e-mail and the attached table (exhibit 172), confirm that the table was in relation to the 2009-2010 school year. The CSFY did, after the agreement ended, hire an individual into that position.

[326] Ms. Taillefer acknowledged that the CSFY did not have an insurance policy prior to receiving the letter from the MEY about insurance.

[327] Ms. Taillefer confirmed that the CSFY prepared the questionnaire sent to parents and students of EET regarding Académie Parhémie (exhibit 53).

[328] After all of the CSFY witnesses testified, the GY called Lorraine Taillefer as an adverse witness. Rule 42(18) provides that the defendant can call a plaintiff's witness for the purposes of cross-examination. The plaintiff's lawyer can ask only questions which arise from the cross-examination. Ms. Taillefer confirmed that she has been the director general of the CSFY since

2006. She confirmed that the following comments in her 2007 Annual Report were true at the time (p. 6, exhibit 161): [TRANSLATION] “The school board has all of the tools necessary to offer high quality instruction to all of its students. We need only listen well to the community, create the necessary relationships, offer an interesting and creative program, in order to be leaders in the area of French education in a minority environment”.

[329] Ms. Taillefer confirmed that there were no problems with the facilities in 2007. Data regarding the number of children registered in pre-school in 2005-2006 is missing. She explained that the GY did not count these children because the pre-school teacher in 2005-2006 was not an employee of the GY. She became a GY employee in 2006-2007. According to Ms. Taillefer, the lack of space is partly due to the increase in the number of students in the elementary levels.

[330] The CSFY provided three versions of documents showing registrations in the categories of non rights holders: the January 27, 2011 version (exhibit 509), the January 18, 2011 version (exhibit 524), and the January 19, 2011 version (exhibit 507). The amendments are to the categorization of anglophone non rights holders, and to the anglophone rights holders due to family continuity. The first version shows 9% anglophone and 5% family continuity. The January 18 revised version shows 5% anglophone and 10% family continuity. The final version shows 4% anglophone and 10% family continuity. The final version does not correct an error in the total number, but only in the distribution between these two categories.

[331] In cross-examination, counsel suggested to Ms. Taillefer that there was no reference to industrial arts in the September 25, 2006 report (exhibit 106). Ms. Taillefer stated that the report dealt with it in a general way. Ms. Taillefer did not agree that the description of the global Académie Parhémie program (exhibit 217) included no mention of industrial arts. She explained that many of the courses mentioned therein contain an element of industrial arts. She acknowledged, however, that the words “industrial arts” do not appear in the document.

[332] Ms. Taillefer confirmed that other schools rejected EET’s requests in fall 2010 and January 2011, to collaborate in order to provide an industrial arts course in another school. Ms. Taillefer explained that she was looking for a block of time dedicated to industrial arts. There had previously been some availability at “Skills Canada”, but that building is now closed.

[333] A parent/student satisfaction poll was done for the 2008-2009 school year (exhibit 528). A number of students mentioned “bullying”. Further, a number expressed their satisfaction with the school. A small percentage made negative comments regarding split or combined classes. Most of the students wanted to continue to attend school in French to Grade 12. The results regarding the parents are found at pages 11 to 20. Most said they were satisfied with the experiential programming as shown at page 17 because of the small number of students in the secondary levels. However, they also noted, that the small number has its disadvantages. Further, 55% of the parents believed that the Académie Parhémie program stops the exodus of young people to the anglophone school. The 2008 poll for the 2007-2008 school year indicates that the majority of the students were satisfied, but questioned the Académie Parhémie. There was a satisfaction rate of 90% regarding classrooms (exhibit 529).

[334] I find that Ms. Taillefer is credible and reliable. She expressed frustration and impatience during the cross-examination. However, this was not surprising given the repeated questions regarding her reliability and abilities as director of education.

K. Valerie Stehelin

[335] Valerie Stehelin has been director of the department of human resources for the Yukon since 1994. She has been employed by the GY for 35 ans.

[336] The CSFY is responsible for all the steps in the process of hiring of the director general, including interviews, advertisements, etc. The staff of the human resources department plays no role in the selection of the candidate. According to Ms. Stehelin, the CSFY can choose to hire the director general for a fixed period. The director general is part of the CSFY, despite the fact that the GY is the employer. She stated that the GY does not monitor the director general's activities in relation to operational requirements. Further, the CSFY evaluates the director general and sends the evaluation to the MEY department who approves a new salary. Discipline issues in relation to the director general are dealt with by way of recommendation to the deputy minister. It is possible that the MEY was involved in the 2006 evaluation.

[337] Since at least 2005, the CSFY makes the decisions regarding the director general's trips outside of the province. Ms. Stehelin prepared a letter, signed by the deputy minister, stating that

the CSFY makes the decisions regarding trips. A directive to this effect is contained in the document entitled “Management Board Directives”.

[338] Raises for the director of education are given within the “planning framework” by the section concerned with benefits, bonuses, and other matters. Merit increases occur after evaluation. There are three categories of evaluation in the government: “developing” - increase of 0 to 2 %, “fully developing” - 2 to 4 %, and “outstanding” - 4 to 8 %. Ms. Stehelin explained that when Ms. Taillefer was hired, the chair of the school board, André Bourcier, said that she should be placed on a slightly lower scale given her lack of experience in this type of work. After the first year, the CSFY recommended that the GY approve a raise of 6 %, based on her good work. The minister chose not to follow this resolution, but rather to give her a raise of 4 %, as it was only her first year, and she did not fit the criteria for “outstanding” . In 2008 and 2009, the CSFY recommended a raise of 6 %, which was granted (see exhibits 110-115).

[339] Ms. Stehelin explained that the director general selects the school principal. She prepares the advertisement in French, which is posted on the MEY website, receives the resumes, and controls the entire process, including verification of references. The human resources department helps candidates coming from outside the Yukon, facilitating their travel, etc. Ms. Stehelin said that the MEY plays no role in the hiring of the school principal. The human resources department prepares the offer of employment in English, and sends it to the director general who has a French copy. The two versions are signed and sent back to the MEY. The English copy is the definitive version, and is sent to two government departments to ensure payment of the salary, etc. According to Ms. Stehelin, the other department have no capacity to work in French.

[340] Ms. Stehelin stated that she responded to Ms. Taillefer regarding the language of the offers of employment by stating that the human resources department is not in a position to translate the documents (exhibit 148A). She sent the offer in English to the director general in electronic form. She assumed that the director general translated it, given the French contract of June 2007 (exhibit 130).

[341] Ms. Stehelin explained that the CSFY's director general is responsible for the evaluation, discipline, etc. of the staff. However, firing and dismissal of the school principal are matters for the deputy minister of education, except for dismissal of the director general during the probationary period.

[342] Previously, the school principal contracts were only for three years. Since 2003, all school principal positions are ongoing, i.e. permanent. Ms. Stehelin noted that the YTA laid a complaint alleging that the CSFY breached the collective agreement in hiring the school principal for a fixed term.

[343] Ms. Stehelin explained that the director general signs the teachers' employment contracts and manages these with the assistance of the school principal.

[344] According to Ms. Stehelin, if the CSFY became the teachers' employer, there could be problems regarding their admissibility to the federal government's pension plans.

[345] Ms. Stehelin noted that EET is fourth among the 28 Yukon schools regarding teacher-student ratios. According to her, a secondary school program can function with four teachers.

[346] Following the auditor general's report, a committee was struck in order to establish a new staffing formula. A consultant, Dick Chambers, was hired from British Columbia to participate on the committee. The committee worked from January to March 2010. A number of representatives were present. The committee's report was published on March 8, 2010 (exhibit 143). Ms. Stehelin stated that the committee's work was done in English. She commented on the changes to the formula, including the 15 % for the francophone school, "vulnerability and transition", and others. According to her, EET had 13 FTE positions under the old formula, yet the MEY gave it an additional 5,5 FT. Under the new formula, EET has 21 FT. Ms. Stehelin said that it is common to have combined or split classes in secondary school. However, there are never two teachers for the same year.

[347] Regarding staff development, Ms. Stehelin spoke of the \$362,000.00 provided to the YTA, as well as four other possible sources of financing.

[348] Ms. Stehelin explained that one of the three professional development days in the Yukon is dedicated to "traditional hunt in the native communities".

[349] Regarding the collective agreement, Ms. Stehelin said that the Public Service Commission is the employer of the teaching staff. She met with the director of education after the last round of collective bargaining and she found that the three points raised by the director

of education were not really relevant to the collective agreement.

[350] In cross-examination, Ms. Stehelin confirmed that she has no training in teaching or pedagogy. Her experience is limited to management of human resources. Her human resources department is comprised of eight employees including herself. Currently, none of the employees is bilingual. There is no bilingual position. Her department is responsible for payment of salaries, which is done by way of a computer system.

[351] Ms. Stehelin confirmed that three days of orientation are offered to new teachers. The director general does the orientation for EET teachers. Human resources' orientation is not offered in French.

[352] Ms. Stehelin explained that the pay cheques are in English only. There is no bilingual employee in the departments involved in issuing them. The human resources department does not prepare any documents in French. Ms. Stehelin stated that the policy in her department is that English is the only administrative language at the GY.

[353] Ms. Stehelin maintained that she had nothing to do with the decision not to allow the CSFY to participate in the collective bargaining. It was Maegan Slobogan, from staff relations. Ms. Stehelin explained that the complaints process involves different levels. The CSFY had not yet been consulted regarding a fixed term for the school principal. There was a second complaint regarding the elimination of a position at the secondary level in Académie Parhémie. The first

meeting with the director general in this regard took place on May 12, 2010. Ms. Stehelin was the only anglophone present.

[354] Ms. Stehelin explained that the three year fixed term contract for the school principal would make the search for candidates more difficult. In 2003, these contracts were made permanent. According to her, the director general of the CSFY was advised of the change, but not consulted. The position can be either for a term or indefinite, but various factors must be taken into account.

[355] Ms. Stehelin stated that the human resources department does not have the ability to do translations, being a small department with few employees. There is a coordinator for the French programs who could provide service in French. This position had been vacant since the prior fall. In any event, the coordinator does not do translation. Translation is contracted out to the private sector.

[356] Ms. Stehelin did not understand the concept of having two teachers for one class.

[357] Ms. Stehelin prepared the document entitled "GL SUBLEDGER=1627 Prog=200205" (exhibit 144) in order to explain where she received the data regarding the anticipated number of teachers at EET, being 8.5 FT.

[358] Ms. Stehelin confirmed that there is no French website nor a policy regarding answering

the phone, whether in French or in English. There is no active policy regarding service in French.

[359] Ms. Stehelin confirmed that two other small schools had a lower teacher-student ratio than EET. In fact, EET is sixth, and not fourth.

[360] Ms. Stehelin stated that she had not studied the francophone factor in the staffing formulas in the 13 Canadian jurisdictions. She relied, rather, on the recommendations of the consultant, Richard Chambers. She could not say whether Mr. Chambers had considered the factors specific to the CSFY. She confirmed that the committee's mandate was to ensure that there were no FTE losses in any of the Yukon schools. The committee did not consider specific programs.

[361] I find that Ms. Stehelin is credible and reliable regarding facts known to her. She was not qualified to comment on combined classes, the secondary level, nor areas related to teaching. She was very frank concerning the lack of service in French.

L. Norman Laniel

[362] Norman Laniel is the assistant director, responsible for supervising the census methodology at Statistics Canada. He has been in this position since 2006. He has been an

employee of Statistics Canada for 28 years. He obtained a masters' degree in statistics from the University of Montreal.

[363] Mr. Laniel discussed the 1996, 2001 and 2006 census, in particular with respect to the data on the mother tongue of children aged 0 to 17 years (exhibit 175). The 1996 census shows that 550 children between 0 and 17 years had at least one parent identifying French as their first language. For children between 5 and 17 years, the figure was 415. In these same categories, the 2001 census shows figures of 345 and 255 respectively. The figures in the 2006 census are 325 and 190.

[364] Mr. Laniel explained that the information was collected by way of a long form questionnaire. Only one home in five (20%) received the long form. Further, some people were omitted at the time of the census. As a result, the census, as any poll, is subject to a margin of error. Mr. Laniel explained that if the margin of error is applied to 190, there would be a variation of 73 - higher or lower. In other words, the number of children, in 2006, having at least one parent who identified French as their first language varies between 117 and 263. He explained that the results of the census are true 19 times out of 20, therefore there could be an additional margin of error of 2.5%, resulting in a range of values from 114 to 270. He confirmed that the figure would be higher if the school age in the Yukon was higher than 17 year, such as 21 years, and if one took into account children younger than 5 years old.

[365] In cross-examination, Mr. Laniel stated that one of the factors taken into account is the exogamous family, but he did not explain this in detail. He did not know whether the other two categories under s. 23 of the *Charter* had been taken into account in the calculations.

[366] I find Mr. Laniel to be credible and reliable.

M. Judith Anderson

[367] The defendant proposed Judith Anderson as an expert witness. Ms. Anderson has been a lawyer for around 40 years (exhibit 176). The report initially prepared by Ms. Anderson and the defendant's will-say notice constitute, almost in their entirety, an inadmissible legal opinion. Curiously, just prior to calling Ms. Anderson as an expert witness, the defendant indicated that she would not be called as an expert regarding the legal opinion, nor on the issue of whether the provisions in the *Education Act* satisfy s. 23 of the *Charter*. However, the defendant wanted call her as an expert regarding the operations and management of a school board, and the collective agreement.

[368] Following presentation of a brief and multiple arguments, the Court decided not to allow Ms. Anderson's evidence in the areas identified by the defendant. However, the Court allowed her to testify as an ordinary witness regarding the facts in her report, including many about which she had personal knowledge, in particular the history of the *Education Act*, given the fact

that she worked for the GY as a legislative drafter of that statute. Further, her report contains some of her research on the school boards and statutes in other provinces.

[369] Ms. Anderson noted that there were many school boards in Alberta, in the early 1900s - one for each school in 4 square miles (para. 2, exhibit 177). She explained that the prevailing concept in the Yukon is a system of gradual devolution of power to the school board.

[370] In cross-examination, Ms. Anderson agreed that Nunavut has only one school with its own school board. She was not sure whether Saskatchewan had a school board for each school in the period from 1995 to 2000.

[371] Ms. Anderson acknowledged the inaccuracy of information contained in para. 91 of her report with respect to the collective bargaining process in Saskatchewan. She explained that her intention in this regard was simply to demonstrate the fact that there are three different systems of collective bargaining in Canada.

[372] I find Ms. Anderson to be credible.

N. Patricia Daws

[373] Patricia Daws has worked for 17 years as Public Service Commissioner.

[374] She explained that teachers, school principals, and assistant principals are all employees of the GY, and therefore are all part of the same bargaining unit. This situation has historical underpinnings, influenced by the low number of employees in the Yukon in the past. She explained that the CSFY's director is not the only position which is accountable to two different organizations. For example, the WCB chair is accountable to his office as well as to the GY.

[375] Ms. Daws noted that some CSFY employees, such as the secretaries, the support staff and the custodians, are covered by a different collective agreement. The *Public Service Act*, R.S.Y. 2002, c. 183 prohibits the contracting out of these jobs to the private sector, and the *Canada Labour Code* would have to be examined if the CSFY wished to hire its own custodians and secretaries. According to her, the Public Service Commission must receive offer of employment letters in English. The Commission does not have the ability to translate them. However, there could be French copies.

[376] Ms. Daws stated that the Public Service Commission is responsible for collective bargaining with the YTA. The Commission obtains information from the department of education and the superintendents.

[377] She explained that her department, the department of education and the department of finances share responsibility regarding teachers' salaries. There is a double checking system. She could not imagine how another entity would be able to perform this task.

[378] Ms. Daws explained that GY employees, including teachers, are members of the Federal Superannuation Plan, as provided under the *Public Servants Superannuation Act*, R.S.Y. 2002, c. 182. This defined benefit pension plan promises a certain level of pension, instead of pensions where the benefit at retirement is determined by the amount of annuity that the accumulated contributions plus interest can purchase at retirement. Ms. Daws did not believe that it would be possible for CSFY employees to participate in the federal pension plan without a legislative amendment approved by the federal government.

[379] Ms. Daws cited the example of the Yukon Hospital Corporation which had asked to be able to participate in the federal pension. The federal government refused. In fact, the federal government has encouraged, in the past, other organizations in the Yukon to establish their own plans. The GY considered the issue, but Canadian Public Services raised objections.

[380] Ms. Daws stated that the Yukon College is part of another bargaining unit. The college has its own pension and benefits plan, as does the Yukon Hospital Corporation. According to her, these two organizations have experienced problems in financing their pension plans. The GY has given them funds to cover their deficits. The territorial judges are part of a plan which is separate from that of other GY employees. Notwithstanding the transfer of the value of their pension under the federal plan, the GY had to contribute around \$1 million for each of the three judges in order to ensure the viability of the pension.

[381] The teachers' benefits plan includes, among other things, long term disability insurance, extended health benefits and dental care. It is a good plan. Ms. Daws stated that the teachers can

only participate in this plan as GY employees. The CSFY could establish its own plan, but it would be costly. The Yukon can negotiate good premiums due to the large number of employees. There are a number of representatives on the committee which manages benefits. The committee has already denied requests by other groups, such as the members of the Legislative Assembly, to participate in the plan. Ms. Daws did not believe it would be possible to force the committee to accept a request.

[382] In other words, if a party wished to leave to become an employee of the CSFY, there would have to be negotiations with the YTA regarding monies for professional development and the collective agreement.

[383] In cross-examination, Ms. Daws confirmed that there are around 4,200 government employees in the Yukon, of which 685 are teachers. There are 90 employees at the Public Service Commission. She provided details regarding the number of employees in each GY department.

[384] She stated that there have been a number of instances of devolution of federal employees to the Yukon, the last having occurred in 2003. The transfer of employees is not a cost-cutting measure, but rather a transfer of power to the GY. The devolution of power arises from the Yukon's desire to exercise greater authority, as do the provinces, on its human and other resources. Ms. Daws confirmed that 80% of the GY budget comes from the federal government.

[385] Ms. Daws explained that the GY had limited powers regarding the new Yukon benefit plan. The federal government allowed GY employees to continue to participate in the federal pension plan. Yukon College and Yukon Hospital Corporation staff are not GY employees. The Yukon Hospital Corporation established a separate company and the employer had to pay for its own pension plan. Yukon College does not participate in the federal plan. She said that the GY preferred that the Yukon Hospital and Yukon College were distinct entities. According to her, no study has been done on these separate plans. Such a study would require an actuarial analysis.

[386] Ms. Daws stated that the payroll system involves the department of education, the Public Service Commission and the department of finances. She did not want to guess the amount of the Public Service Commission's budget which includes not only her department, but also the WCB premiums and the amounts for leave accruals, as well as costs of retirement benefits for all employees.

[387] Ms. Daws stated that no study has been done regarding the cost per government employee of administering salary and benefits.

[388] Ms. Daws confirmed that collective bargaining is governed by the *Labour Relations Act*. She explained the two step process: the first is informal regarding areas other than finances, and the other formal step concerns funding. She was aware of the fact that in other jurisdictions, school boards make representations in the collective bargaining context.

[389] Ms. Daws explained that the CSFY does not participate in collective bargaining because the “Public Service Commission represents the Yukon government”. According to her, the issue of possible consultations with the CSFY would be a matter for the department of education, who would be able to present concerns or suggestions of the CSFY during bargaining.

[390] According to Ms. Daws, Val Stehelin and Christy Whitley participated as representatives of the GY in the last round of collective bargaining. Ms. Daws confirmed that the Yukon College and the Yukon Hospital negotiate their own collective agreements in a process governed by the *Canadian Labour Code*. City of Whitehorse employees also do their own collective bargaining.

[391] Ms. Daws explained that the pay cheques are computer generated. She did not think that the computer program would have the ability to issue cheques in French.

[392] The members of the Legislative Assembly participate in the same benefits plan as the other GY employees, but not in the pension plan, given that they are not GY employees. When an elected member retires, he does not receive any more benefits. Ms. Daws believed that any modification of the list of those who can access the benefits plan must be effected through the management committee, which would then make a recommendation to the minister of finance.

[393] Ms. Daws spoke about the Public Service Commission’s policy whereby English is the language in the workplace, as contemplated by the law. The Commission communicates in French only when it posts advertisements for bilingual positions.

[394] The Commission's website is currently only in English. There is a list of areas in the MEY which are supposed to have their own bilingual websites. However, Canadian Heritage refused to provide funding for this project. The work is currently being done by the French Language Services Directorate.

[395] Ms. Daws stated that the Public Service Commission does not publish any documents in French. She was not able to offer any French services to the CSFY. None of the 90 positions at the Commission is bilingual. The Commission office provides only service in English. Further, no representations are made to the public regarding the Commission's capacity to provide services in French.

[396] Ms. Daws confirmed that the human resources department presents the orientation regarding benefits to the new teachers. The Public Service Commission would not be able to provide those sessions in French.

[397] I find that Ms. Daws is credible and reliable. Her testimony assists in providing a greater understanding of the role of the Public Service Commission.

O. Sandra Henderson

[398] Sandra Henderson is a francophone originally from Gaspé. She has been a teacher since 1955. She moved to Whitehorse in 1981 to teach the first immersion class. Thirteen of her 33

students were francophone, which gave her the desire to establish a francophone school. The program started in 1984 for Grades 3, 4, 5, and 6. In 1985, she was transferred to the secondary school, Riverdale. Some of her francophone students followed her to that school.

[399] Ms. Henderson participated in the francophone program at Riverdale until 1988. From 1988 to 2004, she taught at F.H. Collins in immersion and “Core French”. From March to June 2004, she acted as a temporary replacement teacher for the French first language course in Grades 10, 11 and 12 at EET.

[400] Ms. Henderson was aware, during her all of her years at F.H. Collins, of students who had left EET. From her discussions with them, she concluded that they left due to social problems or a lack of sports teams, etc. The youth found the small milieu to be limiting, as was the fact of staying with the same students or friends for thirteen years.

[401] Ms. Henderson stated that young people choose their own courses, especially at the secondary level. They want to be able to make their own decisions in this respect. She was under the impression in 2004 that EET had considerable resources for the French courses. She believed that all of the human resources positions were filled at the time.

[402] Ms. Henderson retired in June 2004. She then became a member of F.H. Collins’ school council, a position which she held for two years. She then acted for two years as president of the YTA. Since that time, she has returned to her position as member of F.H. Collins’ school council.

[403] I concluded, in listening to Ms. Henderson, that fewer youth would leave EET if it had a greater number of students.

[404] In cross-examination, Ms. Henderson confirmed that she had only taught at EET from March to June 2004. In 2009-2010, she was part of a group - as a volunteer but also as school councillor for F.H. Collins - which reviewed the secondary programs. She was especially interested in the areas of French, trades, and aboriginals.

[405] Ms. Henderson believes, as a result of her experience at F.H. Collins and elsewhere, that young people like and want there to be a separation between the elementary and secondary levels.

[406] She stated that between 1995 and 2004, she spoke to around 15 students regarding their decision to leave EET for F.H. Collins. According to Ms. Henderson, the students at F.H. Collins can take the courses they want to take and that is very important for students. Further, she stated that it is important for youth to have a trade program, regardless of where it is located. Ms. Henderson added that it would be good if EET offered a trade course, but she noted that the low student population is always a problem. She noted that three trades are currently taught at F.H. Collins. She was of the view that even more trades must be offered.

[407] Ms. Henderson testified in a direct and honest manner, especially regarding the relationship between the number of students and the social aspect, choice of courses and trades.

P. Elizabeth Lemay

[408] Elizabeth Lemay worked for about 35 years in British Columbia as a teacher and school principal, before becoming director of programs and services at MEY in 2008. She does not speak French.

[409] Ms. Lemay said that the CSFY had been invited to participate in creating the document entitled “Yukon Department of Education Kindergarten to Grade 12 Literacy Framework” (exhibit 178), but the CSFY turned down the invitation. Concerning francophone resources, Ms. Lemay explained that the person who did the inventory of books retired and it has been difficult to find a replacement. This has also caused problems in relation to English resources and books (exhibit 180). Ms. Lemay identified an e-mail exchange which took place in May 2009 (exhibit 181) concerning verification of the “Individual Education Programs (IEP)”. She said that the CSFY’s director of education had questioned the quality of the translation of certain documents, as indicated in the June 2009 e-mails (exhibit 182). Ms. Lemay explained that a contract employee, Ms. Julie Desroche of British Columbia, evaluated EET’s special needs students. She did the evaluations in French, but the written reports were drafted in English. The MEY then translated the report into French, and that was provided to the EET parents. Subsequently, Ms. Desroche met with the parents and school representatives, either in person or by way of teleconference.

[410] Regarding allocation of special needs resources, Ms. Lemay explained that the full-time positions are assigned to the students with the most severe problems. Ms. Lemay stated that teacher-aides are allocated according to the needs of the students and their salaries do not form part of the school budget.

[411] Ms. Lemay noted that her department has a “Bilingual Support Officer” for French services. Further, there are two bilingual positions which are presently vacant, one in support programs and the other being the position of Coordinator of French programs.

[412] Ms. Lemay gave a long speech regarding the curriculum, the philosophy underlying learning expectations, as well as the idea that the goal is not necessarily to be able to write exams. She stated that teachers must be flexible. She also spoke of assessments for learning that the teacher must undertake. She never responded to a question regarding testing.

[413] Ms. Lemay was not aware of a request made to her department to translate the new math program. She went on to say that there are math resources available to EET. Further, the school is always welcome to participate in “In Service” training. She noted that one of the math consultants in British Columbia works in French. She added that the “Western Protocol” is published in both English and French.

[414] Ms. Lemay is a member of a committee which makes decisions regarding the professional development budget in the context of the collective agreement. The YTA set criteria for its members. She identified three factors which are taken into consideration: whether the

teacher has already received the training, whether the training is outside of the territories, and whether there will be a “bang for your buck”.

[415] Since moving to the Yukon, Ms. Lemay has been in charge of special programs. There are 19 employees in the department for children with special needs.

[416] Ms. Lemay confirmed that the CSFY must obtain the MEY’s permission before using curriculum other than the curriculum from British Columbia. She was aware of a request by the CSFY to use the Alberta science curriculum. When counsel asked her if she had made a decision in this regard, she said that the issue had been discussed with the consultant. She added that the teachers can use Alberta Grade 10 science manuals, but not the Alberta curriculum. She confirmed that she had discussed this with Jean-François Blouin at least three time, but she did not recall there having been any written exchange.

[417] In cross-examination Ms. Lemay confirmed that the Grade 7 to 12 science curriculum as well as the learning outcomes come from British Columbia (exhibit 164). They are only available in English. Further, she anticipated further discussions with Mr. Blouin on this topic. According to Ms. Lemay, “literacy” is only currently available in English. However, there will be a French version in the future when the document is finalized.

[418] Ms. Lemay identified Joanne Davidson, of her department, as being the person responsible for the YSIS system (computer system). Ms. Lemay was aware of the fact that the YSIS program has no accents or cédilles. She had discussions about this with the francophone

school board in British Columbia. When counsel asked her if she had taken the position that accents and cedilles are not necessary, she replied that work had been done on this issue. She had learned that the accents can be added manually, but she was not aware of all of the details. As for a permanent solution, she stated that there would be discussions. She added that the MEY was able to seek solutions. When she was asked about a timeline, she replied that it was being discussed. Finally, when she was asked whether the CSFY was required to use the YSIS system, she stated that it was up to the assistant deputy minister to respond to that question.

[419] According to Ms. Lemay, EET only has to make a request if it needs the services of a educational psychologist or an evaluation. She referred to a recent case where there was a crisis at EET. A bilingual individual from the MEY, Stacey Bernard, went to EET to do the work in French. Following an objection by counsel for the plaintiff, the defendant admitted that Stacey Bernard was not able to work in French, and that she had evaluated the child in English. When counsel asked Ms. Lemay where she had gotten her information, she said that she relied on information from others.

[420] Ms. Lemay agreed that many schools in the Yukon have resource rooms for children with difficulties, and that EET does not have one.

[421] Ms. Lemay confirmed that the students must write MEY exams in Grades 10, 11 and 12. These exams are prepared in English in British Columbia based on the recommended manuals and texts. She was aware that some of the manuals are not available in French. She responded in an evasive manner in saying that she knew there were some in French. She did not agree that the

teacher would have more work to do if the manuals were not available in French. When counsel asked her what her department was going to do to resolve the problem, she replied that there would be consultation. According to her, the lack of French manuals is not a disadvantage in the 21st century, because there is a new philosophy of learning.

[422] Ms. Lemay stated that there is no fixed number of days per year dedicated to professional development of teachers. The number is determined based on need. She explained that this determination is made by the MEY in a collaborative process. The schools make requests and there are discussions at the higher level. Ms. Lemay acknowledged that there is no professional development for French first language. She added that she would be happy to facilitate such training.

[423] Ms. Lemay participated in the negotiations regarding the new Canada-Yukon bilateral agreement for 2009-2012. She was not aware of the amount in the 2009-2012 agreement which was earmarked for the French first language program. Ms. Lemay suggested that one would have to ask Cyndy Dekuysscher, director of finance in the department of education. According to Ms. Lemay, no capital projects were identified during the negotiations. As a result, none was discussed in March 2010 during the final discussions. She confirmed that the agreement was to be signed on March 31, 2010. Ms. Lemay was aware of the fact that the CSFY, in relation to the Canada-Yukon bilateral agreement for 2005-2009, had demanded the transfer back of funds designated for the French first language program (exhibit 56).

[424] Ms. Lemay was not aware of Canadian Heritage's request for a tripartite meeting between the Yukon, Canada and the CSFY regarding Gilbert Lamarche's request to transfer \$1.9 million from the French first language program to the French second language program.

[425] Ms. Lemay indicated that the CSFY would receive, under the 2010-2011 agreement, around \$515,000.00. She explained that this amount was part of the action plan submitted prior to March 31, 2010.

[426] Ms. Lemay confirmed that she signed a letter dated May 12, 2010 and drafted by Christey Whitley to all EET parents regarding the Académie Parhémie program (exhibit 149). The last paragraph of the first page indicates that the pilot project was only for three years. In cross-examination counsel asked her whether, according to the MEY, the Académie Parhémie pilot project was for 3 or 5 years. Ms. Lemay replied that she preferred not to respond to that question. When asked whether the \$375,000.00 per year had been spent by the MEY, Ms. Lemay stated that the question would have to be posed to the individual in the department of finances.

[427] Ms. Lemay confirmed that the website is not available in French. However, a translation has already been worked on. Again, I found that she did not respond directly to the questions put to her. When she was asked when this work would be finished, she replied: "There will be collaborative discussions".

[428] I find Ms. Lemay's testimony to be of little use, given her evasive manner and her attempts to divert questions.

Q. Ed Shultz

[429] Ed Shultz is currently director of the First Nations program at the MEY. He has held a number of positions at the MEY. For six years, he was “Grand Chief of the Yukon First Nations”.

[430] According to Mr. Shultz, the greatest challenge for members of the First Nations is to obtain an education which is in line with their culture. He stated that aboriginals have the lowest rate of graduates in the country, as demonstrated in the document entitled “Public Schools and Advanced Education Yukon Department of Education” (exhibit 183). He said the data in the document represents an overestimate and in fact the rate is even lower. Further, aboriginal graduates often do not have the prerequisites for trade schools.

[431] Mr. Shultz noted that the MEY devotes around \$2.8 million to aboriginal educational programs. There are eight aboriginal languages in the Yukon. There is between 0.5 and 1 FTE teacher in each region who teaches the relevant aboriginal language.

[432] According to Mr. Shultz, the programs must respond to the needs of aboriginals and there must be an increase in the number of experiential programs in order to raise the number of graduates. He believes that more instruction must be offered in the aboriginal languages and that the schools must be changed to make them more of a community.

[433] Mr. Shultz was of the view that there is a current lack of adequate resources. For example, alphabets must be created for aboriginal languages. Many schools outside of Whitehorse do not have a secondary level. The children must move to a residence in Whitehorse, which is not an ideal solution.

[434] In cross-examination, Mr. Shultz confirmed that he did not know much about the francophone situation. However, he stated that “full day instruction” would be the most effective approach for teaching an aboriginal language. He added that control by aboriginals of their own schools is important and desirable and that school boards would perhaps be a good way for aboriginals to gain more control.

[435] Mr. Shultz agreed that there must be a greater investment in order to increase the number of aboriginal graduates. However, he was of the view that money is not a complete solution. He also agreed with the suggestion that education is more expensive in small communities due to the lower number of students as well as costs of administration.

[436] I find that Mr. Shultz is credible and reliable. His evidence was interesting. His recommendations in relation to aboriginal education could be applied to the francophone situation in the Yukon.

R. Anita Simpson

[437] Until her retirement in 2008, Anita Simpson was a manger in administration services. Currently she works “auxiliary on call” for the MEY in the finance unit. She is francophone. However, she chose to testify in English.

[438] Ms. Simpson played a role in the bilateral agreements, verifying the figures. The interim and final reports would follow. The requests would then be sent to Canadian Heritage who would give the funds to the GY. The GY would spend the funds. If the GY did not spend all of the funds provided, the monies would be lost. Regarding the contribution agreements, the CSFY would send reports to the MEY. Then the francophone coordinator at the MEY would obtain information regarding the figures from the department of finance and would prepare an annual report. The MEY would send the report to the CSFY and to the Association franco-yukonnaise.

[439] Ms. Simpson discussed a document entitled “Canadian Heritage - Action Plan Financial Mapping by Objectives 2004-2005” (exhibit 184). This document, prepared by Gilbert Lamarche, sets out the anticipated costs. She stated that the federal government paid the amounts indicated in the document (see also exhibit 185).

[440] Ms. Simpson confirmed that all of the information in the document “Canadian Heritage - Action Plan Explanations by Objectives 2004-2009” (exhibit 185) pertains to core funding, and additional funds.

[441] Ms. Simpson confirmed that she received, shortly after it was drafted, a copy of the letter dated January 30, 2006 from Gilbert Lamarche to Canadian Heritage (exhibit 37). She stated that the French first language budget was compared, in keeping with the protocol, with what was approved. They requested that the difference of \$1.9 million be transferred from French first language to French second language. The transfer would not have been possible without Mr. Kubica's approval.

[442] In cross-examination, Ms. Simpson explained that the said transfer occurred in order to avoid the funds being returned to the federal government. She had not asked the CSFY whether the CSFY could spend the money. She was not involved in the discussions. When counsel asked her how the MEY could know in advance that the CSFY would not be able to spend the money, counsel for the defendant objected to the question.

[443] Ms. Simpson stated that in 2005-2006 the CSFY had spent the funds according to the budget submitted to the MEY. Ms. Simpson was asked whether she asked about the possibility of the CSFY spending more money. She responded that she was not involved in discussions in this respect.

[444] In 2006-2007, there was a transfer from French first language to French second language of around \$513,000.00. According to Ms. Simpson, the amount was determined based on the CSFY's budget. When she was asked to explain how that would be possible if she had not yet received the CSFY's budget for 2006-2007, she did not respond. When she was asked how the

MEY could determine, four years in advance, that the CSFY would not be able to spend the monies, she stated: “I can’t answer that”.

[445] Ms. Simpson could not give a good explanation of the meaning of the term “additional costs” used in the bilateral agreements (exhibits 56 and 185). She commented on the correlation between Objective 2 in exhibit 185 and Objective 1 in exhibit 56, stating that the amounts in exhibit 185 had not yet been spent.

[446] Ms. Simpson agreed that clause 1.2 of the bilateral agreement (exhibit 185) has to do with the salaries of all EET staff, including custodians, clerical substitutes, etc. Ms. Simpson explained that the MEY had prepared exhibit 185 in order to calculate the total cost of the French first language program. She could not explain the meaning of the headings “more deductions should we need them” and “more deductions SUDN” (pp. 2, 5, 6, exhibit 184). She had not drafted the document. She agreed with the suggestion that the MEY had prepared exhibit 184 in order to show that the MEY paid its part, and not for Canadian Heritage. Ms. Simpson identified the percentage paid by the GY in the last column of exhibit 56. She did not reply to the question regarding the difference between the core funding and the additional funding in the budget of her department of finance. She stated that the MEY had paid the costs for student recruitment.

[447] Ms. Simpson believed that Ms. Elizabeth Lemay was responsible for the bilateral agreement.

[448] Ms. Simpson confirmed that the monies received by the GY from the federal government for French first language went partly to the CSFY and partly to pay the salaries of consultants and others.

[449] Ms. Simpson did not reply to the question as to how the MEY made the payments of \$375,000.00 to the CSFY for the Académie Parhémie program. In re-examination, Ms. Simpson acknowledged that the payment of \$375,000.00 could be a transfer of money or in kind.

[450] I found Ms. Simpson to be very difficult to follow. Her testimony was sometimes ambiguous, sometimes equivocal and evasive. She left the impression that she did not want to respond to questions. It was perhaps intentional or simply because she did not have much knowledge of the topic.

S. Cyndy Dekuysscher

[451] Cyndy Dekuysscher has been director of finance at MEY for 3 years.

[452] Ms. Dekuysscher was of the opinion that the MEY could transfer a number budget items for 2010-2011(exhibit 186) to the CSFY, except for three items closely related to the GY: staff, custodians and school utilities. Ms. Dekuysscher revealed during her testimony for the first time that the MEY had decided to allow the transfer of funds with the exception of these three categories. The CSFY simply has to send a letter or e-mail making the request. She said that the

schools currently hold their trust accounts. Those with signing authority are GY employees. The GY requires reports under the *Financial Administration Act*, R.S.Y. 2002, c. 87. She was aware of the fact that EET did not submit reports to the GY, and she stated that was not a problem.

[453] Ms. Dekuysscher believed that the sum of around \$16,000.00 for publicity and recruitment was already included in the budget under “Retention and leadership program”. She believed, therefore, that there would have been duplicate payment if the CSFY did not take this money from its own budget to pay for the publicity.

[454] Ms. Dekuysscher spoke about an agreement in April 2008 between the CSFY and the MEY under which the CSFY was to send its budget to the MEY for approval, which would allow the MEY to keep tabs on what was going on. The MEY expects that the CSFY will stay within the approved budget. According to Ms. Dekuysscher, the MEY paid the insurance premiums the first time the issue arose. Everyone understood that it was an unanticipated expense.

[455] Ms. Dekuysscher discussed the MEY’s bill to the CSFY for a full-time teacher’s salary. Following a meeting in June 2009, she believed that the CSFY could “reprofile within the action plan” if the CSFY considered that the position at Académie Parhémie was a priority. She was not sure if the full-time teacher position was part of the \$375,000.00, but she thought that was probably the case.

[456] As for bus transportation, Ms. Dekuysscher stated that the CSFY's costs to make its own transport arrangements could amount to as much as \$420,000.00. There were currently 7 buses and one "handy bus" dedicated to student transportation. The MEY had a total budget of \$2.4 million for transportation in the City of Whitehorse. She maintained that the opening of EET four days earlier than other schools in September 2009 resulted in a cost of 7,049.00.

[457] In cross-examination, Ms. Dekuysscher confirmed that she had never before communicated the fact that the CSFY could request the transfer of most of its budget ("block transfer"). She confirmed that the budget for all of the Yukon schools for 2010-2011 was around \$87,715,000.00 (p. 8-8, exhibit 187 - "Department of Education Minister Hon. P. Roubelle"). Further, she confirmed that the annual cost for student transportation, including those from EET, was around \$1,386.00 per student. She said that the MEY's documentation shows that the total cost per student is around \$15,647.00. This figure is based on total expenditures from kindergarten to Grade 12, or \$88 million for 5,500 students. However, Ms. Dekuysscher indicated that the MEY had hired a consultant, Dick Chambers, two or three months prior, to help determine the actual cost per student. Ms. Dekuysscher had not advised the CSFY of the new procedure, nor of the hiring of Mr. Chambers. According to her, the MEY was going to attempt to determine the cost per student in the Yukon, the cost per student at EET, and the cost of special needs.

[458] Counsel asked Ms. Dekuysscher who decided which amounts would be cut from the CSFY's proposed budget prior to approval by the MEY. Her response was not clear at all. She

said that the MEY reviewed the budget, and the MEY “cannot flow money unless voted upon in the legislature, and if it’s not in our budget, then we can’t approve it”.

[459] Ms. Dekuysscher did not know that the \$120,000.00 appearing in the CSFY’s 2009-2010 budget (exhibit 109) covered the insurance premiums in question (exhibit 133).

[460] She stated that she was not the final decision maker regarding the EET budgets. There were a number of factors to consider. All of the school budgets were governed by the same principles. There was no special formula for EET.

[461] Ms. Dekuysscher confirmed that she was responsible for administering the funds under the bilateral agreements. Under the previous policy, the money went directly to EET and not to the CSFY. This practice would change once the MEY received a requested from the CSFY.

[462] Ms. Dekuysscher explained that the money for the purchase of teachers came from the bilateral agreement. The MEY department of finance sends a bill for these positions through the accounting branch. There is no contract or memorandum of understanding between the MEY and the CSFY regarding purchase of these additional positions. She said that the arrangements are often done by e-mail, which in her view is not ideal. She stated that she had never sent a bill for three full-time positions to the CSFY in 2008-2009. According to her, there should have been one.

[463] She did not give a clear response to the question as to whether \$623,817.00 had still not been paid, as requested (exhibit 83), due to the claim in this litigation having been served.

[464] Ms. Dekuysscher spoke about the agreement in relation to Académie Parhémie and the three annual payments by the MEY of \$375,000.00. She stated that the agreement did not mention the possibility of payments in kind. She had never advised the federal government that the \$375,000.00 had not been paid in funds. She had no responsibility in this regard. Ms. Dekuysscher did not yet know whether the CSFY intended to continue to offer the program. She was awaiting the final report due at the end of June 2010.

[465] There was another agreement between the MEY, the CSFY and the Académie Parhémie program (exhibit 60). Ms. Dekuysscher confirmed that the figures as set out on page 12 of 14 of that agreement indicate \$575,000.00\$ and a federal contribution of \$200,000.00 under the bilateral agreement. She added in this regard that the “documents as backup are in our office”.

[466] Ms. Dekuysscher explained that according to the MEY, the payment of \$375,000.00 in kind was effected by way of payment of 20% of the operating costs. She denied that this contribution was already provided for in the bilateral agreement. Ms. Dekuysscher had prepared the document entitled “EET Direct Operating Costs 2008-09 School Year” (exhibit 108). She stated that this document represented 100% of the direct expenses. This document shows that there were 15.65 teachers for a total of \$1,564,055.00. She agreed that there were four more full-time teaching positions for a total of 19.65 full-time teachers. Those four positions are identified

in exhibit 60. She noted that exhibit 60 was created in order to identify the costs related to Académie Parhémie. She confirmed that the CSFY had never had 23.65 positions.

[467] The amount of \$102,000.00, for bus transportation, appears among the expenses in the document entitled “EET Direct Operating Costs 2008-09 School Year”. Ms. Dekuysscher confirmed that the \$20,400.00 (exhibit 60) was another payment in kind and was part of the \$375,000.00. She did not agree with the proposition that including the \$102,000.00 in the budget (exhibit 108) as well as the 20% in the Académie Parhémie budget resulted in double accounting. As for supporting documents, she said: “the working file is back at the department”’s.

[468] Regarding the budget submitted to the MEY by the CSFY in January 2010 (exhibit 190), Ms. Dekuysscher stated that the CSFY identified \$120,000.00 as being the operating budget. The MEY only approved \$89,934.00. She was not involved in the decision to reduce it. However, she had prepared the approved budget (exhibit 186). When counsel asked how the CSFY would be able to pay the insurance premiums (exhibit 59) included in the \$120,000.00, given the reduction, she replied that her role was simply to identify the figures in the budget. She gave a long explanation regarding additional costs, but she never really responded to the question. Ms. Dekuysscher had never consulted the CSFY regarding this reduction of around \$30,000.00. She did not know if there had been consultations in this regard. She acknowledged, however, that the *Education Act* requires consultation between the MEY and the CSFY.

[469] Ms. Dekuysscher explained that her role during the negotiations for the new bilateral agreement and memorandum of understanding 2009-2013 (exhibit 105), was to identify the

various impacts on the budget. Her explanations regarding the memorandum were difficult to follow with respect to the allocations and their justification.

[470] Ms. Dekuysscher stated that 15 people currently work in the department of finance. None of them speaks French. No position in her department is designated bilingual. She noted that the law in the Yukon establishes English as the language of the workplace. Her department communicates in English with all of the schools, including EET, and all of the meetings with the CSFY take place in English.

[471] Ms. Dekuysscher stated that the Directorate of French Services pays for translation, and then sends a bill to her department of finance for reimbursement. She stated that the annual translation costs for the CSFY had not been determined, but it would be possible to do so.

[472] Regarding the memorandum of understanding of June 30, 2008 between the GY and the CSFY, counsel asked why the CSFY had only received \$716,800.00 instead of \$1,340,617.00, as provided for in the budget (exhibit 82). She stated that the amount of \$716,800.00 is contemplated in the budget, while \$623,817.00 are new funds. Regarding the memorandum of understanding of June 2009 between the GY and the CSFY (exhibit 85), Ms. Dekuysscher could not explain how \$511,680.00, the funds sent to the CSFY, had been established.

[473] I find Ms. Dekuysscher is generally reliable. However, she had difficulty responding and she often replied that she was not responsible or it was her department's responsibility. Her testimony regarding the financing of the Académie Parhémie program was problematic. The MEY

documentation shows double accounting with respect to certain services. The Court does not accept the response that the documentation existed but was back in the office.

T. David Hrycan

[474] David Hrycan has been deputy minister of finance for four years. He has worked since 1987 in the Ministry of Finance.

[475] Mr. Hrycan explained that the GY was running a deficit of \$2.4 million in the fall of 2010. However, the net financial resources at the time of the trial amounted to \$33 million. In other words, the GY had a surplus of \$33 million. According to him, the next budget would be filed on February 3, 2011. He thought there would be an increase in the anticipated deficit.

[476] Mr. Hrycan maintained that the construction of a school at a cost of between \$15 and \$45 million would result in a corresponding reduction in the net financial resources. Further, construction at a cost of between \$20 and \$30 million could result in a deficit. In such case, there would be two options : raise revenues, for example through raising taxes, or cut allocations to other projects. Mr. Hrycan believed that the budget for construction of the new school for F.H. Collins, of around \$45 to \$50 million, was already part of the long term plan.

[477] According to Mr. Hrycan, transferring title to the school to the CSFY would take away one of the GY's assets, which would have a negative effect on its balance sheet. There would

also be future effects, given that the GY insures its own assets and benefits from some expertise due to its size. He noted that the GY does not pay GST. He also spoke of economies of scale and purchasing power.

[478] In cross-examination, Mr. Hrycan confirmed that the total budget for 2010-2011 and 2011-2012 was more than \$1 billion. Around \$110 million of the total comes from GY's own revenues. Around \$900 million comes from other sources, including \$600 million from the federal government. The GY can distribute these funds as it sees fit.

[479] Around \$300 million of the budget consists of conditional transfers from the federal government to the GY for specific purposes. According to Mr. Hrycan, these costs and revenues will continually increase in the future.

[480] Mr. Hrycan explained that the accumulated surplus includes the GY's assets such as roads, schools, bridges, etc. The surplus is not used for debt repayment. The net financial resources are the liquid assets that the GY can allocate to debt repayment.

[481] Mr. Hrycan noted that a total of around \$250 million is earmarked for financing of capital projects for 2010-2011, of which \$130 million will come from the GY. He confirmed having signed the Consolidated statement of financial position as at March 31, 2010 (exhibit 531), which identified total expenses of around \$135 million of which around \$121 million is for operations and maintenance et \$8 million is for investment projects (p. 4). Mr. Hrycan explained that this proportion varies from year to year.

[482] In re-examination, Mr. Hrycan confirmed that the budget item of around \$250 million for capital expenses was already allocated to particular projects.

[483] I find that Mr. Hrycan is credible and reliable. It appears that the GY is posting a surplus of around \$30 to \$33 million. I infer that the GY would not have to seek other revenue sources nor cut other projects, if it contributed up to \$30 million for the construction of the building sought by the plaintiff, or renovations.

U. Bruce McAskill

[484] Bruce McAskill was qualified as an expert witness in the areas of use and planning of educational institutions, as well as general learning outcomes in math and science. He was not qualified as an expert in timetabling.

[485] From 1990 to 1995, Mr. McAskill was a secondary math and science teacher in a secondary school in Surrey, B.C. Between 1995 and 2003, he worked at the Ministry of Education in British Columbia. Since 2003, he has been a consultant with Hold Fast Consultants. Mr. McAskill does not have formal training in the use and planning of educational institutions. He has prepared only one report in this area, a report in 2007 for the GY. In 2003, he was on a committee of the Ministry of Education in British Columbia which was involved in the

development of a document entitled “Area Standards”. This document reads in part as follows (exhibit 50, Appendix 2):

The Ministry of Education area standard prescribes areas and other standards established by the Ministry of Education for space in elementary, middle and secondary schools. These standards apply to all facilities that are either to be newly constructed or enlarged. The Standards are also to be used to establish a nominal capacity of existing schools.

[486] The MEY hired Mr. McAskill in 2006-2007 in order to study and provide an opinion with respect to the following questions: Is a new school necessary in the Copper Ridge neighbourhood? Should Porter Creek School be expanded? Should F.H. Collins School be renovated or should a new school be built?

[487] Mr. McAskill prepared two reports dated March 31, 2010 (exhibit 532) and May 3, 2010 (exhibit 533). For the purposes of his study, he went to three schools in the Yukon : EET, Tantalus School in Carmacks, and J.V. Clark School in Mayo. The last two are rural schools offering kindergarten to Grade 12. He noted that the Yukon population is aging while the average age of students is decreasing. The Yukon student population has been declining since 2006.

[488] According to him, the Statistics Canada reports for 2006, 2001 and 1996 (exhibit 175) do not have an impact on his report. He recognized that there had been an increase in the number of elementary level students at EET.

[489] Mr. McAskill spoke of “raw capacity” as being the maximum number of students based on certain criteria. However, he defined “raw capacity” as the existing classrooms. He also spoke about “ideal capacity”, meaning the efficiency factor.

[490] Counsel showed Mr. McAskill exhibit 50A which shows the capacity of all of the Yukon schools. He was asked which rooms within a school are used to determine capacity in the Yukon, and noted that the practice is different in British Columbia.

[491] Mr. McAskill stated that the average rate of use of Yukon schools is around 60%, as it is at EET. He referred to British Columbia, noting that many schools function at capacity and portables must be added. He cited other examples in British Columbia regarding new schools. According to Mr. McAskill, a new school is built for the population as it exists at the time when construction begins.

[492] Mr. McAskill spoke about his impressions during his visit to EET. He noted that there was no industrial arts room. He believed, however, that EET had access to F.H. Collins’ industrial arts facility. He found that the gymnasium was adequate for a school having less than 500 students. He confirmed that the temporary student meeting room was in a hallway. He found it to be, nevertheless, inviting.

[493] Mr. McAskill noted that kindergarten 4 at other schools is a half-day program and often combined with kindergarten 5. Full-time kindergarten reduces by half the availability of the rooms in question.

[494] When he prepared his report in 2010, there were around 190 students registered at EET. According to him, the space was sufficient for an educational program. His opinion would not change, whether there were 184 or 241 students registered, given that the maximum recommended capacity is 292 students.

[495] He maintained that it is possible to teach math and science in combined or split classes, even if it is not an ideal situation. Smaller classes make teaching easier. He noted that this is very common for Grades 7 and 8. He himself has taught these courses to split or combined classes. According to him, it would be possible to teach Math 11 and 12 together to a small number of students. Whether Grades 7 to 12 were together, or separate, in his view EET could easily accommodate the students.

[496] In cross-examination, Mr. McAskill confirmed that he was not aware of the fact that kindergarten 4 was a full-time program. According to him, this is a choice on the part of the CSFY. He was aware of the CSFY's internal policy whereby the teacher-student ratio for kindergarten 4 is 1:12. He confirmed that this policy would have an effect on the space. He did not know that the Grade 7-8 class had 25 students in it. He had not prepared his plans based on other scenarios put to him in cross-examination.

[497] Mr. McAskill had not been told that the science laboratory and the home economics room had to be used for the purposes identified in cross-examination. Further, he had not been given details concerning use of the art room.

[498] Mr. McAskill confirmed that the situation is more complicated when a school offers kindergarten to Grade 12. He also acknowledged that the elementary level in such a school puts pressure on the secondary level. He stated that the square footage of the rooms is a factor. However, he had not considered the size of individual classrooms at EET.

[499] Regarding “maximum capacity” as identified in exhibit 50A, Mr. McAskill stated that the maximum capacity in January 2010 was 289 students. This figure was provided to him by the MEY.

[500] Mr. McAskill knew that s. 23 of the *Charter* is an important consideration. However, he did not take it into account in formulating his opinion. His study sought rather to determine whether the program was “pedagogically sound”. He noted, however, that the francophone school has a right to equal education, which explains his visits to other schools for comparison purposes. He acknowledged that the anglophone student population is decreasing, while the student population at the francophone school is increasing.

[501] Mr. McAskill confirmed having seen Lee Kubica’s report prior to preparing his own, but not that of M. Bilodeau, nor of Dr. Landry. He had not been informed that the full-time

kindergarten 4 has been financed by the GY since 2006. The comments “Plan” and “K4 full-time markedly different” in the March report came from the MEY and were confirmed by Gord DeBruyn (p. 20, exhibit 532).

[502] Exhibit 50E shows the dimensions of each room in EET. In re-examination, Mr. McAskill stated that he would be of the same opinion whether the maximum capacity was 289 or 296. He recognized that an expansion of the elementary section would put pressure on the secondary school, but again this fact would have no impact on his opinion.

[503] I find Mr. McAskill is credible and reliable. However, he based his opinion solely on the identified maximum capacity of 289 or 296, concluding that the school is adequate as long as the number of students is below this figure. Further, Mr. McAskill considered a number of factors which do not apply to EET, and he failed to take into account the third factor of “practical capacity”, nor kindergarten 4, nor the particular needs of a francophone school. For all of these reasons, I attribute little weight to his opinion.

V. Charles Georges Callas

[504] Since January 8, 2008, Charles George Callas has been employed by the MEY in “Facilities project management”. He is responsible for sixteen of the 32 buildings, of which 29 are schools. Gord DeBruyn takes care of the other buildings. The two men bring to their jobs many years of experience, Mr. Callas as an electrician, and Gord DeBruyn as an engineer. One

of Mr. Callas' responsibilities is to take care of capital planning for the buildings and maintenance. He tries to prepare five year plans to identify future needs. With a capital annual budget of between \$3 to \$4 million, it is important to establish priorities.

[505] According to Mr. Callas, work in the schools must be done in the summer and sometimes during the Christmas and spring breaks. In addition to recent work at EET on the windows and the counters in the art room, there was a sewer backup in April 2010, which cost \$92,000.00 to repair. The relevant annual budgets for EET contemplate the following expenses: around \$90,000.00 for custodial services, \$23,000.00 for security, and \$100,000.00 for maintenance. He confirmed the e-mail exchanged regarding installation of the windows (exhibit 527). He saw no problem with the school principals communicating directly with the contractors. It would, in fact, sometimes be preferable. He did not think the window situation would have been different if the CSFY had taken care of it.

[506] Mr. Callas confirmed that Gord DeBruyn had prepared the "capacity chart" (exhibit 50A). He believed that the multiplier was changed to make things simpler. For elementary schools, up to 80% is allowed for "raw capacity".

[507] Gord DeBruyn provided most of the information regarding the elementary and secondary schools at Watson Lake. He believed that a school can accommodate 200 students from kindergarten to Grade 12, as is possible in Watson Lake. He added that the construction plans for the new schools often take into account future expansion.

[508] In cross-examination, Mr. Callas confirmed that he had only received the figure for maintenance of \$100,000.00 from the department the day prior to testifying in court. He admitted that he did not have extensive knowledge concerning the budget. Mr. Callas confirmed that there was no set budget for individual buildings. This can cause problems. However, it provides a certain flexibility to deal with unforeseen needs.

[509] Mr. Callas confirmed that some work orders or other documents had been lost at the office several times in the previous year.

[510] Mr. Callas confirmed that the MEY had hired Dick Chambers. Mr. Chambers had run the meetings of the “Demographic Adjustment Advisory Committee”. Mr. Callas did not know what changes had been made to exhibit 50A in January 2010, nor whether there was a similar document prior to January 2010. Mr. Callas had asked Gord Debruyne to change it in order to set out the definitions for different types of rooms (p. 2, exhibit 50A).

[511] I find Mr. Callas to be credible and reliable. I accept his testimony to the effect that the work on the windows at EET would probably not have been completed more quickly if the CSFY had managed the work.

W. Michael Woods

[512] Michael Woods has a bachelor and masters in education. He is currently working on his doctorate. Prior to becoming a superintendent for the MEY, he worked for 12 years as a school principal in British Columbia, principally in the small rural schools. He taught split or combined classes. As superintendent, he provides a direct link between the MEY and the three secondary schools in Whitehorse, the elementary and secondary schools at Watson Lake, the Independent Learning Centre, three catholic schools, and a residence.

[513] One of Mr. Woods' responsibilities is to approve the timetabling for the schools under his jurisdiction. He explained that timetabling is complicated. The task is very different for elementary and secondary. When there are fewer than 100 students, one works primarily with blocks. The expectations and needs of the school or the community have an influence on timetabling.

[514] Mr. Woods explained that there are always staff and space restraints. For example, when there is only one gymnasium for 350 students, alternatives must be sought. In a school offering kindergarten to Grade 12, one has to address multiple priorities. He spoke of the "continuous model". According to him, the principal of "curriculum mapping" is relatively new. In all cases, timetabling starts with the teachers.

[515] Mr. Woods noted that split or combined classes are common in rural schools. He believed that there was a combined class at Takahini School in Whitehorse. According to him,

one has to take into account various factors, such as the individual students and staff, prior to making a decision as to whether or not to combine different grades. A combined Grade 1 and 2 class could create problems if there are very young children in Grade 1. Combined classes in math and science at the secondary level require more planning and well defined learning outcomes. It is also preferable to devote more resources to Grade 8 students to assist in the transition to Grades 9 to 12.

[516] According to Mr. Woods, students want there to be enough other students around to allow for interaction.

[517] Mr. Woods indicated that one has to thoroughly consider the kindergarten 4 children's natures before combining the two kindergarten 4 classes. He added: "Early intervention is the most important thing. Kindergarten 5 must have quiet spaces, a resource room..."

[518] Mr. Woods stated that most of the schools only have one gymnasium, except for secondary students in Whitehorse. In a school offering kindergarten to Grade 12, the elementary schedule often dictates the use of space. Sharing the art room could be a challenge given that the secondary students often work on more complex projects.

[519] Mr. Woods noted a decrease in attendance in industrial arts courses. Young people today will opt rather for "Clean technology" courses such as computers, "robotics", and others. He added that trades are important, and consequently it is important to continue to offer traditional industrial arts courses.

[520] Mr. Woods explained that the construction project for F.H. Collins included renovations which were necessary in order to maintain the industrial arts course.

[521] According to Mr. Woods, there were generally three to four teachers per day in the industrial arts courses in the secondary schools in Whitehorse. There were locations outside of the school for various aspects of the industrial arts program, such as work experience, job shadowing and apprentice programs. The students at Porter Creek School attended F.H. Collins for the industrial arts course.

[522] Mr. Woods confirmed EET's requests in September 2010 and January 2011 to use rooms at F.H. Collins (exhibits 525 and 526). He then spoke of a new program called "City Wide Campus" which has to do with industrial arts, without providing much detail.

[523] Defence counsel presented exhibits 504 et 50E again to Mr. Woods, being a plan of EET with the classrooms and their dimensions. Counsel asked him if he had drawn any conclusions. He replied that he was looking at them for the first time, and after a moment's reflection, he made general suggestions as he studied the documents. Mr. Woods stated that there was space available for industrial arts courses, such as at "Skills Canada". He noted that there was a computer laboratory in all of the Yukon schools, but that the new trend was to use laptops.

[524] Mr. Woods explained that the two schools in Watson Lake are located on separate grounds. However, he treated them as one school. The secondary school in Watson Lake is used by the community college.

[525] The Wood Street program is an experiential program for Grades 9 to 12. Based on outdoor activities, it uses a team approach. Generally, between 100 and 120 students participate in it at a time, or around 16 to 20 students in each of the five individualized programs. Each of these programs has its own classroom and other spaces, but no gymnasium, industrial arts room or science laboratory. Wood Street shares an old junior high school with other schools. Mr. Woods admitted that he did not know much about Académie Parhélie, but he nevertheless saw some similarities regarding trips and outdoor activities.

[526] Mr. Woods spoke about exhibit 50A which shows “raw capacity” and “recommended capacity”, stating: “The interesting thing of the capacity issue is that you actually have to see what is deployed in the school”.

[527] Mr. Woods was asked to comment on exhibit 505 which includes projected registration and use of space, and whether he considered that there was flexibility taking into account these projections. He responded that it depends on the type of students. He also suggested that two alternative classes were perhaps not necessary, and that another arrangement could be made for the two kindergarten 4 classes. Finally, he reiterated that the rural schools only accepted kindergarten 4 students if they had enough space. He also suggested combining Grades 11 and 12, despite the fact that the documentation shows that they are already together.

[528] In cross-examination, Mr. Woods confirmed that his experience as superintendent in British Columbia related to small schools. There were two secondary schools from Grade 8 to Grade 12 for a population of around 165 and 135 students. He did not agree that it would be more difficult to create a timetable or manage space for a school offering kindergarten to Grade 12 than for elementary or for secondary. He contradicted himself on these points, given his answers in direct examination.

[529] According to Mr. Woods, there were no secondary classes in Whitehorse where math 11 and 12 were taught together.

[530] Mr. Woods admitted that he had never visited EET, nor had he developed a timetable for EET. He has never worked, taught at or supervised a francophone school.

[531] Mr. Woods did not necessarily agree with the suggestion that the school principal, with the help of teachers, is in the best position to prepare the timetable. He added that there are other factors, such as the collective agreement and special needs. The superintendent must take into account many factors. He contradicted himself on these points, given his answers in direct examination.

[532] Mr. Woods recognized that a number of factors, including the following, have an influence on timetabling :

- individual students's abilities and their characters;
- human resources and teacher aids and their availability;
- level of student grade levels;
- infrastructures and their availability;
- sharing of spaces between elementary and secondary (He indicated that this is true to a certain point, which is contrary to the answer he gave in direct examination);
- teachers specialization ("generally enters before setting a timetable");
- level of literacy of students (implying, in a francophone school, the importance of francization at all levels).

[533] Mr. Woods confirmed that one must take into account all of the above factors prior to making a timetable.

[534] When counsel suggested to him that it was impossible for him to weigh all of the factors he had just identified in examining the exhibits which had been shown to him earlier in the day,

he maintained that it was possible, adding that certain factors apply to both francophone and anglophone schools.

[535] According to Mr. Woods, the multi-use rooms offer flexibility. He confirmed that there is no split or combined Grade 1 in the City of Whitehorse. Despite the fact that he had not studied the philosophy of Académie Parhélie, he knew that the program used a team teaching approach. He could not say whether Académie Parhélie used “curriculum programming” for its timetabling. He knew that the teachers at Académie Parhélie taught according to themes.

[536] Mr. Woods explained that the “Wood Street” program was semestered. The students only do one semester at Wood Street and then return to their original schools for the other semester. He was not sure whether there was a science laboratory at Wood Street. However, there was a computer laboratory.

[537] Regarding construction of F.H. Collins School, Mr. Woods confirmed that the “Wood Street” program would continue to be separate and apart. Mr. Woods added that there was no split or combined science class at Wood Street.

[538] When he was asked: “Do you agree that the industrial arts program answers a need for anglophone students in Whitehorse?”, Mr. Woods responded: “We feel it is a worthy program”. Next, he was asked: “So do you agree that francophone students would also have a need for industrial arts?” He did not respond to this question.

[539] Mr. Woods was not aware of the fact that the Skills Canada buildings were no longer available to EET. He believed that it would be possible to teach industrial arts in French and English at the same time.

[540] Mr. Woods did not know which multiplier was used on page 2 of “Secondary usage factors”, “Capacity” (exhibit 50A) before it was changed to 0.6, nor what other changes might have been made to the document. It is difficult to believe that, as superintendent of schools, he would not be aware of this.

[541] Mr. Woods knew that the kindergarten 4 program at EET helped children achieve a language level so that they could integrate into the school. He was asked: “In this context, when learning a language, would it be preferable that smaller class numbers would be better?”, he replied: “Yes, regarding parent-teacher ratios”. Mr. Woods knew that at the department of Child Services, the teacher-student ratio is 1:8. In re-examination, Mr. Woods stated that this ratio was not used in the schools.

[542] I have noted a number of contradictions in Mr. Woods’s answers in direct and cross-examination, and therefore I cannot attribute much weight to his evidence. However, he provided some useful general information, especially concerning timetabling. Regarding use of EET, his testimony was not very useful, given that he had never attended at the school, nor seen the usage plans (exhibits 504 et 50E) before testifying. His opinion on the best use of rooms was based on the current student profile. Given his lack of familiarity with the students in question, his suggestions and observations are not very convincing.

X. Sébastien Markley

[543] Sébastien Markley works as a “Socio-economic Statistician” in the GY’s statistics office. He does research and gives opinions to the GY and others. The defendant presented Mr. Markley as an ordinary witness, and not as an expert witness. No notice was given that Mr. Markley would give expert testimony.

[544] The defendant wished to ask Mr. Markley’s opinion regarding future demographic trends in the Yukon. Mr. Markley confirmed that he himself had collected data and done population estimates for the Yukon. He said he had come up with four different scenarios based on his estimates. He could then offer an opinion regarding the future, assuming that the birth, death, migration and age rates stayed constant over the next ten years. His predictions are only as reliable as are the data on which he based them.

[545] The plaintiff objected to Mr. Markley testifying as an ordinary witness, submitting that the testimony sought from Mr. Markley was, in reality, an expert opinion. Mr. Markley has special knowledge and his opinion would be based on an interpretation of very complex data. Further, it would be an interpretation of his own assumptions.

[546] Having considered the arguments, the Court decided that Mr. Markley could not testify as an ordinary witness. The evidence that the defendant sought to adduce through him was in

fact an expert opinion. No notice had been given, nor was any attempt made to qualify him as an expert. As a result, the Court did not permit Mr. Markley to give evidence on the future population trends in the Yukon.

Y. Christey Whitley

[547] For three years, Christey Whitley has been the assistant deputy minister of education et superintendent of all of the schools in the Yukon. Before she took that position, she had gained approximately 26 years of experience in various provinces in the area of education. She taught for 9 years and was school principal or assistant principal for 17 years.

[548] Ms. Whitley has good knowledge of the education systems in British Columbia, Manitoba and the Yukon. She explained that the MEY plays the role of “district office”. The director answers directly to the CSFY and the superintendents answer directly to Ms. Whitley.

[549] According to Ms. Whitley, the CSFY exercised considerable control and management. She described it as being much more independent than the other schools.

[550] Ms. Whitley spoke about the YSIS system. The auditor general of Canada had criticized the data collection of student information in the Yukon. The GY looked at a number of systems. After consultations, the GY chose the YSIS system. According to Ms. Whitley, the CSFY could

not withdraw from this commitment. With the YSIS system, accents can be inserted into documents, but not to students names.

[551] Ms. Whitley was of the view that any gap in the choice of courses is the CSFY's own programming problem. She did add that the number of students is always a problem.

[552] Ms. Whitley admitted having sent the letter dated may 12, 2010 to the parents (exhibit 149), after having heard Lorraine Taillefer say on the radio that a letter had been sent to parents suggesting that Académie Parhémie was going to suffer budget cuts (\$375,000.00). She sent the letter to correct the information given by Ms. Taillefer. According to Ms. Whitley, the agreement regarding Académie Parhémie was for only three years. She believed that the CSFY had not stated in its plan that the duration would be 5 years.

[553] Ms. Whitley confirmed that the website was only in English, but that the MEY was working to change that. However, she did not give a timeline.

[554] She stated that it was very difficult to fill bilingual positions for experts, specialists, personnel and support staff.

[555] According to Ms. Whitley, student left EET in order to be with their friends, i.e. for social reasons. She had spoken with some students who had left her with the impression that they are more autonomous than they used to be.

[556] Ms. Whitley discussed the process for establishing a budget. She stated that the most significant need in the Yukon in the area of education is to improve aboriginal education, and that all additional funds should be allocated to First Nations.

[557] Ms. Whitley explained that the Yukon schools had to use the British Columbia learning outcomes. However, the CSFY could make its own program decisions. She knew that there could be additional work for EET teachers, given the lack of French resources, but in her view this additional work was one of the factors justifying the full-time pedagogical consultant at EET.

[558] Ms. Whitley stated that the committee which developed the new staffing formula gave 15% due to s. 23, and that the CSFY representative who was in attendance did not object.

[559] According to Ms. Whitley, split or combined classes are very common in Yukon and elsewhere. She saw advantages in combined classes. However, she acknowledged that classes can be difficult to teach for various reasons.

[560] Ms. Whitley was asked in examination in chief if there were enough FTE teachers to meet the needs in industrial arts. She replied that the most popular trade used to be carpentry, which required a facility. However, there are now apprenticeship programs, such as pottery, which require fewer workshops. In her opinion, EET would be able to use an industrial arts facility at one of the other schools.

[561] Ms. Whitley could not imagine why Académie Parhémie would have difficulties meeting its needs under the new staffing formula (exhibit 52). She said that she had developed two different scenarios whereby EET could function with 13 or 14 FT. However, under the new formula, EET had 21 FT. According to Ms. Whitley, it was up to the school principal to assign staff in an efficient manner. None of the plans Ms. Whitley said she developed was submitted in evidence.

[562] Ms. Whitley recognized that combined or split math and science classes are not ideal in Grades 10, 11 and 12. However, it all depends on the particular teaching style, as well as the learning outcomes sought. She stated, simply, that there are ways of doing things.

[563] Ms. Whitley discussed the financing of kindergarten 4 in the rural schools, explaining that the number of students was decreasing and there were spaces available. According to her, it was a question of fairness. She noted that it was only a half-day program.

[564] In looking at the school plan (exhibit 504) and usage in 2010-2011, Ms. Whitley stated that, as a former school principal and superintendent, she would assign staff “as necessary to meet the needs of the students”.

[565] She sent a letter dated May 17, 2010 (exhibit 519), the first day of the trial, stating that the GY would be enforcing its rule regarding the criteria for admission under s. 23 of the *Charter*. Ms. Whitley explained that the GY was simply tightening its belt. She said that the timing was coincidental. She underlined the fact that the litigation had nothing to do with having sent the letter the first day of trial.

[566] In cross-examination, Ms. Whitley confirmed that she has been assistant deputy minister since August 14, 2007, succeeding Mr. Kubica in that role. Ms. Whitley had never been superintendent of a school board, but she was the assistant to a superintendent in Manitoba for four and a half months before moving to the Yukon in August 2007.

[567] Ms. Whitley explained the concept of a teacher bank. The new staffing formula provided for a limited number of teachers. However, the CSFY can ask the MEY if it can purchase additional teachers. According to Ms. Whitley, the MEY would approve such purchases if the CSFY had the sufficient funds.

[568] Regarding YSIS, Ms. Whitley did not know if systems used in other provinces had been considered in relation to the ability to add accents. Ms. Whitley avoided responding to the question as to whether accents are necessary in order to search for students in the databank. She was not sure whether there a timeline had been established for finding a solution to the problem. As for the question of interim solutions, Ms. Whitley replied that nothing in the YSIS system needs to be sent to the families. Further, If there were problems, she would assist the CSFY. According to her, the fact that a student's name is missing accents or cedilles does not amount to a spelling mistake. Nevertheless, she agreed that a person's name is directly related to the individual's dignity. She said that the new system would be mandatory in September 2010, but she saw no problem with the new system. According to her, the MEY had the right to insist on the use of the YSIS system, which it would do in short order. She continued with a long explanation to the effect that the system was not only for data collection, but also for communications. As for the possibility that problems would arise in the students' report cards if there were no accents, she said: "I don't know for sure".

[569] Regarding the May 12, 2010 letter to all EET parents (exhibit 149), Ms. Whitley stated that it was important that the parents receive honest information. She did not respond to the question as to whether the letter was an honest response. It was the first time that the MEY had sent a letter directly to the parents. The MEY had not consulted the CSFY before sending it.

According to her, such a consultation was not at all necessary, given that the minister is ultimately responsible for all of the children in the Yukon.

[570] In response to the question as to whether the CSFY's purchase of additional FTE must be in the approved budget, she stated: "I don't know how they did this in the past". She did not know if all of the CSFY's funds came from the MEY: "I don't know if they [the CSFY] have other resources". She was not aware of other sources of financing. It is difficult to believe that the assistant deputy minister would not know this.

[571] Ms. Whitley confirmed that British Columbia also used a 15% premium for francophone schools. She was asked whether she knew that there would be fewer FTE at EET, in spite of the new staffing formula. She replied: "Depends on your reality. We are not responsible if the school board does not buy more". She did not know how the CSFY had previously purchased additional positions. She had never inquired into the purchases by the CSFY. She did not respond to the question as to whether she had evidence showing that the new formula would effect a reduction in the FT.

[572] Ms. Whitley wrote in the May 12, 2010 letter (exhibit 149) that the MEY had paid \$375,000.00 for three years. She stated that this amount was "built into the budget". She agreed that the MEY had never paid the \$375,000.00 directly to the CSFY. She could not give details. However, she indicated that Cyndy Dekuysscher, as director of finances, would be able to

provide more information. She added that she wanted to leave the impression, in the May 12 letter, that the MEY had paid the \$375,000.00. She was not sure who had decided to send the letter in her name, which is difficult to believe.

[573] Ms. Whitley confirmed that the MEY had given “bridge financing” for a FTE position. When it was suggested that the MEY granted this funding because it knew that the CSFY had no money, she responded “no”. She went on to say: “I didn’t know the finances of the CSFY or how much money they had”. This is not credible, given that the goal of bridge financing is to make up a shortfall.

[574] Ms. Whitley agreed with the suggestion that the May 7, 2010 article in the “Yukon News” (exhibits 192 et 192A) was written to give the impression that the MEY had paid \$375,000.00 to the Académie Parhémie project during the first year, and \$515,000.00 the second year. She had obtained the figures from Cyndy Dekuysscher. She had spoken to the journalist. When asked whether she had told the journalist that these were payments in kind, she did not respond. According to her, it was not a question of the recipient, but rather the reason behind the payments. She reiterated that the journalist did not ask her if they were payments in kind.

[575] Ms. Whitley went on to say that she had never previously seen the article, i.e. before June 18 2010. After having had a chance to read the article in its entirety, she was asked the same question regarding the impression that she wanted to convey through the article. She responded:

“It is the writer who is leaving the impression, I don’t remember what I said to the journalist”.

However, she admitted having spoken to the journalist regarding the federal funds of \$200,000.00, and the amount of \$375,000.00.

[576] The second column of the article includes a statement attributed to Ms. Whitley. She commented about it, saying: “I can’t imagine that I said that”. She explained that she intended to make it clear that the MEY supported EET and Académie Parhémie.

[577] There was a long discussion regarding learning programs. Ms. Whitley maintained that the CSFY could not use Alberta learning programs for science, but it could use Alberta’s pedagogical materials.

[578] Regarding translations, Ms. Whitley recognized that the MEY experienced difficulties and that there were sometimes delays of two or three months in the translation of a simple letter. According to her, this situation was not acceptable and had to be corrected.

[579] Regarding the letter dated December 13, 2008 from Canadian Heritage to Mr. Bourcier as chair of the CSFY (exhibit 99), Ms. Whitley stated that the MEY, in effect, had requested a tripartite meeting. Despite the fact that she gave a long explanation, she never responded to the question as to whether there had ever been such a meeting between the federal government, the

Yukon and the CSFY. She knew that it was to be a meeting regarding \$1.9 million. She eventually admitted that no meeting had taken place, stating that Canadian Heritage had refused to participate. During this entire exchange, Ms. Whitley gave very evasive answers to the questions. She firmly declared that the MEY had an obligation to support French first language.

[580] According to Ms. Whitley, a question regarding s. 23 could be included on the registration form (exhibit 62). She did not see a problem with that. She did not know if such a request had been made.

[581] She was not aware of what had gone on over the last decade in the Yukon regarding school management in general. However, she was under the impression that the MEY “was giving powers as they (CSFY) were ready to be taken on”.

[582] According to Ms. Whitley, there was no policy in the Yukon regarding combined classes for Grade 1. She stated that it is for each teacher to make such a decision. She could not say how many combined Grade ½ classes there were in the Yukon. According to her, combining classes had no impact on the “Program reading recovery”. Ms. Whitley did not have personal experience with teaching math and science together to combined classes. She had already done timetabling for middle schools, from Grades 7 to 9, in Manitoba. She had never done timetabling for Grades 10, 11 and 12, nor for a school offering kindergarten to Grade 12.

[583] Ms. Whitley confirmed that the Wood Street program included science courses but she could not provide details. She believed the classes were single, and not combined. She stated that the details of these areas were beyond her area of responsibility.

[584] Ms. Whitley stated that the designation of a student as needing an alternative “special needs” class depends on the student. When asked: “Are you saying that EET did not follow proper process for the 5 students?”, she replied: “I wouldn’t know that”. She admitted, however, that her committee would have overseen the process at EET. In fact, Ms. Whitley confirmed that she was chair of two committees, the “staff allocation committee” and the “demographic adjustment committee”.

[585] Regarding the May 17, 2010 letter (exhibit 519), Ms. Whitley stated that this was written because of the work of these two committees and the auditor general’s recommendations. She believed that exhibit 50A came out of the “staffing allocation committee”. She said that one would have to ask Charles Callas why the multiplier in exhibit 50A had been changed from 0.5 to 0.6.

[586] Ms. Whitley said she was very familiar with the concepts of “raw capacity” and

“recommended capacity”. She stated: “the capacity as I understand, varies depending on who does it”. She then said that “raw capacity is what you could manage”. Her explanation is contrary to the testimony of Mr. Kubica and Mr. McAskill.

[587] Ms. Whitley admitted that the CSFY had the right to offer full-time kindergarten 4, given that the MEY itself had provided the teachers.

[588] According to Ms. Whitley, the GY took into consideration, in looking at the issue of special needs, s. 15 of the *Charter* and the principle of “inclusive education”. Counsel for the GY asked her if the principle of inclusive education applies to all children. She did not respond. Rather, she went on to explain the process and the procedural framework. She eventually responded that a student could ultimately be removed from the classroom. She stated that there were 8 resource programs in the Yukon for 49 children. On the topic of an alternative or segregated class at EET for 5 special needs students, she stated: “that would appear to be high”.

[589] Ms. Whitley spoke about the “Special Program Services: A Handbook of Procedures and Guidelines” which had been adopted to assist in determining special needs and the need for alternative classes. She explained that the GY was currently revising the manual which was written in the 1990s. Ms. Whitley confirmed that certain circumstances justify removing the student from the classroom. However, this solution is rarely used. She also confirmed that the

secondary schools in Whitehorse had resource rooms or alternative classes, including F.H. Collins (two classes) and Vanier in the River Front program (one class). She was not sure about Porter Creek School.

[590] Ms. Whitley was aware of the cascade model as set out in the “Special Program Services: A Handbook of Procedures and Guidelines”. It involves a team of parents, teachers, specialists and others which determines needs. She stated that the team would decide whether or not to isolate a child from the others.

[591] In cross-examination Ms. Whitley expressed the view that EET had not followed the prescribed procedure. She described the process as follows. The relevant documentation is collected in the child’s file. The department hires experts. Next, the team members meet, and ultimately make a decision. When asked again why she said that EET had not followed the procedure, she responded: “no file was brought to the table” adding “to my knowledge”.

According to Ms. Whitley, the entire process is done within the school, that is to say by way of a school-based team. Therefore, she was asked again to explain why she believed that EET had not followed the prescribed procedure. Ms. Whitley did not respond to this question, but again added that specialists or psychologists should have been involved. However, when she was asked what she based this conclusion on, she replied: “I would have to do a file review. I don’t do the file

reviews personally”. At this point, Ms. Whitley gave the impression that she was making up her answers as she went along.

[592] Ms. Whitley said that she denied the CSFY’s request for a special needs resource room at EET because she did not see the need.

[593] Ms. Whitley stated that they were not requiring the declarations provided for under s. 6 of the regulation (admission criteria) in order to obtain “accurate enrollment figures”. The committee considered the regulation. It found that the GY itself did not follow it. Ms. Whitley did not respond to additional questions regarding the letter of May 17, 2010. She was aware, prior to May 17, 2010 that the CSFY had a policy, but she did not know the details. Ms. Whitley stated that she had never raised questions regarding the admission criteria adopted by the CSFY in January 2010.

[594] According to Ms. Whitley, EET did not use its space in a very effective manner. She said that she did a usage plan of the space at EET. However, she never responded to the question as to whether she had shared it with EET. Ms. Whitley admitted that class dimensions are a factor to be taken into account. She knew that the federal government had contributed a certain amount of money for the construction of EET in 1995. She was also aware that there were cuts to the original plan - one secondary classroom and the industrial arts room. Regarding kindergarten 4,

Ms. Whitley had previously seen exhibit 50D “Enrollment by school grade”, dated October 31, 2010, showing that a total of 11 schools in the Yukon offered a kindergarten 4 program. There were 64 students in these 11 schools, including EET, 21 of whom were in EET’s kindergarten 4. There were 43 in the other schools. According to Ms. Whitley, there are a number of ways of dealing with a situation where the number of students exceeds the ratio provided for under the collective agreement. Dividing the class is not the only solution. Ms. Whitley confirmed that the secondary anglophone schools in Whitehorse were physically separate from the elementary schools. She added: “They have been set up that way”. Ms. Whitley did not know whether any secondary schools in Whitehorse had combined classes. That was a question for Mike Woods. Ms. Whitley did not reply to the question whether there was a standard in Whitehorse with respect to having two teachers in the same class. She said, however, that she believed there were two teachers in one class in Porter Creek School, but Mike Woods could confirm this.

[595] In re-examination, counsel asked her questions regarding the following statement attributed to Ms. Whitley in the newspaper article: “about how much money it wants to invest...”. She said: “I am puzzled by this quote”.

[596] Having considered her testimony in its entirety, I find that Ms. Whitley is not reliable. She seemed to avoid responding to the questions. Sometimes she said that she did not have relevant knowledge. Sometimes she did not respond at all to the questions. At other time, she

gave long responses without answering the question. As mentioned above, she was simply not credible on certain points.

[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.

V. Management

i) Law - Case Law - Section 23 of the *Charter*

[598] Section 23 of the *Charter* provides:

23. (1) Citizens of Canada

(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

(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,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(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.

(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

(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 minority language instruction; and

(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.

[599] The Supreme Court of Canada held that even if it is expressed as a political compromise, linguistic rights must be given a large, liberal and purposive interpretation as all *Charter* rights: ***R. v. Beaulac***, [1999] 1 S.C.R. 768 at para. 25; ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62, [2003] 3 S.C.R. 3 au par. 27.

[600] Section 23 represents “a linchpin in this nation's commitment to the values of bilingualism and biculturalism” because of the vital role of education in preserving and encouraging linguistic and cultural vitality: ***Mahe v. Alberta***, [1990] 1 S.C.R. 342 at para. 2, ***Solski (Tutor of) v. Quebec (Attorney General)***, [2005] 1 S.C.R. 201, 2005 SCC 14 at para. 3. Section 23 lays down a comprehensive code that establishes the nature and scope of the educational rights of an English or French linguistic minority: ***Quebec (Education, Recreation and Sports) v. Nguyen***, 2009 SCC 47, [2009] 3 S.C.R. 208 at para. 25.

[601] Section 23 is a remedial provision intended to alter the *status quo*: ***Mahe*** at paras. 34, 36. Its general purpose is to preserve and promote the two official languages of Canada, and their

respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population, a goal which is promoted by granting minority language educational rights to minority language parents throughout Canada. It encompasses a notion of equality between Canada's official language groups: *Mahe* at paras. 31, 45. In other words, it is aimed at a particular result, being a standard of education equivalent to that of the official language majority. This substantive equality requires that official language minorities be treated differently, if necessary: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 31.

[602] Section 23 places positive obligations on government to alter or develop major institutional structures: *Mahe* at para. 37. For example, in 2003 the Supreme Court in *Doucet-Boudreau* upheld a structural order against a government under s. 24 (1) to ensure the construction of school buildings for the minority. The Supreme Court recognized that when positive measures are necessary to achieve the purpose, minority language education rights are particularly vulnerable to government delay or inaction because the resulting cultural erosion would eventually permit governments to avoid its duties: *Doucet-Boudreau* au par. 29.

[603] However, a province or territory's obligation to ensure official minority language instruction is not without limits.

1) ***“Where Numbers Warrant”***

[604] The rights apply only where numbers warrant. The Supreme Court held that the numbers standard has to be worked out by examining the particular facts of each case. The Court must consider the known demand and the total number of persons who could potentially take advantage of the service. The calculation of relevant numbers is not restricted to the existing school boundaries. The Court must also take into account a number of complex and subtle factors, for example whether it is a rural or urban area. It is up to the province who maintains that the numbers are insufficient to undertake its own studies and adduce other evidence regarding the known and potential demand: *Arsenault-Cameron*, para. 34.

2) ***Minority Language Instruction Facilities***

[605] The phrase “minority language instruction facilities” implies a certain degree of management and control. The Supreme Court held that s. 23 must be viewed as encompassing a "sliding scale" of requirement. Section 23 guarantees the type and level of rights and services which is appropriate in order to provide minority language instruction for the particular number of students involved, the lower level being “instruction” and the upper level being “educational facilities”.

[606] Even if it is impossible to anticipate all of the circumstances in which it would be applied, the Supreme Court specified that the degree of management and control required by s. 23 includes the exclusive authority to make decisions relating to:

- expenditures of funds provided for language instruction and facilities;
- appointment and direction of those responsible for the administration of such instruction and facilities;
- establishment of programs of instruction;
- recruitment and assignment of teachers and other staff; and
- making of agreements for education and services for minority language pupils: *Mahe* at paras. 60, 61.

[607] The Court emphasized that the provision of educational services incorporates an entitlement to facilities that are in a distinct physical setting, because French students should be immersed in French in the playground, in extra-curricular activities, as well as in the classroom. The facility should be administered and operated in French, including the posters on the wall: *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at para. 24.

[608] Many factors can influence minority language and culture in many different ways. The goal is to give the linguistic minority control over the aspects of teaching the language which relate to the culture and language. However, the government has the widest possible discretion in choosing the institutional means by which its obligations are to be met. As a result, the courts should be loathe to interfere and impose standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right: *Mahe* at paras. 52, 96.

[609] The numbers warrant test requires taking into consideration the appropriate services in terms of education, as well as the cost of the services. It is financially impractical to accord to every group of minority language students, no matter how small, the same services which a large group of s. 23 students are accorded. The Supreme Court noted, however, that differences in cost, if they are not excessive, must be accepted. In most cases, pedagogical requirements will prevent the imposition of unrealistic financial demands upon the state and pedagogical considerations will have more weight than financial requirements in determining whether numbers warrant: *Mahe*, para. 80.

3) *Application of the Principles*

[610] A chronological overview of the relevant cases facilitates an understanding of the ongoing developments in this area.

[611] In *Reference re Education Act (Ont.) and Minority Language Rights* (1984), 47 O.R. (2d) 1 (C.A.), the Court of Appeal held that a statutory arbitrary figure required for instruction, in that case 25 students for elementary schools or 20 students for secondary schools, contravened s. 23.

[612] In *Marchand v. Simcoe County Board of Education et al.*, [1986] 55 O.R. (2d) 638 (H.C.J.), Sirois J. held that once the numbers justify a separate school, the quality of education must be the same as that of the majority. Further, the costs relating to majority education are not to be attributed more weight than the costs relating to minority education.

[613] The situation in Nova Scotia was discussed in *Lavoie v. Nova Scotia (Attorney General)* (1989), 58 D.L.R. (4th) 293 (N.S.C.A.). The trial judge had denied the request for French instruction and for a school. Noting that many of the anglophone schools in the region had between 14 and 68 students, the Court of Appeal held that a group of 50 students justified instruction in French, but not “an instruction facility” (nor a school board). However, the instruction would be provided in a manner which avoided assimilation or immersion.

[614] At the time of the trial in *Mahe*, there were 424,000 students in 146 different jurisdictions in Alberta. Of those, 25 school boards had fewer than 250 students, eight had less than 100 and four had less than 50 students. In Edmonton, 116,788 students were registered in the public and separate schools in nine school districts, of which 3,750 were potential rights holders (3.2 %). Five school districts in Edmonton had fewer than 5,000 students - between 4,187 and 381. The Supreme Court held that a group of at least 242 students warranted a francophone school as well as a certain level of management and control by the parents. However, 242 students out of a total of 117,000 (0,2 %) did not warrant the creation of an independent school board. The Court granted co-management with at least the five exclusive management components mentioned above. There was already a francophone school in Edmonton. The Supreme Court noted that the granting of management powers and control in that situation would not likely have a great impact on the pedagogical structure nor on the finances. Since that time, the rights holders have obtained an independent school board.

[615] At the time of the *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, there were around 5,617 children of rights holders in Manitoba who were registered in French programs as of 1988, and around 18,975 children who might be eligible for participation. The Court decided that in certain regions of the province, the number warranted at a minimum a school in a distinct physical setting and creation of a separate francophone school board. The Court noted that the Manitoba government had deemed it appropriate to establish a single francophone school board which would be responsible for instruction in French in the province.

[616] In *Abbey et al. v. Essex County Board of Education* (1999), 42 O.R. (3d) 481 (C.A.), the Court considered the issue of interpretation of the phrase “Canadian citizens ...if any of their children has received [instruction in French]”. The Court decided that where an admissions committee, directed by members of the minority group, admits children of non rights holders, the brothers and sisters of those children have the right under s. 23(2). The Court cited the words of Dickson C.J. in *Mahe* to the effect that the parents under s. 23 might not be part of the minority language group. The Court of Appeal in *Abbey* emphasized that the more people there are who can fluently speak both official languages of Canada, the easier it will be for linguistic minorities to flourish within society.

[617] The francophones of Prince Edward Island fought for a long time before being able to exercise their under s. 23. In 1982, parents of 17 students in Region 2, representing Summerside and the surrounding area, requested instruction in French for a Grade 1 class. The board denied the request based on an insufficient number of students. The board proposed immersion or

transportation to Region 5. A lawsuit was abandoned when the Court of Appeal in *Reference re School Act of P.E.I.* (1988), 69 Nfld. & P.E.I.R. 236 (C.A.) found that certain aspects of the statute and regulations contravened the *Charter*. The subsequent amendments provided for modification of Region 5 which would be solely responsible for French education throughout the province. In 1995-1996, 34 children were pre-registered and 13 others were ready to attend a French school in Summerside. 140 children coming under s. 23 attended English elementary schools in the Summerside region during the 1995-1996 school year. 155 children having rights under s. 23 could attend French classes in Summerside during the 1996-1997 school year. DesRoches J. accepted that 306 students were potentially eligible for French instruction (155 students were eligible plus 151 students who would enter the school system). The government refused to put in place a francophone school. The trial level of the Supreme Court of Prince Edward Island held that the number of children in the Grade 1 to 6 classes who could eventually attend was sufficient to warrant the provision, at the public's expense, of French language instruction in Summerside. DesRoches J. held that the particular facts of the case required a remedy at the high level of the sliding scale.

[618] In *Arsenault-Cameron* the Supreme Court allowed the appeal and reinstated the trial decision. The Supreme Court underlined the importance of understanding the historical and social context of the situation to be corrected, in particular the reasons why the educational system did not respond to the actual needs of the official language minority in 1982 and why it perhaps did not respond to the needs at the present time. The Court criticized the position taken by the Ministry and the Appeal Court to the effect that the length of the bus trips, the size of the schools, and the quality of education justified denial of the claim. The Court noted that s. 23 is

based on the idea that substantive equality requires that the official language minorities be treated differently, if necessary, according to their situation and particular needs, in order to ensure a level of education equivalent to that of the official language majority. In effect, the pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students. Further, nothing in the evidence led to the conclusion that instruction in a small school would be sub-standard. Regarding the roles of the Ministry and the board, the Court stated:

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...

53 The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it

can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[619] LeBlanc J. in *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2000), 185 N.S.R. (2d) 246, [2000] N.S.J. No. 191 (S.C.) found that there were between 20 and 340 students registered in secondary school in the five regions of the francophone board for the school years from 1997-98 to 1999-2000. The Court held that the number of children in each of the regions warranted instruction and instruction facilities, noting that the Nova Scotia government had not contested that evidence. What was really at issue was not the existence or substance of the rights, but rather the date on which the rights holders could finally benefit from the programs and schools. He ordered the province and the board to build schools and offer programs in more or less precise timeframes. He ordered the defendants to do their best to comply with the order, and he seized himself of the matter in order to receive updates from the defendants on their compliance with the order. In *Doucet-Boudreau*, the majority of the Supreme Court confirmed the availability of such a structural injunction against a government under s. 24(1) of the *Charter* in order to put an end to inaction or delays in the construction of school buildings for the minority.

[620] The Supreme Court in *Solski* confirmed that in order to be eligible under s. 23, children do not have to have a practical knowledge of the minority language, nor belong to cultural group

which is identified with the language. Section 23 is also supposed to apply to members of cultural communities who are neither francophone nor anglophones.

[621] In *Dauphinee v. Conseil Scolaire Acadien Provincial*, 2007 NSSC 238, parents claimed access to a financial support program for a francophone special needs students. The Court stated that it was not an issue of numbers (because that issue had already been decided), but rather of equivalence. The Court determined that the francophone students were in the same predicament as the majority students regarding the school fee cost sharing arrangements. However, the department of education in its financial support program had not provided for francophone special needs students. The fact of designating only three English schools for this financial support resulted in exclusion of francophone students. Therefore, the department had breached s. 23 in failing to provide equivalent services.

ii) Analysis

1) The Number of Rights Holders in the Yukon

[622] First of all, the Court must determine the number of rights holders under s. 23 in order to be able to determine the extent of the GY's obligation to ensure instruction for the French language minority. In fact, the GY does not dispute the position that the number of students in question warrants instruction in the French language. However, the GY submits that the

requirements under s. 23 have been more than met by creation of the EET school, even if the number of students was as much as 400.

[623] In 1996, the GY created the CSFY, being the first school board in the Yukon. The status of school board, as provided under the *Education Act*, brings with it the highest level of management and control to the CSFY. The GY argues, however, that the number of rights holders under s. 23 in the Yukon does not justify the creation of a school board, and that the level of control currently granted to the CSFY exceeds what is required under s. 23. However, the GY does not propose to change the CSFY's status.

[624] Given the GY's position, the Court must determine the number of rights holders, and then decide whether the GY has granted the CSFY, for over 15 years, more power than necessary.

[625] The Supreme Court of Canada, in *Mahe* and *Arsenault-Cameron* (para. 32), held that the number of rights holders is between the number of persons identified and the total number who could eventually be eligible for French language instruction.

[626] The GY relies on the evidence of Norman Laniel, assistant director responsible for supervising the methodology of Statistics Canada's census of 2006 (exhibit 175) and the explanation of the relevant data. The GY has not undertaken any study of its own, but it adduced evidence regarding known or eventual requests of rights holders.

[627] Mr. Laniel stated that the data from the 2006 census show 190 rights holder children between the ages of 5 and 17 years old. His evidence demonstrated that there was a very high margin of error, given the fact that the data are only based on responses to the long form completed by at most 20% of the population. As a result, the figure of 190 children could vary by 73 one way or the other. That is to say that the number of children having one parent who identifies French as the first language, could be as low as 117 or as high as 263. Further, it is necessary to apply another margin of error of 2.5%, which means that the number is actually between 114 and 270.

[628] Mr. Laniel confirmed that the number of rights holders would possibly be higher if one takes into account the other two categories of rights holders provided for under s. 23, being parents who do not identify French as their first language, but who studied French first language, and parents who have a child who is studying or has studied in French first language. Further, if school age is defined as being 3 to 21 years old, instead of 5 to 17 years old, the number would be higher again.

[629] Section 10 of the *Education Act* provides that persons between the ages of 5 and 21 years old are entitled to receive an educational program. Section 32 of the same statute provides that the GY will establish a kindergarten program that children can attend from the age of 4 years. The GY witnesses confirmed that the MEY provides 100% of the financing for full-time kindergarten 4 at EET. Section 33 of the *Education Act* provides that a school board can also establish an educational program for children who have not yet reached school age.

[630] Dr. Landry testified as an expert. The Court accepted his opinions as detailed in paragraphs 96 to 108 of his expert report (exhibit 46).

[631] According to Dr. Landry, the Statistics Canada census are not reliable. First, the data are only drawn from 20% of a population, already small in the Yukon, and still smaller, if one considers the francophone minority population. Secondly, the question do not address the parents' education, nor the other categories under s. 23. He pointed out many indicators of problems within the census. He gave as an example of the lack of reliability of the Statistics Canada census (para. 98, exhibit 46), the fact that rights holder parents would have more children who know French (245) than there are children (210).

[632] Dr. Landry noted that Statistics Canada grouped as coming from one region the statistics from the Yukon, the Northwest Territories and Nunavut. According to Dr. Landry, the databanks from the census have gaps, in addition to not being reliable due to the small population. He described a number of factors leading to an underestimate by Statistics Canada of the number of rights holders. In particular, the census does not take into account the elementary education of a parent, nor the family continuity which is related to the education of a bother or sister of a child rights holder. Further, Statistics Canada cannot identify the children of rights holders in exogamous situations, where the child in a single parent family resides with an anglophone parent.

[633] Dr. Landry added that other considerations and criteria are legitimate but do not strictly arise under s. 23. Children of francophone parents who do not yet have Canadian citizenship or

children of citizens or non-citizens who do not identify French as their first language, but who come from a country where French is the first official language.

[634] Drawing on his experience as an expert in the area, Dr. Landry stated that the figure of 190 in the 2006 census would be at least doubled if the above factors were taken into account.

[635] The evidence demonstrates that there were 145 students registered at EET in 2006. According to Dr. Landry, the figure should be at least doubled to 290 rights holder children. He confirmed that he has written reports on studies in this particular area, attesting to a greater potential in the territories. He put the number of rights holders in the Yukon at 200 to 400, but in his view it would be closer to 400.

[636] The rate of exogamy in the Yukon is 80%. According to Dr. Landry, it is difficult to believe that all of these exogamous couples have registered their children at EET. He noted that only 25% of the exogamous homes identify their children as being French.

[637] According to Dr. Landry, the greatest proportion of rights holders attending francophone schools, outside of New Brunswick, is in Ontario (50%). The 2006 Statistics Canada census shows 190 rights holders in the Yukon. In 2006, 146 students were registered at EET, which suggests that 76% of the rights holders in the Yukon already attended EET.

[638] As mentioned above, the GY took the position that the number of rights holders does not justify the level of management and control currently given to the CSFY. However, the Supreme

Court of Canada in *Arsenault-Cameron* (para. 34) imposed a duty on the territories to do their own studies and present evidence in support of such a position.

[639] In this regard, the CSFY even asked that the GY facilitate such a study of the number of rights holders. In an e-mail dated December 2009 (exhibit 138), the director of the CSFY made the following request:

The CSFY would like to do a study with all the Whitehorse students to find out how many right holders' parents sent their children to other schools than EET.

Would it possible to get the student lists for all Whitehorse schools in order for the CSFY to conduct this study? We will be able, by looking at names, to identify many children of right holders. Following that step, the CSFY would contact all Principals or French teachers to ask them if we have missed any families.

Ms. Taillefer testified that the GY never responded to this request.

[640] It is true that Ms. Whitley confirmed that the GY had not done any studies to determine the number of rights holders. However, the evidence shows that the GY must have done such a study on the number of rights holders. In 2006, the GY wrote that less than one third of the rights holders exercised their right under s. 23 of the *Charter*. In the Canada-Yukon agreement (exhibit 56), entitled "Canada-Yukon Agreement on Minority-Language Education and Second Official Language Instruction 2005-06 to 2008-09", there is a summary provided by GY to Canadian Heritage. In Schedule 2 dated March 22, 2006, the GY stated (p. 5):

...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. Among those who do attend Émilie-Tremblay school, many come from exogamous and cross-cultural homes where the language is not always spoken. Very often, some parents have not studied in French nor have they the means to support the cultural actualization of their children.

[641] These comments raise the issue as to how many rights holders exercised their right in 2006. One has only to refer to the number of students registered at EET in 2006, being 145 as identified in the GY's annual report for the 2007-08 school year (p. 70, exhibit 147). One can conclude that the number of rights holders in 2006, according to the GY, was at least 435, being three times 145.

[642] There were approximately 180 registrants at EET for September 2010 which would represent attendance of almost 100% of the children of rights holders, if one relies on the census data.

[643] After analysing all of the evidence, the Court accepts Dr. Landry's opinion that the number of rights holders in the Yukon is at least double the number identified by the Statistics Canada census for the reasons set out above, and particularly those identified in the expert reports. The data from Statistics Canada in this regard are not reliable without further analysis, as demonstrated by the numerous research studies such as those undertaken by Dr. Landry.

[644] In conclusion, I find that Dr. Landry's opinions are well supported. The number of rights holders is between at least 200 and 400. It is probably 400 or more, assuming that the Yukon follows the Canadian average whereby half of the rights holders attend francophone schools. Therefore, given that there are 185 registrants in 2010, this number must be doubled to 390. The GY's comments as contained in exhibit 56 support Dr. Landry's position that the number of rights holders is undoubtedly greater than 400. To conclude, the evidence establishes that the number of rights holders is between 400 and 435.

2) Degree of Management and Control

[645] The CSFY submits that the current number of rights holders justifies a school board with powers as provided under the *Education Act*.

[646] The GY argues that the creation of EET satisfied its obligations under s. 23, even if the number of rights holders is between 200 and 400. Referring to the sliding scale as described in *Mahe*, the GY states that even 400 rights holders do not justify the creation of an independent school board. The GY's brief sets out its position (para. 140): [TRANSLATION]

The defendant, rather than investing the minimum possible toward its obligations, even created a francophone school board. In this way, the Yukon has given the francophone minority powers which are greater than the control exercised by anglophone parents over the instruction of their children. In fact, and in contrast

to the rights holders, anglophones do not have school boards, nor do the other aboriginal minorities whose numbers are much greater than the number of rights holders.

[647] In spite of its position, the GY does not propose to change the *status quo*. In fact, the assistant deputy minister, Wally Seipp, recognized three years after the GY's creation of the school board the GY's intention to transfer more and more powers under the *Education Act*. On August 30, 1999 (exhibit 30), Mr. Seipp wrote:

The Yukon Francophone School Board is a creation of the *Education Act* and derives all of its powers solely from that statute and any attendant regulations. Those powers and responsibilities are considerable as both the spirit and the letter of the *Act* intend for boards to exercise significant control over the schools in their respective education areas. These powers and responsibilities are spelled out clearly in Section 116 of the *Act* and include those operation and management responsibilities contemplated in Section 114(1).

...

It is my view that since the creation of the Yukon Francophone School Board, we have been engaged in a process of progressively transferring those operational and management powers and responsibilities respecting École Émilie-Tremblay from the public schools branch to the board. I see this process as advancing along

a continuum with the board governing both the prioritization of these responsibilities to be transferred and the rate at which they will be transferred.

[648] An example of the recognition of the transfer of power by the GY to the CSFY arose during the trial when Ms. Dekuysscher stated that the GY anticipated transferring all of the CSFY's 2010-11 budget funding to it, except for three items.

[649] According to the expert, Mr. Bilodeau (exhibit 35), the number of rights holders in the Yukon, whether it be 200 or 400, justifies full financial management, including the powers already granted to the CSFY under the *Education Act*. Mr. Bilodeau confirmed that there are different systems across Canada. He noted school boards with less than 171 students which function efficiently.

[650] Dr. Landry provided an expert opinion to the effect that the fundamental independence of the community must be respected. Also, micro-management must be avoided as this decreases autonomy (exhibit 46).

[651] Mr. Bilodeau, Dr. Landry and Ms. Anderson (exhibit 177) all agreed that there is not one single school board model in Canada and that the management models are determined according to the particular context in each province or territory.

[652] In fact, *Mahe* confirms the need to adapt the model to the particular circumstances in each province or territory. The GY relies on *Mahe*, noting that the Supreme Court of Canada did

not grant a school board despite the fact that Alberta had 3 750 rights holders. It follows, according to the GY, that 400 rights holders in the Yukon do not warrant a school board. In other words, on the sliding scale, the number of rights holders in the Yukon does not justify the creation of an independent school board.

[653] With respect to *Mahe*, it must be recalled, however, that 3.2% of the students in the Edmonton region were potentially eligible to register in the francophone school. In the Yukon, 400 students makes up 8% of the total student population of around 5,000. The evidence establishes that the GY, in creating the CSFY, has not exceeded the requirements imposed by s. 23 of the *Charter*. This is evidenced in one of the first contribution agreements negotiated between the GY and the CSFY on June 7, 1996 following the creation of the CSFY (exhibit 18). The preamble provides:

Whereas s.72 of the *Education Act* provides for the creation of a school board, and whereas the Yukon Francophone School Board has been dually constituted under the provisions of the *Education Act*,

Whereas s. 56 of the *Education Act* obligates the government of the Yukon to comply with s. 23 of the *Charter of Rights and Freedoms*,

Whereas the *Education Act* and Regulations recognize that the Yukon Francophone School Board has to fulfill duties and obligations in regard to s. 23, parents throughout the Yukon territory,

Whereas the parties to this agreement undertake to comply with the rulings of the Supreme Court of Canada, as they pertain to s. 23 of the *Charter of Rights and Freedoms*.

[654] These comments in the 1996 preamble show up numerous times, in particular in the Contribution agreement framework 2000-04 dated June 27, 2001 (exhibit 20).

[655] The Supreme Court of Canada held that the appropriate level of management and control will depend on the particular situation of the territory or community in question.

[656] This Court accepts the proposition and declaration in *Mahe* to the effect that the government should have the broadest discretionary power possible in the choice of the institutional means it uses to fulfill its duties under s. 23. The GY did, in fact, exercise its discretionary power in choosing to create a school board in order to fulfill its obligations under s. 23 of the *Charter*. It is true that one school board could manage the 5,000 students in the Yukon (see para. 14, exhibit 177). However, the GY clearly chose in 1990 to allow each Yukon school (28 in total) the possibility of requiring the creation of a school board. Section 72(3) of the *Education Act* requires the Ministry to establish a school board when the absolute majority of a particular school votes in favour of the creation of a school board.

[657] The *Education Act*, as well as the documents in evidence, establish that the GY has in no way granted more power or favoured the francophone minority to the detriment of the rights of the anglophone majority or the aboriginals. In the Canada-Yukon Agreement on Minority-

Language Education and Second Official Language Instruction 2005-06 to 2008-09 (exhibit 56), the GY wrote (p. 5):

Yukon schools have the choice to be administered by school councils or boards.

Except for Émilie-Tremblay school, all Yukon schools have opted for councils. A council exists for each attendance area...

The Government of Yukon is proud to have implemented a Francophone school system pursuant to Section 23 of the Canadian Charter of Rights and Freedoms that guarantees access to French First-Language education.

[658] The only reasonable conclusion is that the GY made the decision, due to the particular context in the Yukon, to allow each of the 28 schools in the Yukon to become school boards. It appears, from an analysis of the registrations in each of these schools, from October 31, 2010 (exhibit 50D), that six schools in Whitehorse having lower student populations than EET, could have school boards. In rural Yukon, thirteen schools are in the same situation. In summary, in the Yukon context, 21 schools out of 27 having lower populations than EET can request the creation of school boards with the powers currently accorded to EET under the *Education Act*.

[659] In short, if the CSFY has more power than the school councils for the other 27 schools in the Yukon, it is because the other schools have chosen not to invoke s. 72(3) of the *Education Act*. To conclude, the evidence regarding the particular context in the Yukon shows that the GY chose to allow the creation of up to 28 school boards, despite the fact that there are, in Canada,

school boards which manage 5,000 students. Therefore, the GY has granted to the CSFY the same level of management and control as any other school in the Yukon could exercise. I conclude that application of the sliding scale to the particular context of the Yukon results in a requirement for a school board having the powers set out under the *Education Act*.

3) Management of Finances, Staff, Programs and Buildings

[660] This Court recognized, in the above discussion, that the GY has indeed exercised its discretionary power in choosing certain institutional means in order to fulfill its obligations under s. 23, including creation of a school board (CSFY).

[661] The CSFY maintains that the provisions of the *Education Act* and regulations generally suffice to allow the CSFY to exercise the management required in all areas, in particular management of finances, staff, programs and buildings. However, these provisions have not been applied. Further, the GY micro-manages as if the CSFY was only a school council having powers of recommendation. The CSFY submits that this situation contravenes s. 23 and the provisions of the *Education Act*.

[662] The GY argues that it has honoured its obligations under s. 23 in creating the CSFY and in building a school. It submits that the CSFY is claiming complete and exclusive control over every decision relating to instruction, school programs, management of employees and staff, as well as management and maintenance of buildings and their construction. According to the GY,

the CSFY requires only management powers in relation to key aspects relating to French instruction, and that it already has these powers.

[663] I draw the following conclusions from the testimony of Ms. Beaudoin, Mr. Champagne, Mr. Blouin, Mr. Bourcier, M. Ruest, Ms. Taillefer, Ms. Stehelin, Ms. Daws, Ms. Lemay, Ms. Simpson, Mr. Callas, Mr. Woods, Ms. Dekuysscher and Ms. Whitley. Since the establishment of the CSFY in 1996, there have been numerous disputes, misunderstandings, meetings and negotiations between the CSFY and the GY, all with the purpose of requiring the GY to respect the components of management granted to the CSFY under the *Education Act*. The GY has either refused or neglected to abide by its own legislation. It is useful to review a few facts which show the GY's micro-management and its failure to act in accordance with the legislation.

[664] First, there is Ms. Dekuyssher's testimony. She is responsible for finances at the MEY. The evidence of the GY and CSFY's witnesses, as confirmed by numerous exhibits, shows that the GY has held, for at least 14 years, most of the funds provided for in the CSFY's budget. The evidence establishes as well that the GY would send the money directly to EET and not to the CSFY. The CSFY succeeded in meeting its most pressing needs through piecemeal negotiations in the context of numerous "Memoranda of Understanding" and "Contribution Agreements". Over the years, the CSFY requested that the GY send it the budget funds, as provided for in the *Education Act*, so that it could manage the funding. The GY had always refused this request. However, for unexplained reasons, Ms. Dekuysscher announced during her testimony in June 2010, that all of the funding contemplated in the CSFY budget for 2010-11 would be paid

immediately to the CSFY, except for three budget items. She stated that the CSFY had only to send a letter or e-mail requesting the same.

[665] As to breaching the statute, Ms. Dekuysscher admitted that neither she, nor the Minister had ever consulted the CSFY regarding its annual budget. Yet s. 174 (3)(b) provides that the Minister will consult the school board regarding its annual operations and maintenance budget. These are only two examples among many demonstrating micro-management and breach by the GY of the *Education Act*.

[666] The Court is of the view that almost all of the misunderstandings and disputes between the CSFY and the GY would be avoided if the *Education Act* provisions which give management powers to all school boards, were given effect in good faith. It goes without saying that the GY always has a discretionary power and a legitimate interest in quality standards for the teaching programs, facilities, institutions, transportation, and other areas. However, the power to regulate must be exercised taking into account the language, culture and particular situation of the minority, in order to comply with the objectives and obligations imposed by s. 23. The GY acknowledged that the CSFY, because of the rights under s. 23, is not like other school boards (if there were any). It also recognized that the unique status justifies allocation of higher funding to minority language schools than that given to majority schools. In this respect, the GY formally recognized its obligations, first in the preamble to the *Education Act* which reads as follows: “Recognizing that rights and privileges enjoyed by minorities as enshrined in the law shall be respected”. Due to this understanding of its obligations, the GY provided in s. 185(c) the power to adopt a regulation “respecting anything that may be required to give effect to the French

language rights referred to in this Act and required by section 23 of the Canadian Charter of Rights and Freedoms”.

[667] Having noted the GY’s express intention not only to respect the rights and privileges of the francophone minority but also to facilitate the implementation of these rights, the Court is able to consider the most significant disputes raised during the trial.

a) School Principal Position

[668] The CSFY claims management power in relation to the length of the school principal’s contract. The GY submits that all school principal positions have been permanent since 2003, in order to facilitate recruitment and encourage consistency. According to Mr. Champagne, principal of EET, this position should be for a fixed term and not permanent or indefinite. He emphasized that new ideas and change can be very beneficial to the school. He signed a contract with the CSFY for a fixed term, which is currently the subject of a complaint before the YTA.

[669] Mr. Bourcier, chair of the CSFY, shares the opinion that the school principal contract should be for a fixed terms. In his view, the CSFY, and not the GY, should decide the type of contract and its length.

[670] Ms. Stehelin, director of human resources, noted that since 2003 all school principal contracts are permanent. Prior to 2003, they were for a maximum of three years. She explained that fixed term contracts were an obstacle in the search for candidates. According to Ms.

Stehelin, the CSFY was advised of the change, but it had not been consulted. She added that the contract could be for a fixed term, but a number of factors would have to be taken into account. She did not identify the relevant factors.

[671] It is helpful therefore to consider the relevant provisions in the *Education Act* and the regulations. Section 116(1) authorizes a school board such as the CSFY, to recruit, fire, discipline, transfer, promote or demote the school principal. Section 170(2) authorizes the school board to appoint a school principal. Section 185 allows the Commissioner in Executive Council (the GY) to make a regulation prescribing the term of appointment for principals. There is, in fact, a regulation in this respect, being O.I.C. 1991/198. Regarding the length of the mandate, para. 1 provides:

1. A School Board ...shall appoint a principal ...for a term ...as agreed to by the School Board ...and the principal but which shall be for not less than 24 months and not more than 36 months.

2. The appointment of a principal for a term under section 1 may be renewed on agreement by the School Board ...and the principal.

Ms. Stehelin was the only witness to testify regarding the changes in 2003. No other evidence was adduced in this regard. It appears that the 2003 policy regarding permanent contracts was the subject of collective bargaining between the GY and the YTA. The Court notes that s. 116(1)a) provides that the decision to recruit, fire, discipline, transfer, promote or demote the

school principal is subject to the other provisions in the *Education Act* and the applicable collective agreements.

[672] This being said, there is nothing in the *Education Act* which would prevent the school principal's mandate from being a fixed term contract. Regulation 1991/198 provides, in effect, that the school principal contracts will be for a period of between two and three years. The impediment seems to be the collective agreement. Ms. Daws explained that the collective bargaining in the Yukon occurs between the Public Service Commission and the YTA. Ms. Daws stated that the CSFY did not participate in the collective bargaining because the Public Service Commission "represents the Yukon government". Section 170(4) of the *Education Act* provides as follows: "Staff in schools operated by School Boards are employees of the Government of the Yukon". Ms. Daws added that the MEY could consult the CSFY and then present its concerns or suggestions to the Public Service Commission who would then be in a position to present them in the context of the collective bargaining with the YTA.

[673] In this respect, Ms. Anderson explained that there are various collective bargaining models across Canada. In some jurisdictions, bargaining occurs only between the province/territory and the teachers' association, but in other provinces, it occurs between teachers and school boards. Ms. Daws and Ms. Dekuysscher both stated that the CSFY staff including the school principal, must be GY employees as provided under s. 170(4) for reasons relating to pension and benefits plans. However, Ms. Stehelin, Ms. Dekuysscher and Ms. Whitley all said that the CSFY exercises complete management over staff, which are CSFY employees in all but name, for the reasons mentioned above. Section 116(1)(a), s. 170(2) and s.

174(2)(b) confirm the evidence of the GY witnesses, in requiring the school board to include in its operations and maintenance budget funds required for regular instruction.

[674] One might ask whether there are other Yukon statutes which would prevent the CSFY from hiring the school principal on a fixed term contract. Section 2 of the *Education Labour Relations Act*, R.S.Y. 2002, c. 62 , provides that nothing in the Act is to be construed as affecting the right or authority of the employer in certain circumstances, including managing the educational system and schools established pursuant to the *Education Act* (au par. 2(a)). The CSFY is, for all intent and purposes, the employer. Section 105 provides for a probationary period for school principals. Section 105(1) provides that the probationary period for school principals is two years. Section 105(7) provides that the contract of employment of the school principal shall continue “When no notice of termination is given during the two year probationary period”. The French version of s. 105(7) states: “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”. It is interesting to note that the English version of s. 105(7) does not use the words “permanent contract” but rather states: “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” (emphasis added). The terms of employment are addressed in s. 108. The terms and conditions of a contract of employment of a school principal are provisions in the *Education Labour Relations Act* and regulations, and the *Education Act* and regulations. Further the collective agreement dictates terms and conditions. Again, there is a difference between the English and French versions. In the English version, s. 108(1) provides that “the terms and

conditions of a contract of employment of an employee shall be (a) the provisions of this act and regulations, and the *Education Act* and regulations” (emphasis added). The French version uses the term “or” instead of “et”. Section 111 provides for transfer of school principals to other schools in the same in the same school zone. In the CSFY’s school zone, there is only one school.

[675] This raises the question as to whether s. 105 of the *Education Labour Relations Act* is inconsistent with the *Education Act* and its regulation which provides that school principal positions are for a fixed term. In the Court’s view, there is no inconsistency. The *raison d’être* of s. 105 of the *Education Labour Relations Act* is to ensure that the school principal is on probation for two years. The distinction is that the director of education can cancel the appointment of a school principal any time during the probationary period (s. 105(3)). It follows that the use in the French version of the word “permanent” in s. 105(7) simply means that the school principal’s contract is no longer probationary and can only be terminated for cause. The language used in s. 105(7) of the English version is clear that after the probationary period “the contract of employment of the principal shall continue until and unless terminated in accordance with this Act”. In other words, a school principal who completes the probationary period will have the advantage of greater job security. The word “permanent” simply means that the school principal position is not longer probationary. Nothing in this wording or these statutory provisions contradicts the *Education Act* or regulation.

[676] As a result, nothing prevents an employer from negotiating with the school principal, after the probationary period, a fixed term contract. Whether a school principal signs a fixed

term or permanent contract, he or she can rely on the rights under the *Education Labour Relations Act* and the collective agreement.

[677] The CSFY has responsibility over all areas in relation to staff, including the school principal. Therefore, it is important for the CSFY to have management power in relation to the length of the school principal contracts. Another significant reason is that, in contrast to the GY, the CSFY cannot transfer the principal to another school.

[678] In light of the foregoing, there is nothing in the *Education Act* or regulation nor in the *Education Labour Relations Act* which prevents the CSFY from hiring a school principal on a two to three year contract. The fixed terms for school principals, as argued by the CSFY, are necessary in the circumstances, given that the CSFY has only one school.

[679] The collective agreement appears to create an impediment. As discussed above, the GY does not consider CSFY staff as its personnel, except in relation to the pension and benefit plans. There is nothing preventing the CSFY staff from continuing to be employees of the GY for the reasons set out above. However, the GY acknowledges that the *Education Act* makes the CSFY, and not the GY, the employer of all of its staff for all practical purposes. Therefore, it is up to the GY to give a voice to the CSFY as employer. The GY has the power to allow the CSFY to participate as a representative of the Public Service Commission in negotiations with the YTA. The *Education Act* and the francophone rights under s. 23 place a number of obligations on the CSFY. Among these duties are those of an employer. The GY deems it advisable to ensure that its interests are protected during the bargaining with its employees. The same goes for the CSFY.

b) School Year and School Transportation

[680] The CSFY submits that it has the right under the *Education Act* to establish its school calendar. It maintains that the GY does not respect this power under the guise of needing to coordinate school bus transportation for the entire City of Whitehorse. In order to avoid such problems, the CSFY asks that responsibility for school transport be transferred to it, even if that could result in additional costs. According to the CSFY, management of transportation has to do with aspects of language and culture, given that the students can spend up to two hours per day on the bus. It also raises the possibility of requiring that certain bus drivers be bilingual, and ensuring bilingual signage on the bus.

[681] The GY's position regarding the power to establish the school calendar is not clear. However, on the issue of transportation, the GY sees no link between transportation and language or culture. According to the GY, the government should have the greatest level of discretion and should be able to benefit from economies of scale.

[682] Section 46 of the *Education Act* imposes on the CSFY, in very clear terms, the duty to establish a school calendar for EET. Sections 46(2), (3), (4), (5), (6) and (7) prescribe certain terms regarding the school calendar. Section 46(1)(a) provides expressly that the school board will specify the school opening date. Section 46(1)(c) addresses the length of the school days. Given s. 46, it is difficult to understand why the authority of the CSFY in this respect would be in issue. At the end of the day, the MEY acknowledged this power. In a letter to the chair of the

CSFY dated June 10, 2009 (exhibit 124), Patrick Rouble, the Minister of Education, wrote the following: “The *Commission scolaire du Yukon #23* can set the school year as long as the provisions of the *Education Act* and the *YTA Collective Agreement* are met”. Nevertheless, M.O. 2010/12, issued by the MEY under s. 46 of the *Education Act*, sets out 2010-11 school calendar. A revised version of this Ministerial Order sets out a school calendar for elementary schools as well as one for secondary schools, in Whitehorse. There is no mention of EET among the elementary schools in s. 1. The same goes for secondary schools. It appears, therefore that this MEY directive does not apply to the CSFY. It is significant that the school calendar for elementary schools, even in Whitehorse, is not identical to the calendar for secondary schools. More specifically, the last day for elementary school is June 17, 2011, while it is June 24, 2011 for the secondary schools. This being said, s. 46 of the *Education Act* and the comments of the Minister of Education are clear that the CSFY has the power to establish its own school calendar.

[683] The school calendar raises issues regarding school transportation. Section 47(2) requires the MEY to provide school transportation. Section 116(2)(a) provides that the CSFY can advise the Minister regarding transportation services. According to s. 9 of the *Education Act*, the Minister can delegate to the CSFY in writing the obligation to provide school transportation. The GY does not want to delegate this power, stating that the additional costs relating to such a transfer would be too high. Ms. Dekuysscher testified that the budget for seven buses for EET is around \$450,000.00, or around 18% of the GY’s total school transport budget. According to its calculations, the additional costs for the start date five day earlier for the EET students would amount to around \$7,000.00. The Court finds that the additional costs relating to transfer to the CSFY of management of the school transportation are not justified. However, the GY must

provide school transportation as required in order to meet the needs of the school calendar established by the CSFY.

[684] Regarding the issue of bilingual drivers and signage, s. 116(2)(a) is relevant. The school board can advise the GY in this respect.

c) Professional Development of Teachers

[685] The CSFY requests that the GY make the necessary amendments so that the CSFY can designate more than 15 hours (three days) to the professional training of staff as provided under ss. 46(2) and (6). The CSFY submits that it is important to devote more time to professional development because of the development of new programs which are necessary for EET students (exhibit 120).

[686] The GY understands the advantages of adding 20 additional hours of professional development. It says, however: "...we are of the view that subsections 46(2) and (6) of the *Education Act*, read in the context of the rest of the section, establish a mandatory requirement that there be 950 hours of instruction including 15 hours for non-instructional purposes and the Act does not provide any ability to deviate from this" (exhibit 121 - MEY's letter dated April 23, 2009). The Minister went on to say: [TRANSLATION] "We cannot comply with your request to add 20 hours until the statute is amended in the future. Further, although you raise the end of the collective agreement with the Yukon teachers, any renewal of that agreement must also comply with the *Education Act*".

[687] Section 5 c) of the *Education Act* provides that the Minister must contribute or participate in the professional development of teachers. According to Ms. Stehelin, the GY provides \$362,000.00 to the YTA for professional development (“Annual Report of the Yukon Department of Education 2007-08 Academic Year”, exhibit 147). Page 66 of the annual report, regarding “professional development for teachers”, provides:

The department of education, in partnership with the Yukon Teachers Association (YTA) works to provide professional development opportunities for Yukon teachers on an ongoing basis. ...In 2007-08, the department of education contributed through a framework outlined in the YTA collective agreement a sum of \$362,000.00 to the YTA professional development fund. It also covered the costs of the position of a half-time professional development coordinator for the YTA. An additional \$50,000.00 is provided for the teachers’ mentoring fund.

In addition, public schools spent approximately \$140,000.00 in professional development for teachers, through the delivery of inservice and workshops presented by the department of education consultants.

[688] Ms. Stehelin added that 5 hours out of the total 15 hours are dedicated to the “traditional hunt in the native communities”. She stated as well that the professional development offered through the YTA is in English.

[689] Ms. Lemay explained that the budget for professional development in the amount of \$362,000.00 is part of the collective agreement. A committee decides which members are approved for training sessions. She set out three criteria: whether a teacher has already had training, whether the training was offered outside of the Yukon in the last two years, and finally whether the training would provide a “bang for your buck”.

[690] Ms. Lemay confirmed that there was no professional training for French first language. However, she indicated that she would be happy to facilitate such training.

[691] Under s. 116(2)(g) of the *Education Act*, the CSFY has the right to have and manage professional development for its teachers. The wording of s. 5 c), regarding the Minister’s duty to contribute to the professional developments of teachers, is identical to the wording of s. 116(2)(g): “professional development of teachers”.

[692] The correspondence between the CSFY and the GY (exhibit 120 to 126) makes clear that each party interprets the 15 hours under s. 46(6) as being hours dedicated to professional development. According to this interpretation, the maximum number of hours set aside for professional development is 15 hours.

[693] In the Court’s view, this is an erroneous interpretation of s. 46(6). The 15 hours mentioned in s. 46(6) have nothing to do with professional development. Section 46(6) provides that the school board will set aside 15 hours per year for “non-instructional purposes for its

school”. The *Education Act* contains no definition of “non-instructional purposes”. However, s. 116(2)(i) provides that the school board can approve the allocation of school days for extra-curricular activities. The English version states: “the School Board may approve the allocation of school days for extra-curricular activities”. This refers to activities, outside of school, principally for the students (see s. 116(2)(h) or in English “extra-curricular”). The 15 hours for “non-instructional purposes” have nothing to do with the professional development of teachers.

[694] This raises the issue of the time identified, whether by the GY or the CSFY, as being for professional development of teachers. It appears that the number of days as well as the content of the professional development of teachers must be the subject of negotiations between the employer (the CSFY) and the YTA.

[695] Regardless, the evidence of the witnesses, Ms. Lemay, Ms. Stehelin, Mr. Bourcier, Mr. Champagne and Mr. Blouin, shows that the professional development provided through the YTA does not ensure that EET teachers receive relevant training in French. The CSFY has a duty and the mandate to provide French first language education in the Yukon. The teachers are central to the implementation of this obligation. Section 116(2)(g) of the *Education Act* grants the CSFY the power to manage the professional development of its teachers. The GY recognizes the obligation to respect the francophone rights under s. 23 of the *Charter*. I conclude that it falls to the CSFY to manage professional training in French for the CSFY teachers.

d) Budget, Staff, Buildings and Title to Property

[696] June 17, 2010 marked a turning point in the trial. Almost all of the 22 witnesses who testified, as well as hundreds of exhibits filed, between May 16, 2010 and June 17, 2010, dealt with the central issue of management of the budgets. Specifically, the CSFY claimed the power to manage the budgets, as provided under s. 174 of the *Education Act*. The GY submitted that it could not grant this power. In the 2008-09 fiscal year, the CSFY received and managed the amount of \$716,800.00 of a budget of \$3,407,904.00 (exhibit 189), or 20% of the total budget. It would serve no purpose to review the hundreds of exhibits which led to numerous disagreements between the CSFY and the GY. It suffices to mention the disputes regarding financing of the insurance policies for Académie Parhélie, the budgets paid directly to EET, the credit cards, the bills for publicity, not to mention numerous other points of disagreement.

[697] On June 17, 2010, the GY called Cyndy Dekuysscher, MEY director of finances, as a witness. She announced that the GY had decided to allow the transfer to the CSFY of all of the budget funds for fiscal year 2010-11 (exhibit 186), except for three items. After years of disputes on the issue of the right to manage the budget, Ms. Dekuysscher stated that the CSFY had only to send a letter or e-mail asking for the funds to be transferred. Ms. Dekuysscher maintained, however, that three categories of funds could not be transferred to the CSFY, being the amounts for staff, custodians and utilities for EET. She justified the GY's position regarding staff and custodians, stating that these persons, as GY employees, had to be paid by the GY. She explained that the budget for the utilities could not be transferred because the building belongs to the GY. The question is whether this reasoning is well founded.

[698] The GY submits that the CSFY is, in effect, the employer of its teaching staff, the support staff and the custodians. Paragraph 193 of the GY's brief states: [TRANSLATION] In this case, the CSFY would be considered at common law as the employer because it chooses the employees and manages them, is responsible for evaluating and disciplining the employees, and directs them. Therefore, the CSFY has direct control over its employees". However, the GY takes the position that the CSFY's staff and employees must remain employees of the GY for administrative and economic reasons. At the administrative level, Ms. Stehelin did not know whether there was a French software program which could issue pay cheques in French. She also did not know how the tax deductions or pension and benefit plans would be managed. At the economic level regarding the pension plan and benefits, Ms. Daws explained that only GY employees are able to participate in the *Federal Superannuation Pension Act*. Further, support staff are part of the Department of Public Works and must also be GY employees for pension reasons. The large number of employees at the GY allows it to obtain the best premiums and benefits. Regarding the utilities, Ms. Dekuysscher only raised the issue of the title to property.

[699] Section 174 of the *Education Act* requires the CSFY to prepare, each year, its operations and maintenance budget. Section 174(2) outlines the budget items. The budget must include sufficient amounts for the following categories: administration, regular instruction, special instruction, plan operation and maintenance, special advisory services, tuition and other costs for resident students attending an educational program outside the education area of the school board, and any other required expenditure. Section 174(3) provides that the Minister of Education, once he receives the budget, will consult with the school board regarding its annual

operations and maintenance budget. Following this consultation, he must approve the annual operations and maintenance budget, subject to the regulations for grants and contributions to school boards. Section 175 expressly provides that the school board itself administers the budget. Section 175(1) reads: “The annual operations and maintenance budget for a school board shall be administered and spent under the direction of the school board”. Section 178 requires the GY to provide sufficient financial resources: “The Minister shall provide each School Board with funding sufficient to meet the requirements of its approved annual operations and maintenance budget from money appropriated by the Legislative Assembly”.

[700] In summary, the *Education Act* provides that the school board will not only present its operations and maintenance budgets to the GY but also that it will administer and use them, as mandated. These provisions very clearly indicate that the annual operations and maintenance budget is comprised, first, of teaching staff (s. 174(2)(b)), support staff (s. 174(2)(g)) and utilities (s. 174(2)(d)).

[701] Can CSFY staff technically remain GY employees as provided for under s. 170(4)? In my view, this is possible. If the GY deems that there are economic or other reasons for the individuals in question remaining GY employees, it need only delegate to the school board in writing all of the rights and obligations which it currently holds. Moreover, the GY continuously stated, throughout the trial, that the CSFY had control and management power over its staff. Such a delegation is expressly provided for under s. 9 of the *Education Act*.

[702] The CSFY would then be responsible for managing payment of salaries, benefits, pensions, as well as other benefits. These tasks would be accomplished through the CSFY's secretary-treasurer. In this regard, the following position of the GY is erroneous (para. 173 of the brief): [TRANSLATION] "Finally, regarding the secretary-treasurer, such a position is not required to meet the obligations under s. 23". These comments ignore the fact that the GY requires the CSFY at s. 127 to appoint a secretary-treasurer who shall perform those duties prescribed by the regulations. The regulation O.I.C. 1991/035 describes those functions as follows:

1) The secretary-treasurer of each Council or School Board shall:

(a) maintain a full and accurate record of all proceedings and comply with all administrative procedures specified by the Council or School Board and by the Minister;

(b) maintain a full and accurate record of the financial transactions of the Council or School Board and comply with all accounting procedures established by the Council or School Board and by the Minister, and

(c) perform such administrative tasks as may be directed by the Council or School Board.

[703] Needless to say, the secretary-treasurer is responsible for administrative tasks concerning CSFY staff, thus mirroring the GY's structure. It makes sense that the secretary-treasurer's salary is part of the operations and maintenance budget given that the GY requires, through s. 174(2)(a) of the *Education Act*, the hiring of a secretary-treasurer.

[704] Regarding the utilities, the simplest and most practical solution would be to transfer title to the property to the CSFY. According to Mr. Hrycan, such a transfer would have a negative impact on the GY's balance sheet, as it would remove an assets from the list of fixed assets. He believed that there would be other impacts in relation to property insurance. He mentioned that the GY has a certain expertise due to its size. He spoke of "economies of scale" or "purchasing power". Section 77(1) of the *Education Act* contemplates the possibility of such a transfer. The GY obtained a legal opinion from the Legal Services Branch, on November 14, 2006, which it decided to share with the CSFY, confirming the possibility of a transfer of title to EET to the CSFY (exhibit 341). Under s. 114(1), The Minister is responsible for the operation and management of any school in an attendance area in which there is a school committee or Council. In contrast, s. 116(1)(f) provides that the a school board will maintain, repair, furnish and keep in good order all of its real and personal property. This management duty is recognized in the school board's operation and maintenance budget (s. 174(2)(d) - plant operation and maintenance).

[705] The GY submits that such a transfer would not be advisable for the reasons listed above: insurance, the balance sheet, expertise and economies of scale. The GY presented no evidence to establish the amount for additional insurance. Section 7 of the *Education Act* provides for the

possibility of agreements. There was no evidence establishing that the GY could not continue to be the self-insurer if such a transfer were to take place. The change to the balance sheet would not have a real impact on the bottom line of the GY's budget. Section 130 of the *Education Act* gives some protection in providing that the school board may not sell, lease, or otherwise dispose of any real property or any interest in it except with the approval of the Minister and in accordance with the regulations. Regarding expertise or size of the GY and economies of scale, Mr. Hrycan, Mr. Callas and Mr. Woods presented no evidence to support their opinions.

[706] In conclusion, it is clear that ss. 116 and 174 place duties on the CSFY which make it, for all intent and purposes, the owner of the EET building. The GY could transfer title to the CSFY, or conclude an landlord/tenant agreement, with the tenant assuming all of the obligations in relation to the building. In both cases, CSFY would be responsible for paying the utilities.

[707] It is absolutely essential that the MEY comply with the requirements set out in s. 174(3) of the *Education Act*. Good management is impossible without consultation on the annual operations and maintenance budget as well as all of the duties imposed on the CSFY. Ms. Dekuysscher confirmed the reduction to the CSFY's proposed operations budget (2008-09 budget, exhibit 184), without any consultation with the CSFY, from \$120,000.00 to \$89,934.00. Ms. Dekuysscher and the GY representatives were aware of the fact that the *Education Act* requires the Minister to consult the CSFY in this regard.

e) Programs

[708] Much evidence was presented through expert witnesses, such as Mr. Bilodeau, Dr. Landry and Mr. Kubica, regarding the importance of management of programming. Mr. Blouin, Mr. Champagne and Mr. Bourcier added to this evidence. It would serve no useful purpose at this point to review all of the details of the evidence regarding programs and the past disputes.

[709] In fact, the CSFY and the GY agree on their respective roles in this area. Both cite the following passage of the Supreme Court in *Arsenault-Cameron* (para. 53):

The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[710] The Supreme Court had earlier held (para. 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 ...

[711] The two parties accept that the Minister's ability to exercise his discretionary power is restricted by the remedial nature of s. 23, the particular needs of the minority language community and the exclusive right of minority representatives to manage minority instruction instructional facilities (*Arsenault-Cameron*, para. 44). These important principles, as set out by the Supreme Court, are recognized by the signatories of the 2006 Canada-Yukon Agreement. The preamble (exhibit 56) provides:

WHEREAS section 23 of the Canadian Charter of Rights and Freedoms recognizes the right of Canadian citizens belonging to the ...French-language minority in a ...territory to have their children educated in that language, at the elementary and secondary levels...and ...the right to have them receive that instruction in minority language educational facilities provided out of public funds;

WHEREAS education is under territorial jurisdiction;

WHEREAS Yukon, in the context of its responsibility for education, provides education in French in the territory in accordance with section 23 of the Canadian Charter of Rights and Freedoms and its spirit...

[712] Since 1990, the GY has recognized what is at stake in s. 23 in the preamble of the *Education Act* which states: “Recognizing that rights and privileges enjoyed by minorities as enshrined in the law shall be respected....”.

[713] The issue is which programs are necessary to ensure the respect of the rights and privileges granted by the *Education Act* and s. 23.

[714] The Canada-Yukon Agreement gives the impression that the only issues regarding programming are related to special needs programs, recruitment and francization, including playschool or pre-school children. In fact, the agreement signed by the Yukon and Canada on March 31, 2006 (exhibit 56) provides that Canada will make substantial financial contributions to the Yukon to achieve the following goals (para. 2.2.1.1):

2.2.1 Regular Programs

2.2.1.1 Provide members of the French minority-language community of Yukon with the opportunity to be educated in their own language, including cultural enrichment through exposure to their own culture...

2.2.2 Additional Strategies

2.2.2.1 Consolidate and improve the quality of existing minority-language education programs, and increase or maintain the number of eligible students who attend minority French schools...

[715] In Appendix III of the same agreement, the anticipated outcomes are detailed: “increase to 80% the proportion of eligible students enrolled in Francophone schools in minority communities” and “provide quality education that is comparable to that of the majority”.

Generally, the following support categories are identified:

- promotion of access and integration;
- program quality and cultural enrichment of school environment;
- teachers and education support services;
- improvement of access to post-secondary education;
- promotion of research on minority language education and dissemination of knowledge.

[716] The GY noted, at p. 5 of Appendix II, the importance of a pre-school program:

Very often, some parents have not studied in French nor have they the means to support the cultural actualization of their children. Consequently, until 1999, more than a third of children entering Kindergarten didn't sufficiently master the French language to be able to learn at a normal pace. This weakness on their part slowed down the learning process of the entire class; time reserved to prescribed

curriculum was being spent on teaching basic language skills. This problem hindered the quality of education at the primary level. Instead of gambling on a child's education, many parents found it easier to simply enroll their children in the English stream.

To help solve the problem, the Board and APPÉF initiated Le Jardin d'Émilie in September 2000. This pre-school program for 3 to 5 year-olds plays a dominant role in the health and survival of the school. It is, in certain ways, the "nursery" of the French school. Situated in the school itself, the program provides a cultural identity element that encourages preschoolers to learn and to live in French.

[717] The GY also recognized, as pointed out by the expert, Mr. Kubica, that EET must offer a better selection of courses or programs. At p. 5 of Appendix II, the Yukon wrote: "At the high school level, a good number of Grades 10 through 12 students are abandoning Émilie-Tremblay for a greater course selection or programs offered only in the English stream".

[718] In the same vein, the GY granted certain rights and imposed certain obligations on the CSFY in the *Education Act*, which would imply that the GY appreciates the relationship between its territorial jurisdiction over education and the duties imposed by s. 23. Section 11(1) provides that the CSFY must provide to every school-age person an educational program consistent with the requirements of the Act and regulations. Students who, because of intellectual, communicative, behavioural, physical, or multiple exceptionalities, are in need of special education programs, are entitled to receive a program outlined in an Individualized Education

Plan (s. 15). Section 15(2) provides that a student who is entitled to an Individualized Education Plan shall have the program delivered by the CSFY in the least restrictive and most enabling environment, while having due regard for the educational needs and rights of all students. Section 32 requires that the Minister establish a kindergarten program in accordance with the regulations. According to para. 1(1) of Regulation 1991/068, the school board must offer a program of kindergarten instruction in at least one school in each community where there are 7 or more eligible students. Children who are at least 4 years and 8 months old are eligible for kindergarten. The Act goes even further in providing at s. 33 the school board may establish educational programs for children who have not reached school age, i.e. a pre-school program.

[719] The school board does not only have an obligation to provide, as needed, an individualized study program; s. 34 gives certain students the right to receive such a program. All other students are entitled to receive a free educational program appropriate to their needs (s. 34(a)). The school board also has the power to use a locally developed course of study in an educational program (s. 43(1)). Section 56 of the *Education Act* guarantees the right under s. 23 to receive instruction in French. It falls to the CSFY to offer this instruction, as provided in Regulation 1996/099. Section 10 of that Regulation provides that the CSFY has jurisdiction over and shall administer French language instruction in the Yukon. Finally, the school board must provide educational programs, including locally developed courses, for its students (s. 116(1)(c)).

[720] Despite the position taken in the agreements and the *Education Act*, issues remain. The GY submits that the sliding scale criteria apply to programs for special needs children, and

therefore there is no right where the numbers do not warrant. According to the GY, the number of children requiring a special program does not justify establishing at EET a special needs program paid for by public funds, nor a resource room. Without analysing all of the evidence in detail, the Court accepts the evidence of Mr. Blouin and Mr. Champagne regarding the process and qualification of five special needs students who warrant a resource room. For the reasons already averted to in the witness summary, the Court does not find Ms. Whitley's evidence to be reliable regarding the number of special needs children and the resource room issue. Ms. Lemay contradicted Whitley regarding resource rooms, noting that there are such rooms in other schools in Whitehorse, but not at EET. Regarding the sliding scale and its application to special needs programs, the GY relies on *Dauphinee*. The GY submits that the Nova Scotia Court [TRANSLATION] "held that a number between 0 and 72 could potentially have access to specialized programs, and therefore, the number did not justify establishing a special program in French paid for by public funds, because the costs were high and not justified" (para. 205, defendant's brief).

[721] The Court does not agree with this interpretation of *Dauphinee*. In fact, the Nova Scotia Court held that it was not a question of number, but of equivalency. In *Dauphinee*, the francophones experienced the same uncertainty as the majority regarding the cost sharing agreements for school fees. Nova Scotia had only designated three anglophone schools as recipients of financial support for special needs children. It had not provided for similar support for francophone special needs students. The Court therefore declared that the Department of Education did not provide equivalent services, thereby breaching s. 23.

[722] The situation in the Yukon is even clearer than that in Nova Scotia. The *Education Act* governs the issue of special needs children. Not only does the CSFY have an obligation to offer individualized programs under ss. 15 and 16, but the student has the right to such programming under s. 34(b).

[723] Regarding pre-school aged children, the GY now says it is opposed to development of a pre-school program at EET for the purposes of francization and recruitment. It submits that s. 23 does not extend to pre-school aged children. However, during the negotiations with the federal government leading up to the Canada-Yukon agreement (exhibit 56), the GY emphasized the importance of funding for a pre-school aged program for children between 3 and 5 years old, stating that the pre-school program “plays a dominant role in the health and survival of the school” and “provides a cultural identity element that encourages preschoolers to learn and to live in French” (p. 5, Appendix II, exhibit 56). In addition to recognizing its obligations concerning language and culture under s. 23, the GY subsidizes the full-time pre-school aged program which the CSFY has offered for a number of years. It is clear that the GY has recognized its obligations in the pre-school area in terms of francization and recruitment as being part of the remedial steps contemplated by s. 23, and confirmed by the Supreme Court in *Mahe*.

f) Staffing Formula

[724] In March 2010, the MEY adopted a new staffing formula (exhibit 143 - Staffing Entitlement). The underlying purpose of the formula is to allow for the determination of the number of staff allocated to each school in the Yukon. “The following entitlements are

allocations of staff from Yukon Education to schools” (p. 1, exhibit 143). There is only one category, “Differentiated Staffing”, which recognizes French first language education. Page 5 of exhibit 143 provides: “3.4 Francophone - Section 23 Recognition: For EET, add 15% of professional educational staff allocation”. This new staffing formula replaced the old formula entitled “Staffing entitlement formula for Yukon schools” (exhibit 145). The old formula did not mention EET, nor s. 23.

[725] The CSFY submits that the formula was established without taking into account the resources necessary to meet the obligations imposed by s. 23 of the *Charter* and the *Education Act*.

[726] The GY submits that the CSFY and EET should be subject to the same rules as all of the other schools in the Yukon. According to the GY, the additional allocation of 15% granted to EET allows it to meet its obligations under s. 23.

[727] According to Mr. Champagne, principal of EET, the new formula as well as the additional allocation do not meet the needs of EET. He explained that as a result of the application of the new formula, the CSFY had to cut a secondary position and two other positions at EET. The new formula does not recognize, for example, EET’s particular situation regarding the teacher-student ratio for kindergarten 4 and 5, established by the CSFY and recognized by the GY, of 1:12 (instead of 1:20 under the collective agreement). Mr. Champagne acknowledged that on paper the new formula seems to provide an increase from 18.2 to 21 full-

time positions, but it actually results in a reduction. He explained that the CSFY had no more money in its budget to cover the positions it had covered in the past.

[728] According to Mr. Bourcier, chair of the CSFY, the new staffing formula tends to work a disadvantage for the small schools. While acknowledging the additional allocation of 15%, he questioned the reasons behind this percentage. He had never received any explanation.

[729] The director of education, Ms. Taillefer, maintained that the new formula did not address the francophone school's concerns. According to her, the formula is based on the number of students and not the cost per student, as is the case in other provinces. Ms. Taillefer noted that she wrote the GY on April 22, 2010 (exhibit 141), asking for changes to the formula in order to enable the CSFY to meet its particular obligations. She spoke about the category "Vulnerability, Transition and Stability", noting that no position or percentage was attributed to the EET under it. She stated in her request that this category and the obligations under s. 23 justified allocation to EET of a factor for kindergarten 4, secondary, pre-school, exogamy, and the position of assistant principal. She stated that there was no recognition, in the core funding, of the CSFY's needs in relation to industrial arts and the resource rooms. According to Ms. Taillefer, there should be a category recognizing the fact that EET has the mandate of teaching French first language and English first language. Under "French Second Language", EET was granted a 0,28 position. Ms. Taillefer did not understand why EET would be given this 0.28 position as a French first language school. She agreed that all Yukon schools are treated in the same manner regarding purchase of staff from the bank established by the GY. According to Ms. Taillefer, piecemeal negotiations result not from a lack of planning, but from a lack of financing. She

acknowledged that the CSFY must live within its budget as approved by the GY. In her view, it is important to establish the cost per students, and then add amounts for French and the s. 23 obligations.

[730] Ms. Stehelin, director of human resources, explained that a committee established the new formula with the help of Dick Chambers, a consultant from British Columbia. The committee, which did all of its work in English, met many times from January to March 2010. Ms. Stehelin had not studied the francophone factor in the twelve Canadian jurisdictions. She relied on the recommendations of Dick Chambers. However, she did not know whether Mr. Chambers had taken into consideration s. 23. She stated that the committee's mandate, in establishing the new formula, was to avoid loss of full-time positions in the Yukon schools. She confirmed that the committee did not consider particular programs, such as the francophone school.

[731] Ms. Dekuysscher, director of finances at the MEY, confirmed that the GY had not yet calculated the cost per student for the Yukon nor the cost per student at EET. However, she said that the GY had hired Dick Chambers in 2010 to assist in determining the total cost per student in the Yukon. She maintained that the MEY applies the same principles to all of the Yukon schools. CSFY budget decisions are not based on a special formula tailored to the needs of EET.

[732] Ms. Whitley could not imagine how Académie Parhémie would have difficulty meeting its needs under the new staffing formula (exhibits 143 and 52). According to her, the school principal is responsible for making staffing assignments in an efficient way. Ms. Whitley

confirmed that the new staffing formula provides a limited number of teachers, i.e. a bank of teachers. Ms. Whitley could not say how the CSFY would purchase the teachers from the bank without having included it in the budget. She added, however, that the CSFY could make a request to the MEY, who would undoubtedly approve further purchases of teachers, assuming the funds were available. Ms. Whitley confirmed that the 15% is also used for francophones in British Columbia. Regarding the effect of the new formula, that is to say the reduction in the number of full-time positions at EET, Ms. Whitley said: “Depends on your reality. We are not responsible if the school board does not buy more”. Ms. Whitley did not know how the CSFY had purchased additional positions in the past. She had made no inquiries in this respect. Ms. Whitley never replied to the question whether she had evidence contrary to Ms. Taillefer’s evidence that application of the new formula led to a reduction in full-time teachers.

[733] One of the recommendations of the expert, Mr. Kubica, to ensure the survival of EET, was an increase in the choice of courses, which would require more staff. The new formula does not take into account this recommendation.

[734] The GY sets the teacher-student ratio in the collective agreement (exhibit 203) as well as the “Staffing Entitlement” (exhibit 143). This report determines the number of staff which will be approved for a school. It is clear that this type of staffing formula, in itself, does not reflect the particular needs of French first language instruction in a minority situation. Ms. Stehelin confirmed that the CSFY’s particular needs were not taken into account and that the 15% was imposed unilaterally and without explanation.

[735] The GY gives EET, in contrast to other Yukon schools, an arbitrary allocation of 15% (2.7 FT). 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 (exhibit 56). 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.

[736] This being said, the rights and obligations under s. 23, as interpreted in the case law, and the *Education Act* do not allow the CSFY to present unlimited budgets or demands with respect to human resources. The Supreme Court in *Mahe* held that pedagogical considerations weigh more heavily than financial requirements. However, the anticipated costs must not be excessive. In this case, the GY has not alleged nor given evidence showing that the anticipated costs would be excessive. In fact, as Ms. Dekuysscher testified, the GY has not yet determined the cost per student in the Yukon. | |

[737] In my view, the new staffing formula providing for an increase of 15% for French first language instruction does not reflect the current needs. It is up to the GY and the CSFY to identify, together, the CSFY's particular needs and obligations under the *Education Act*, and for the implementation of francophones rights under s. 23 of the *Charter*, in order to arrive at an appropriate staffing formula.

4) Management of Admission of Rights Holders and Non Rights Holders

[738] The CSFY submits that the right to manage admissions to minority schools flows from s. 23 of the *Charter*. It argues that the power to admit or refuse a student is related to language and culture. The Supreme Court in *Mahe* and *Arsenault-Cameron* clearly states that it is up to the minority community, in this case the CSFY, to control those aspects of management having a direct or indirect impact on the language and culture of a school.

[739] The GY submits that the power to manage admissions is an aspect of its constitutional jurisdiction over education. The CSFY's right to manage under s. 23 does not usurp the GY's legislative jurisdiction regarding the language of instruction offered to non rights holders within its territory. Finally, the GY submits that the lack of space at EET results from the CSFY having admitted non rights holders.

[740] Before embarking on an analysis of this issue, it is helpful to review the evidence and exhibits filed in the trial to gain a better understanding of the genesis of this dispute.

[741] Section 2 of the *French Language Instruction Regulation* (O.I.C. 1996/099) contains the following definition:

“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.

[742] Section 5, which prescribes certain admission criteria for the francophone school provides:

5. Citizens of Canada who

(a) are residents of the Yukon and

(b) have the right under section 23 of the Charter to have their children receive primary and secondary school instruction in French in the Yukon, or

(i) are the parents of a child who is receiving French language instruction, or

(ii) are eligible to have a child receive French language instruction,

or

(iii) would be eligible to have a child receive French language instruction if the person had a child

are eligible to be residents of Education Area #23.

[743] Section 9 limits the right to attend the francophone school to eligible students. Section 9 provides: "Only eligible students shall be entitled to receive French language instruction at a school in Education Area #23".

[744] The first reference in relation to management of admissions is found in exhibit 33, the notes of a meeting between the CSFY and the MEY:

We are considering a change to the Board's Vision and Mission, and to the school's admission policy that would allow parents in the Yukon willing to integrate their child in a fully francophone program to register at our school.

[745] In 2007, the CSFY completely reworked its manual of policies, procedures and regulations (exhibit 61). The preamble of policy G-7000 on admissions provides (pp. 136-144, exhibit 61; exhibit 516): [TRANSLATION]

Admission of students from kindergarten to Grade 12 to French first language is determined pursuant to the *Education Act* of the Yukon, this manual, Canadian case law on minority language education and s. 23 of the *Canadian Charter of Rights and Freedoms*.

[746] The admission criteria listed at s. 1(a) apply to children of rights holder parents. Section 1(b) sets out the admission criteria for children of parents other than those falling under s. 1(a). In this part of the policy, there are two exceptions, s. 23 (s. 1(b)(i)) and students with non rights holder parents (s.1(b)(ii)). The policy sets out the terms of admission and procedures regarding exceptional cases. The policy provides that all requests for admission be made in writing. There

is an admission form for parents having the right to admission (exhibit 62), and a form requesting permission to be admitted (exhibit 63).

[747] The new manual of policies, procedures and regulations was made possible thanks to a contribution of \$20,000.00 by the GY for “Research and Drafting of French Policies and Procedures for YSFB and Émilie-Tremblay School” (exhibit 514). The terms which apply to the funds are found in Appendix B, in particular the following:

Description of Project:

B- Upon completion and acceptance by the Board, it is mandatory that a final copy of the said policies and procedures be provided to the Department of Education;

C - The Department of Education will ensure that the document is translated to English in order for it to serve, if need be, future Yukon boards.

[748] In January 2010, Policy G-70 was changed and provided to the GY. The new admission policy of the CSFY (exhibit 517) allows the CSFY to grant admission to children in a number of categories. The policy provides: [TRANSLATION]

The CSFY can admit children in the following categories:

- A) those with a francophone ancestor;
- B) those with a parent who is a francophone immigrant or an immigrant who speaks neither French nor English; and
- C) those whose parents are anglophones and who wish to become integrated into the francophone minority community.

The CSFY can admit a child who does not fall under one of the guaranteed categories in s. 23 if such admission would a) promote French first language instruction, b) promote the flourishing and development of the official language minority community, and c) not threaten the survival of the majority provincial/territorial language.

[749] Regarding the GY's right of surveillance over admission to a francophone school, the policy provides: [TRANSLATION]

There are two bases upon which the provincial/territorial government may impose limits on the CSFY's right to grant admission to person falling outside the s. 23 categories. The first is that the CSFY cannot transform a francophone school into an immersion school. Secondly, the CSFY cannot accept grant permission to be admitted to individuals if such admissions threaten the majority language of the province/territory (*Solski*, Supreme Court of Canada, 2005).

[750] The CSFY managed the admission of rights holders and non rights holders from 1996, when it was established, until the first day of the trial, May 17, 2010, without objection by the GY and apparently in violation of the admission regulation established by the GY.

[751] On the first day of trial, May 17, 2010, the GY served on the CSFY's chair a letter dated May 17, 2010 (exhibit 519) stating, in effect, that the GY would from that point onward apply s. 5 of the *French Language Instruction Regulation* setting out the conditions of admission. The GY gave the following explanation: [TRANSLATION]

This is an important step, given the new kindergarten registration procedure, which will have an impact on the new staffing formula.

[752] Given that the GY had not previously expressed its disagreement with the CSFY's admissions policy, the Court allowed the CSFY to amend its claim to enable the Court to decide the question of admissions. The parties presented their evidence on this topic during the second phase of the trial in January 2011.

[753] Dr. Landry gave his expert opinion on the definition of rights holder. According to him, it is important to broaden the definition. He wrote, at para. 114 of his expert report (exhibit 46):

[TRANSLATION] "In my view, the government has an interest in favouring an expansive definition of children of rights holders if it really wants to take a "pluralist" approach and support the development of the francophone community". Dr. Landry emphasized the large number of francophone immigrants in the Yukon, for whom trilingualism would be a possibility. He gave

the example of an immigrant living in Canada who does not yet have his Canadian citizenship. Under a restrictive reading of s. 23, an immigrant from France could not register his children in the francophone school. As a result, all immigrants, regardless of their language, would be in the non francophone school systems. Dr. Landry noted that many school boards across Canada accept ancestors, that is to say children whose grandparents did not attend a francophone school, because there was no such school.

[754] Mr. Champagne, principal of EET, explained his approach to the admission policy on non rights holders. First, he meets the parents. Then, the family completes a form and attends before a committee which makes a recommendation to the CSFY. Mr. Champagne confirmed that the three categories of non rights holders are immigrants, ancestors and anglophones. The ancestor category is related to the remedial aspect. In 2010-11, 92% of the EET students were rights holders, 1% were immigrants, 3% were in the ancestor category and 4% were anglophones (exhibit 508). Mr. Champagne acknowledged that one must be mindful of facilities in deciding whether or not to admit non rights holders, and that the admission of an anglophone requires the school to then admit all the other members of the same family as rights holders.

[755] Mr. Bourcier explained that the CSFY proposed to the GY in 2006 the creation of a policy manual. The government provided the necessary funds (exhibit 514). Mr. Bourcier had discussions with Mr. Lamarche regarding the policies and Mr. Lamarche had said that everything was acceptable. He also spoke of his discussions with the Minister of Education regarding the admission policy. According to him, the Minister did not want to amend the *Education Act* given that the big issue of educational reform was looming. Mr. Bourcier

recognized that admission of non rights holders could have an impact on facilities. However, he emphasized the importance of admitting non rights holders, given the small community in the Yukon, the high level of immigration, the pluralist environment and the relationship between the ancestor category and the remedial aspect. Mr. Bourcier confirmed that the GY had never asked him, prior to May 17, 2010, to provide declaration forms (exhibit 518).

[756] Mr. Paul, director of the FNCSF, explained the FNCSF's official position as being that the right to manage admissions falls to the school boards. Mr. Paul presented a book of data (exhibit 510) showing that each of the francophone school boards in Canada has a policy on the criteria for admission of non rights holders. It is also clear from exhibit 510 that every francophone school board in Canada grants admission to non rights holders.

[757] Ms. Whitley indicated that a letter dated May 17, 2010 (exhibit 519) was drafted following the recommendations of the two GY committees and the auditor general. She confirmed that the GY had never followed the regulation (s. 6). She was aware that the CSFY had an admissions policy. However, she "never raised concerns about the admission policy". She added that the GY asked for the declarations, as required by the regulation, in order to obtain reliable figures regarding registrations. According to Ms. Whitley, it was only an unfortunate coincidence that the letter was dated the first day of the trial.

a) Analysis

[758] There is no case law directly on point regarding the right to manage admissions in a minority school under s. 23 of the *Charter*. A review of what is taking place in the other provinces and territories in Canada reveals that there is no standard approach. For example, Ontario and Manitoba expressly recognize the school board's authority to manage admission of non rights holders. In New Brunswick, management of non rights holders is done by the francophone school board. However, the province allows admission of non rights holders depending on the child's language abilities. Some provinces, such as British Columbia, Saskatchewan and Prince Edward Island, share management of non rights holders with the francophone school boards. Some jurisdictions are silent regarding admission of non rights holders and management of admissions (Nova Scotia, Newfoundland, Alberta and Nunavut). In effect, only two jurisdictions, the Northwest Territories and the Yukon, have appropriated authority over admissions and management of non rights holders.

[759] It goes without saying that s. 92 of the Constitution of Canada provides that the Yukon territory has jurisdiction over education. However, s. 23, in granting rights in the area of education, modifies some of the rights of the provinces/territories. It follows that the powers are accorded to the CSFY by the GY because of s. 23. In granting these powers to the minority community, as required by s. 23, the provinces and territories recognize the precedence of s. 23. The Supreme Court of Canada in *Arsenault-Cameron* added a sixth exclusive management power: the francophone school board's power to choose the school site. The Court thus emphasized that ministerial power, even in an area of exclusive jurisdiction such as education,

can be subordinate to the decision making power of a francophone school board. The GY expressly recognized this principle. The preamble of the *Education Act* provides: “Recognizing that rights and privileges enjoyed by minorities as enshrined in the law shall be respected”. As well, s. 56 of the *Act* provides: “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”. Section 185(c) provides that the GY can make regulations “respecting anything that may be required to give effect to the French language rights referred to in this Act and required by section 23 of the *Canadian Charter of Rights and Freedoms*”. In effect, the GY has conferred upon the CSFY the duty to manage French instruction in the Yukon. Section 10 of the *Regulation* provides as follows: “The School Board for Education Area #23 shall have jurisdiction over and shall administer French language instruction in the Yukon in accordance with the Act and the regulations”.

[760] This raises the issue of whether the GY’s regulation regarding admissions complies with s. 23. The Supreme Court of Canada, in *Mahe* and *Arsenault-Cameron*, held that the minority language community has management and control regarding a school’s language and culture. The Court held that the determination of admission of children has an influence on language and culture. Needless to say, a rights holder has the right, under s. 23, to demand admission to a francophone school. Section 23 sets out three categories of citizens who have the right to enroll their children in a minority school. This does not mean that these three categories are exhaustive. The Supreme Court of Canada, in *Solski*, recognized that s. 23 must be interpreted in a broad

manner. In effect, the Court held that s. 23 applies to members of cultural communities which are neither francophone nor anglophone.

[761] Similarly, the Ontario Court of Appeal in *Abbey* determined that admission of the children of non rights holders would render the sisters and brothers rights holders under s. 23(2). The Court relied on the comments of Dickson J. In *Mahe*, concluding that the parents contemplated by s. 23 are not necessarily part of a minority language group. The Court emphasized that the more people there are who are fluent in the two official languages of Canada, the easier it will be for language minorities to flourish within society.

[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* and *Nguyen*), 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.

[765] The GY submits that the CSFY has not authority to admit non rights holders, partly because these admissions could have a negative effect on rights holders. This argument is without merit. The GY argues that only a child whose rights flow from the three categories contemplated in s. 23 can attend the francophone minority school. However, the GY enlarged those three categories in adding immigrants to the definition of eligible students in s. 5 of the regulation. This takes us back to the letter of May 17, 2010. The Court rejects the suggestion that the chosen time for delivery of this letter was nothing more than an unfortunate coincidence. Ms. Whitley stated that the letter was sent following the recommendations of two committees in

order to ensure that only rights holder children attend the francophone school, and to avoid encroachment on the Catholic student population. She stated that the GY was “tightening up”, and that the approach adopted was necessary to be in a position to collect registration data. Contrary to her testimony, the May 17, 2010 letter indicates that the reason for enforcement of the regulation was the new staffing formula. In other words, an increase in the number of EET students would increase the GY’s expenses. It is true that the number of students can affect EET’s costs and needs in terms of staff and facilities. However, the GY is responsible for the education of all Yukon children, regardless of whether they attend a francophone or anglophone school. I reject the GY’s argument, given that it is not based on the proposition that the CSFY’s admissions policy threatens the fulfilment of s. 23 nor that it threatens the majority English language in the Yukon. Further, the GY did not raise problems in relation to management, nor the admissions policy. There was no evidence which would justify taking from the CSFY its power to manage admissions.

5) Construction

[766] According to the CSFY, the numbers warrant construction of an independent secondary school for Académie Parhélie. It submits that there is currently a lack of space. As well, there must be substantive equality in order to ensure a level of education equivalent to that of the majority. In other words, the CSFY must be in a position to respond to the particular needs of the students who attend the francophone school, not only in terms of language and culture, but also with respect to pedagogical equivalency, francization and retention.

[767] The GY asserts that it is not necessary to build a new separate building for the secondary level, nor to enlarge EET. The GY made the following arguments:

- the number of students does not justify the construction of a separate secondary school;
- such a school would necessarily and inevitably be the smallest in Whitehorse;
- it is not necessary to build a new secondary school simply in order to offer industrial arts classes;
- it is the programming, more than the facilities, that attracts students.

[768] The GY takes the position that EET is large enough to meet the current and future needs of the rights holders. According to the GY, any overcrowding is the result of inadequate management of available resources and spaces. Specifically the CSFY offers a kindergarten 4 program which takes up two classrooms. As well, the CSFY does not have enough split or combined classes. The GY gave as examples of inadequate management the scheduling, the lack of an agreement for the use of facilities in other schools for industrial arts, the failure to share other resources in Whitehorse, and admission of non rights holders. Finally, the GY disagrees that it is necessary to have additional classes for special needs children.

[769] EET was built in 1995-96. The GY drafted the "Requirements Specifications" of June 15, 1994 (exhibit 236). In the introduction, the GY wrote the following: "Due to the increased demand for French First language education, the Government has decided to initiate the planning

and design of a new French First language school. The project is to be 50% cost-shared with the Federal Government”. The plan provided for a school with a capacity of up to 250 students from kindergarten to Grade 12. The original design of May 15, 1995 contemplated an art class as well as an industrial arts workshop for 24 students (exhibit 512). The workshop was to have six work stations, each of which could accommodate four students. The document also had a clause which anticipated the eventual addition of eight classes: “The design of the school shall allow for the future addition of up to eight classrooms. These do not necessarily have to be in the same location. The “future addition” shall be indicated on the Schematic Design but need not be included in any detail in the working drawings” (5.0.1 General, exhibit 236).

[770] According to Ms. Beaudoin, the bids exceeded the budget by \$600,000.00. As a result, one secondary class and the industrial arts rooms were removed.

[771] In 1996, 113 students attended EET. In 2010, there were 184 students at EET from kindergarten 4 to Grade 12 (exhibit 50D). Mr. Callas and Mr. Woods stated that the maximum capacity of EET, set at 250 in 1996, had increased to 296 (exhibit 50A), due to new utilisation factors.

[772] It is helpful to recall that one must always take into account not only the current number of students attending a school, but also those who might eventually avail themselves of the services, in other words, an estimated figure between the known demand and the total number of students who could eventually attend (400 to 435). None of the witnesses predicted registration of 100% of the eligible students. However, it is reasonable to anticipate a participation rate of

80%. This goal of 80% was set by the GY (exhibit 56 - Schedule 3). An eventual 80% participation rate translates, at the time of the trial, to between 320 and 348 students. However, it must be noted that the figure of between 400 and 435 rights holders does not include the students in kindergarten 4 (21 in 2010), kindergarten 3, nor non rights holders. If these other three categories of students occupy school space currently, and into the future, those students must be added to the number of rights holders who could eventually attend the francophone school. The total number of students would therefore be around 400.

[773] What proportion of these 400 students would be in secondary school? There are currently 41 students at the secondary levels. The actual retention rate for the secondary is around 15% (Mr. Kubica's evidence). If one applies an 80% retention rate to the students currently enrolled in Grades 1 to 6, or 102 (exhibit 505), the number of secondary students would be around 80 in 2016. However, one cannot ignore the fact that the current enrollment rate of rights holders is around 50%. If the enrollment rate for Grades 1 to 6 was 80% instead of 50%, the number of students would increase from 102 to 131. Similarly, if the retention rate of the elementary school students were to remain at 80%, the number of secondary students would rise to 105 in 2016.

[774] According to Dr. Landry, a forecast of secondary students 150 would be optimistic. All three experts, Dr. Landry, Mr. Bilodeau and Mr. Kubica, confirmed that a population of between 90 and 125 secondary students would be viable from a pedagogical point of view. The GY presented no evidence to the contrary.

[775] In conclusion, the determination regarding the space required must take into account the

number of persons who will eventually attend EET (320 to 400 of which 90 to 150 would be secondary students), and not the current figure (184). Therefore, even if only 320 people eventually chose to attend the francophone school, this would exceed EET's maximum capacity of 296, as set by the GY.

[776] Is there currently a lack of space at EET? Before answering this question, it is necessary to consider whether pre-school 3 and 4 should be located in EET. Regarding pre-school 3, Dr. Landry confirmed that there was a trend toward integration of pre-schools within the minority community school centres. Mr. Bourcier and Mr. Champagne confirmed that pre-school assists in the francization of many children of rights holders by enabling them to acquire sufficient language capacity in order to attend French kindergarten.

[777] The GY agreed with the CSFY's position regarding the importance of having pre-school children between 3 and 5 years old, within the school itself. The GY recognized this six years ago (exhibit 56). Page 5 of Schedule 2 states: "This pre-school program for 3 to 5 year-olds plays a dominant role in the health and survival of the school. It is, in certain ways, the "nursery" of the French school. Situated in the school itself, the program provides a cultural identity element that encourages preschoolers to learn and to live in French." Therefore, it is clear that pre-school 3 has a place in the school setting for pedagogical, cultural and language reasons. As for kindergarten 4, the CSFY established this program under s. 33 of the *Education Act*. The GY, as confirmed by Ms. Whitley, provides the financing for the full-time pre-school 4. As well, the GY integrated the teaching staff for pre-school 4 into the YTA regime. I find that the explanations or comments of Ms. Whitley and Mr. Woods concerning pre-school 4 in other

Yukon schools have no substantive relevance.

[778] Many witnesses commented on the current use of space at EET, including Mr. Kubica, Mr. Champagne, Mr. Blouin, Mr. McAskill, Mr. Woods and Ms. Whitley. The comments of the expert, Mr. Kubica and Mr. Champagne are the most reliable and relevant.

[779] Mr. Champagne, principal of EET, explained in detail the reasons why EET did not have enough space (use of EET for 2010-11, exhibit 504). Mr. Champagne explained, referring to exhibit 505 (“Prévisions pour 2010-2014”/”2010-2014 Forecast”), the needs in the area of facilities. He also noted a temporary need in September 2011 for two portables to accommodate two resource rooms for special needs students. Mr. Blouin also explained that EET lacks the space required to meet the needs of the secondary curriculum, as well as for resource rooms.

[780] Mr. Kubica, commenting on school use and capacity, discussed three types of capacity test: “raw capacity”, “ideal capacity” and “practical capacity”. The first, “raw capacity” is defined as follows: “maximum number of students per room based upon the Yukon Teachers Association's collective agreement” (p. 20, exhibit 50). The “ideal capacity”(or “net capacity”) test is the “maximum number of students less some factor accounting for unequal distribution of students per grade”. In other words, one multiplies the “raw capacity by a multiplier which functions as an indicator of how spaces utilize within the school in a more flexible manner. The hypothesis guiding the philosophy of using the multiplier is that the larger the enrolment, the more efficient the use of space”. Mr. Kubica defined “practical or usable capacity” as being “actual usable space as determined by programming needs, student needs and student

distribution changes” (p. 20). Mr. Kubica added: “Practical capacity is what actually happens within the school” (p. 21). He explained:

In the case of École Émilie-Tremblay, the original design of the school accounted for eight classrooms for the elementary school (one for each grade from K-7). At this time, two K4 classes and an extra kindergarten class has resulted in a requirement of three rooms not accounted for during construction. Spaces identified for specialty rooms are required as classroom space.

[781] Mr. Kubica not only confirmed that there is a lack of physical space, but he also identified a lack of dedicated spaces, which are required so that the CSFY and EET can compete with the three anglophone secondary schools in Whitehorse. There must be better facilities, programs and course choice in order to compete with the three anglophone schools, failing which the secondary students will continue to leave for the three anglophone secondary schools in Whitehorse. Mr. Kubica stated (p. 32):

A minimum facility requirement is necessary to be competitive. Without an industrial arts facility, an accessible music room, an adequate gymnasium space, a full time library and a multi-use space for special needs students, distance education and seminar rooms, École Émilie-Tremblay will not be able to compete with the anglophone secondary schools and therefore will continue to fail to retain secondary students in a French environment.

[782] Further, according to him EET must have : “a weight room, cafeteria, a dedicated special needs space...” (p. 30). The Court accepts Mr. Kubica’s evidence and expert opinions given his very close involvement since 1971 in the area of education in the Yukon. His particular knowledge regarding timetabling, course choice, programs, his exhaustive research in order to prepare his expert report (exhibit 50), and his particular study of EET’s needs, support his opinions and recommendations.

[783] The GY relied principally on the evidence of Mr. Woods, Ms. Whitley and Mr. McAskill regarding space. Mr. Woods confirmed that a school housing elementary and secondary programs under the same roof faces many challenges in terms of space and staff. He identified a number of factors having an impact on the complex task of timetabling (para. 532 above). Regarding the usage plan for EET (exhibit 504), Mr. Woods suggested combining the two kindergarten 4 classes. He recognized, however, that it would be necessary to take into account what kind of students were involved, before combining them. He added: “Early intervention is the most important thing. Kindergarten 5 must have quiet spaces, a resource room...”. Mr. Woods described the industrial arts program as being worthwhile for anglophone students in Whitehorse. Mr. Woods never replied to the question as to whether francophone students would also need such a program.

[784] As mentioned above, I considered Mr. Woods’ testimony not to be very reliable, especially in light of the contradictions between his responses in examination in chief and those given during cross-examination. However, his comments on timetabling were helpful. Mr. Woods stated that he had never attended at EET. Before testifying in court, he had never looked

at the school usage plan (exhibits 504 and 50E). According to Mr. Woods, the best use of space takes into account the actual student profile. However, Mr. Woods confirmed that he did not know the students. As a result, his suggestions and observations are not very convincing.

[785] Ms. Whitley, in looking at the EET map together with exhibit 504 and the 2010-2011 usage, stated that she “would deploy staff as necessary to meet the needs of the students”. She did not have a good understanding of the concepts relating to determination of capacity: “raw capacity”, “ideal capacity” or “practical capacity”. She said: “the capacity as I understand, varies depending on who does it”. She added: “raw capacity is what you can manage”. The comments are not consistent with the evidence of the two experts, Mr. Kubica and Mr. McAskill. Ms. Whitley confirmed that the GY finances EET’s full-time kindergarten 4 program and provides teachers. According to Ms. Whitley, the CSFY had the right to offer this program. Ms. Whitley was of the view that the space at EET was poorly managed. She stated that she drafted a usage plan. However, she never replied to the question as to whether she had conveyed this plan to EET. Moreover, her opinions on the advantages of combined classes over single grade classes were contrary to all of the other opinions expressed in this regard during the trial. Finally, Ms. Whitley’s evidence is not reliable. The Court found that she tailored her evidence regarding resource rooms in order to establish that EET did not need this type of space.

[786] Mr. McAskill was qualified as an expert witness in the area of “use and planning of educational facilities” (exhibit 532 and 533). Mr. McAskill discussed the concepts of “raw capacity” and “ideal capacity”. However, he never dealt with “practical capacity” as identified by Mr. Kubica. Mr. McAskill believed that EET had access to an industrial arts room at F.H.

Collins School. According to him, the gymnasium was large enough to accommodate up to 500 students. He confirmed that the student meeting area, which he described as welcoming, was temporarily located in a hallway. He noted that other schools offer a half-day kindergarten 4 which allows combination of kindergarten 4 with kindergarten 5. Mr. McAskill admitted that he had not prepared a school plan reflecting the actual situation as identified by Mr. Champagne. He explained that he had not been asked to prepare such a plan. He was not aware that the combined 7- 8 class had 25 students. Mr. McAskill confirmed that he had not taken into account s. 23 of the *Charter* in preparing his opinion. He added that the francophone school was “entitled to equal education”.

[787] To summarize, according to Mr. McAskill EET had sufficient space, in light of the fact that the maximum capacity of 289 or 296 students (exhibit 50A) exceeds the current student population. The Court cannot accept this opinion. Mr. McAskill did not take into account the third factor (“practical capacity”) in considering use of the facilities. Further, he based his opinion on a number of erroneous assumptions. He was poorly informed regarding the kindergarten 4 program. Finally, he did not take into consideration the particular needs of a francophone school.

[788] Having thoroughly considered the evidence of Mr. Champagne and that of the expert, Mr. Kubica, the Court concludes that there is not only a lack of space at EET, but there is an absence of certain essential rooms, such as an industrial arts workshop and resource rooms.

[789] This raises the question as to whether it is necessary to build an independent secondary

school or enlarge EET. The expert witnesses, Mr. Bilodeau, Dr. Landry and Mr. Kubica, favoured an independent secondary in order to compete with the other secondary schools in Whitehorse. Dr. Landry emphasized that the minority school becomes a real community centre.

[790] As worthy as these opinions may be, the Court must consider construction costs and the history of EET.

[791] Neither the CSFY nor the GY provided a reliable estimate of construction costs. Certain hypotheticals were put to Mr. Hrycan, deputy minister of finance, regarding construction at a cost of \$15 to \$45 million. No evidence was presented regarding the construction costs for a second gymnasium. Moreover, the GY adduced no evidence to the effect that the construction costs would be excessive. The only reliable evidence regarding construction costs is found in the report of the expert, Mr. Kubica, where he states that the current cost of a new school building are around \$4,500.00 per metre (p. 33, exhibit 50).

[792] According to Mr. Hrycan, the GY had, in 2010, a surplus of \$33 million. Mr. Hrycan confirmed the figures in the "Consolidated statement of financial position as of March 31, 2010" (exhibit 531), which can be summarized as follows:

- provisional budget for construction of F.H. Collins : \$44 million;
- capital projects budget for the MEY for 2010 : \$11,900,000.00;
- approved capital budget of the Yukon for 2010 : \$263 million;
- total MEY budget for 2010 : over \$130 million.

[793] I conclude that the GY would be able to undertake construction if the costs did not exceed \$30 million. The GY would not have to seek other sources of revenue nor cut other projects. Given the GY's positive financial position, the GY cannot rely on a lack of funds to justify non-compliance with s. 23.

[794] However, new construction financed with public funds must be undertaken prudently and efficiently. An independent school would entail additional costs for an additional gymnasium, and apparently the annual cost of a second school principal position and an assistant principal. Regarding the cost of a gymnasium, the Court can rely on the amount put forward by Mr. Kubica: \$4,500.00 per metre. EET's existing gymnasium is 400 square metres (p. 6, exhibit 236). According to these figures, the additional amount for a second gymnasium would be approximately \$1,800,000.00 (400 X \$4,500.00). The annual cost for a second school principal of between \$75,000.00 to \$100,000.00 per year, could be avoided in the case of a school housing pre-school to Grade 12.

[795] The Court finds that the appropriate solution is to enlarge EET by way of construction on the existing grounds. In addition to the financial reasons listed above, the Court is of the view that this solution would result in a real minority community centre. Such a centre is very important to language and cultural development as well as the achievement of pedagogical goals. In terms of pedagogy, retention depends on substantive equality with anglophone schools, especially regarding the ability to offer more courses and programs, including an industrial arts course and resource rooms.

[796] In any event, even if the secondary program is located in the same building as the elementary program, there are various ways of making the secondary, for all practical purposes, separate and independent. Mr. Bilodeau and Dr. Landry testified about this, referring to the experience in other Canadian jurisdictions. Having said this, there will have to be two assistant principals, one for the elementary and one for the secondary, and related supports.

VI *Languages Act*

i) Law - Case Law

[797] A side-by-side comparison of the *Charter* and the *Languages Act* reveals the origins and nature of language rights in the Yukon.

<i>Canadian Charter</i>	<i>Languages Act</i>
16(1) (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.	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.
...	(2) The Yukon wishes to extend the recognition of French and the provision of services in French in the Yukon.
	...

<p>(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.</p>	<p>2 Nothing in this Act limits the authority of the Legislative Assembly to advance the equality of status of English, French, or a Yukon aboriginal language.</p>
<p>20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where...</p>	<p>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, and has the same right with respect to any other office of any such institution if...</p>

[798] In *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12 47 at para. 47, the Yukon Court of Appeal confirmed that the *Languages Act* represents an historic compromise between the Yukon and Canadian governments to ensure official recognition of bilingualism in Canadian governmental institutions. Although Parliament excluded the Yukon from application of the *Official Languages Act*, R.S.C. 1985, c. 31, s. 27(1) of the *Yukon Act*, S.C. 2002, c. 7 requires Parliament's consent regarding any amendment to the *Languages Act*, thus creating quasi-constitutional obligations:

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.

[799] Therefore, the statute must receive a purposive interpretation according to its purpose, as stated in *Beaulac* at para. 25 and in a manner which is compatible with s. 23 of the *Charter*. See also *Fédération Franco-Ténoise v. Canada (Attorney General)*, 2006 NWTSC 20 at para. 132, varied: 2008 NWTCA 5.

ii) Analysis

[800] According to the CSFY, s. 27(1) of the *Yukon Act* renders the *Languages Act* quasi-constitutional. Section 6 of the *Languages Act* is identical to s. 20 of the *Charter*, and therefore the *Languages Act* prevails over any other statute, regulation or policy adopted by the GY. The departmental policy entitled “French Language Policy (in force May 12, 1994)” established English as the GY’s language of the workplace (policy 1.7, s. 1.3.2.1). The CSFY submits that this policy does not comply with the *Languages Act*.

[801] The GY submits that s. 6 of the *Languages Act* applies to the public and not to CSFY employees as such. According to the GY, s. 6 grants no rights to GY employees, nor to employees or members of the CSFY regarding language in the workplace. The GY asserts that if there is such an obligation, the GY complies with it in translating correspondence. Active offer, although it might be desirable, is not required by s. 6.

[802] Before embarking on an analysis of these arguments, it is useful to review the evidence. Such a review reveals that this boils down to a somewhat practical issue.

[803] M. Ruest, chair of the CSFY, made a number of requests of the GY for more services in French. The response was always the same: English is the language of the workplace in the Yukon.

[804] Mr. Champagne, principal of EET, noted that EET staff members are required to communicate in French in and outside of the classroom in order to encourage the students to speak in French. In fact, s. 12 of the *French Language Instruction Regulation* (O.I.C. 1996/099) requires the CSFY to use French as the language of the workplace as well as for the management of any French school under its authority. Despite the fact that French is a professional requirement, every communication with the GY takes place in English, and staff cannot insist on using French. Mr. Champagne made reference to the pay cheques, and the offers of employment for French positions, which are solely in English.

[805] Ms. Taillefer, director of education, testified that daily communications with the GY take place in English, while the work at the CSFY is done in French, in compliance with the law. As a result, all daily communications must be translated. She confirmed that this is an impossible situation. When they ask for service in French, the GY responds that it is an employee matter and that the working language is English.

[806] Mr. Bourcier also testified regarding problems in relation to written and oral

communications with the GY.

[807] Ms. Stehelin, director of human resources, confirmed that her department does not have the ability to translate documents. She confirmed that the employment offer for the director of education of the CSFY was in English. Her department is small and does not have the capacity to do translations. Ms. Stehelin explained that the pay cheques are in English because there are no bilingual employees in the relevant departments. She confirmed that the department of human resources does not publish any documentation in French.

[808] Ms. Daws, Public Service Commissioner, indicated that none of the 90 positions in her department is designated as a bilingual position. The Commission's policy is that English is the language of the workplace, as provided in the departmental policy. Ms. Daws confirmed that the Commission does not draft any documents in French. Further, none of the employees would be able to provide service in French to the CSFY.

[809] Ms. Dekuysscher, director of finances, confirmed that none of the 15 employees in her department at this time speaks French. Her department has no position which is designated as bilingual. Ms. Dekuysscher confirmed that her department works only in English and communicates in English with EET, as it does with every other school, and all of the meetings with the CSFY occur in English. She explained that her department had not yet determined the annual translation costs for the CSFY.

[810] Ms. Lemay, director of programs and services in MEY, noted that there is a bilingual

support officer for French services within her department. According to Ms. Lemay, there is no professional training course for teachers in “French first language”. She confirmed that her department’s website is not yet available in French.

[811] Ms. Whitley, assistant deputy minister, admitted that the delays with respect to translation at the GY are much too long. She noted that translation is very costly. According to Ms. Whitley, the department of education was working to resolve the problem with respect to the computer system YSIS, but there was no set timeline. For her, the inability of YSIS to add accents or cédilles to names was not a major concern.

[812] As mentioned above, s. 12 of the *French Language Instruction Regulation* (O.I.C. 1996/099) requires the CSFY to use French as the language of the workplace as well as for the management of any French school under its authority. This regulation is entirely appropriate and reflects the GY’s recognition of its obligation to respect the rights and privileges of the francophone minority and to pass regulations which are required for the implementation of the rights under s. 23 of the *Charter*. The regulation is necessary, given the CSFY’s mandate and duty to provide instruction and management in French in the Yukon (s. 10 of the Regulation 1996/099). The *Education Act* imposes a number of obligations on the CSFY. Most of these obligations are listed in s. 116 of the *Education Act*. The CSFY is required to hire and manage its staff. It is difficult to imagine how the CSFY, as a francophone institution, could fulfill this obligation in English. The CSFY is required to provide educational programs which comply with the law. Again, it is difficult to imagine how the programming for a French minority language

school, aside from its English courses, would take place in English. These are only a couple of examples.

[813] As the Supreme Court emphasized in *Arsenault-Cameron*, the GY will always have a legitimate interest in the substantive content and standards of educational programs. From a purely practical point of view, it is difficult to imagine how the GY can fulfill its obligations in English, if the CSFY and all of its staff communicate in French, as required by GY's regulation. There is a total disconnect.

[814] The GY relies on the fact that the CSFY's staff members are GY employees. Therefore, they are part of the public service whose working language is English. The simplest solution would be for the CSFY staff to cease being GY employees, as requested by the CSFY. This is unnecessary. The GY has recognized that CSFY staff members are not, in any practical sense, GY employees but rather are CSFY employees. The GY adduced evidence establishing that the CSFY's teaching and non-teaching staff are GY employees for purely administrative reasons, i.e. to allow them to take advantage of the pension and benefits plans. However, the GY refuses to provide pay cheques, employment contracts, or any other document exchanged with the CSFY or its staff, in French, except for a few bilingual letters. The GY's position in this respect is somewhat ironic, given that the pension plan is that of the federal government and that all members have access to information in the language of their choosing, either French or English.

[815] The proposed partial solution of translation of documents is inadequate. If the GY does not have the staff needed to manage, with the CSFY in French, it is up to the GY do the

translation so that it can fulfill its obligations.

[816] The CSFY submits that the departmental policy contravenes the *Languages Act*. The policy makes English the administrative language of the workplace for the public service. The *Languages Act* provides that French and English are the official languages of Canada, and that the Yukon agrees to take the steps necessary for implementation of the equal status of French and English in the Yukon. Section 1(2) provides: “The Yukon wishes to extend the recognition of French and the provision of services in French in the Yukon”. In fact, s. 6 of the *Languages Act*, which is identical to s. 16 of the *Charter*, results in the public having the right to use French or English in order to communicate with every level of the GY. This same wording is included in the departmental policy on French services (policy 1.7). The GY’s objective is provided in s. 1.3.1 of the policy:

In accordance with the *Languages Act* the Government of Yukon is committed to extending the recognition of French and to ensuring any member of the public who wishes to communicate with any government department, agency or institution can do so in either English or French and can receive government services in the French language from head or central offices and from other offices.

[817] Section 1.3.2.1 under “Recognition of French” provides:

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.

[818] Policy 1.7 sets out guaranteed services in French (1.3.2.2), other services in French (1.3.2.3), service priorities (1.3.2.5), quality services (1.3.2.7), use of French in the courts (1.3.2.8), personnel and employment practices (1.3.2.9), and legislation in English and French (1.3.2.10). The GY recognized that the financial responsibility for this implementation of bilingualism in the Yukon rested with the federal government. Section 1.3.2.11 of policy 1.7 provides:

The Government of Canada is responsible for all costs incurred in developing, enhancing and implementing French language rights and services in the Yukon required by the enactment of the *Languages Act*. This means the federal government is responsible for funding, on an ongoing basis, all additional costs incurred by the Government of Yukon for implementation of French language services.

[819] Part 2 of Policy 1.7 on French services sets out roles and responsibilities. Section 2.8 described the roles and responsibilities of the Public Service Commission as follows: “develops

and implements personnel policies respecting the implementation of French language services in conjunction with departments and agencies....”.

[820] It bears noting that the guarantees provided in ss. 16 and 20 of the *Charter* are very similar to those provided in ss. 1, 2 and 6 of the *Languages Act*. They have the same purpose. As mentioned above in the discussion regarding the legislation and case law, the *Languages Act* creates quasi-constitutional duties. For this reason, under s. 27 of the *Yukon Act*, the obligations may not be repealed, amended or otherwise rendered inoperable by the legislature without the concurrence of the federal government.

[821] Given the foregoing, I find that the provision making English the only administrative language of the GY public service workplace to be unacceptable to the extent that it prevents communication in French between the GY and those who are required by law to work in French. This departmental policy contravenes the guarantees in the *Languages Act*. A consideration of policy 1.7 on services in French reveals a recognition of the obligation to provide governmental services in French and English. The GY submits, through its counsel’s brief, that the GY has no obligation to make an active offer. This argument is curious, given that policy 1.7 consists almost entirely of active offers, except for the provision regarding the public service’s administration language of work. Even in this respect, s. 2.8 of the policy contemplates implementation of French services for the public service.

[822] Needless to say, the policy making English the administrative language of work in the public service prevents the GY from achieving the purpose of the *Languages Act* as provided

under s. 1 of the statute. Moreover, s. 6 of the *Languages Act* requires the GY to communicate or provide service in French.

[823] The GY has accepted that some GY offices, due to their nature or function, must communicate and provide service in both languages. Under the *Languages Act* and in compliance with s. 6(2), the GY passed a regulation by order in council 2003/79. Section 1 of this regulation provides that, due to their nature, the Department of Energy, Mines and Resources, the Client Services and Inspection Branch, the Forestry Branch, the Lands Branch, the Mining Lands Unit, the Yukon Geological Survey, the Department of Environment, the Water Resources Branch, and the Yukon Water Board must provide communications and services in French and English. Despite the fact that they have no obligation to work and manage solely in French, the GY recognized the need for these offices to communicate and provide service in French. The CSFY is required and mandated to work and manage in French only. Similarly, a person who is required to provide service in French should be able to benefit from the same right. This is especially true here, given the GY's acknowledgement that the persons in question here are, for all practical purposes, CSFY employees and not GY employees.

VII Fiduciary Duty

i) Law - Case-Law

[824] Fiduciary law focuses especially on the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances: *Galambos v. Perez*, 2009

SCC 48, [2009] 3 S.C.R. 247 at para. 67. The particular relationships with which fiduciary law is concerned are those in which one of the parties has a discretionary power over the legal or vital practical interests of the other party: *R. v. Guerin*, [1984] 2 S.C.R. 335 at p. 384. The discretionary power can arise by statute, agreement, or possibly from a unilateral undertaking: *Galambos*, para. 84.

[825] Simply put, the duty results from the nature of the relationship. In *Frame c. Smith*, [1987] 2 S.C.R. 99, La Forest J. set out three general characteristics of the relationships in which a fiduciary duty has been imposed (p. 201):

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[826] In *Galambos* at para. 69, Cromwell J. noted that an undertaking of loyalty is a fundamental characteristic of a fiduciary relationship. The fiduciary undertakes to act in the interests of the other party.

[827] The Crown must act in the public interest. This duty can give rise to claims of a fiduciary relationship. The Supreme Court in *Guerin* recognized such a relationship in that case between

the federal government and aboriginals. However, Dickson J. stated:

104 ...fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.

[828] The courts have also considered the issue in the pension context. In *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, the Crown had managed, as a fiduciary, pensions and other benefits for disabled veterans. In a similar case, *Bennett v. British Columbia*, 2009 BCSC 1358, 77 C.C.P.B. 56, Dorgan J. stated:

60 ...I pause here briefly to note that [the three] characteristics of fiduciary

relationships are not determinative; a relationship that happens to have all three characteristics is not automatically fiduciary in nature. If it was, the Crown would probably find itself under a fiduciary duty in nearly all of its relationships with its citizens as the relationship between Crown and subject frequently has all three characteristics. In my view, something more is needed.

61 That “something more” is a reasonable expectation...

[829] Dorgan J. cited *Hodginson v. Simms*, [1994] 3 S.C.R. 377, in which La Forest J. noted at para. 33 that there has to be evidence that the parties mutually agreed that one of them relinquished his own self-interest and agreed to act solely on behalf of the other party. Dorgan J. held that where the Crown is concerned, “self-interest” means “all other aspects of the public interest”:

62 ...could the plaintiff Class have reasonably expected the Crown to act in their best interests potentially at the expense of the public interest or the interests of other Pension Plan beneficiaries?

63 That the Crown can owe fiduciary duties in certain circumstances is not in issue. Most often, these duties arise when the Crown has undertaken an obligation of a private law nature. Conversely, when its duties are of a public law nature – when a number of competing public interests are at play – it is more likely that the Crown has not entered into a fiduciary relationship. I take these aspects of the

common law as part of the background that necessarily informs the reasonable expectations of the parties.

[830] However, on appeal, the Court approved claims, as part of the proposed class action, based on the breach of fiduciary obligations with respect to the entire class of retired individuals: 2007 BCCA 5, 234 B.C.A.C. 180 (leave denied: [2007] S.C.C.A. No. 100).

[831] The abolishment of funding for denominational schools in Newfoundland gave rise to a claim based in part on fiduciary duty. The Court of Appeal dismissed the appeal, confirming that the *Charter* itself did not provide any guarantee to denominational rights: *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12, 183 D.L.R. (4th) 225 (leave denied: [2000] S.C.C.A. No. 191).

[832] In *Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411 (leave denied: [2008] S.C.C.A. No. 350), a proposed class action sought damages against school boards and the Minister of Education for breaching autistic students' right to equality. Lang J.A. held:

45 ...Authorson was a class action on behalf of veterans whose pensions and allowances were administered by the Department of Veterans Affairs. However, this is not a case where the respondents were charged with administering the appellants' funds. Rather, it is a case about the allocation of general revenues for the education of children, all of whom are vulnerable and many of whom have

disabilities analogous to those of the appellant children.

47 Where the government has duties to multiple interests, the government is likely not in a fiduciary relationship, but rather is exercising a public authority governed by a relevant statute: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 385, *Gorecki v. Canada* (2006), 265 D.L.R. (4th) 206 at para. 6 (Ont. C.A.). By contrast, the government may be in a fiduciary relationship where there is legislative instruction requiring the government to act in an individual's interest, or where there is an assumption of responsibility on the part of the government: see the *Authorson* decisions.

[833] The Supreme Court in *Alberta c. Elder Advocates of Alberta Society*, 2011 SCC 24, recently had the opportunity to reconsider the general criteria for a fiduciary duty and specifically, fiduciary duties in the governmental context. Given that this decision was only rendered in May 2011, it was not included in the parties' arguments. The Supreme Court summarized the applicable criteria as follows:

36 In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries

that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[834] The CSFY submits that the above general principles also apply to the GY. However, as the Supreme Court explained:

37 ...However, the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances.

[835] McLachlin C.J. analyzed, at paras. 37 to 54, fiduciary duties in the governmental context. The Supreme Court, in effect, reiterated and refined as follows the criteria set out in *Guerin*, *Galambos*, *Frame*, *Authorson*, *Hogan*, *Hodginson* and *Sagharian*. First, does the government's duty arise from statute or by implication? (paras. 45 to 46). Is there evidence establishing a defined class of persons to whom the government owes an exclusive duty of loyalty? (para. 49). Does the government power in question affect a legal interest? (para. 51). Finally, is the degree of control exerted by the government over the interest in question equivalent or analogous to direct administration of that interest? (para. 53).

[836] This case law reveals that an evaluation of the Crown's duties entails a largely contextual and factual analysis.

ii) Analysis

[837] The CSFY alleges that the GY owed it a fiduciary duty regarding the funds received from Canadian Heritage for French first language instruction. The CSFY submits that the GY breached this fiduciary duty in reallocating \$1,954,228.00 from the French first language program to the French second language program. According to the CSFY, the facts in this case establish a fiduciary duty, as described by the Supreme Court in *Frame v. Smith* (and confirmed in *Elder Advocates*). Further, the GY acted in bad faith and under false pretexts, thereby breaching its fiduciary duty. The GY submits that the criteria for a fiduciary duty are not met in this case. If, however, the Court finds that a fiduciary duty existed toward the CSFY, then the GY argues that it has neither breached it, nor failed in its duty through fraud, disloyalty or bad faith.

[838] The following is the most relevant evidence on this issue. The protocol for the bilateral agreements for French instruction from 2005 to 2009, between the Canadian government and the ministers of education across Canada, was signed on November 3, 2005 (« Protocol for Agreements », exhibit 209). The CSFY was not party to that protocol. Appendix I of the protocol shows a total budget for 2005 to 2009, and more specifically the additional funds provided by the federal government for minority language instruction and for second language instruction. The federal government's contribution for minority language instruction for 2005-06 is \$1,099,525.00, and \$23,664.00 for second language instruction. For 2006-07, the additional funds for minority language amount to \$1,230,401.00, and \$26, 023.00 for second language instruction. For 2007-08, the amount for minority language instruction is \$1,245,401.00 and \$26,

222.00 for second language instruction. For 2008-09, the amount paid by the federal government to the GY for minority language instruction is \$1,245,401.00, and \$26,222.00 for second language.

[839] In the January 18, 2006 letter from Canadian Heritage to Lee Kubica (exhibit 51), the writer, Hubert Lussier, stated that his department at Canadian Heritage had received a draft action plan regarding core and additional funding for French education. It is significant that a carbon copy of this letter was sent to Gilbert Lamarche. Mr. Lussier notes that the GY's proposals would have the effect of reducing the amount of the contribution to French first language by \$200,355.00 for 2005-06, compared to the prior year. Regarding additional funds for second language instruction, Mr. Lussier wrote:

As to additional funding for French Second Language (FSL), the territorial request for federal funding is greater than the amounts that have been identified in the *Protocol for Agreements for Minority Language Education and Second Language Instruction 2005-2006 to 2008-2009*. I understand, therefore, that the Yukon is requesting a transfer of federal funding between the two linguistic objectives to meet the territorial needs for French as a second language. 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... Therefore, to 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 funding for FFL and a transfer of federal additional funding from FFL to FSL.

[840] The January 23, 2006 letter to Hubert Lussier appears to be a draft written by Gilbert Lamarche (exhibit 36). This draft contemplates that a carbon copy would be sent to Anita Simpson and Edmond Ruest. Clearly, this letter is a reply to Mr. Lussier's letter of January 18, 2006. Mr. Lamarche sent a letter dated January 30, 2006 to Guylain Thorne at Canadian Heritage (exhibit 37). This time, the letter indicates that carbon copies would be sent to Anita Simpson, Edmond Ruest and Barbara Perron. The content of the letter is identical to the one dated January 23, 2006, except for the addressee and the addition of a c.c. to Barbara Perron. The letter indicates that the Yukon was relying on clause 6.4.3.3 of the protocol for agreements (exhibit 209) in requesting approval for a transfer of French first language funding to French second language, over the four years of the agreement as follows:

- 2005-06: \$384,025.00
- 2006-07: \$513,401.00
- 2007-08: \$528,401.00
- 2008-09: \$528,401.00

[841] These transfers total \$1,954,228.00.

[842] Mr. Lamarche wrote in this letter to Guylain Thorne at Canadian Heritage: "The Yukon Francophone School Board was consulted on this matter and agrees with the transfers". Mr.

Thorne acknowledged receipt of this letter on February 6, 2006 (exhibit 38). He confirmed approval of the transfer, adding that he expected that the funding would be transferred back at the end of the bilateral agreement: "... compensating for these transfers of additional funds before the conclusion of this agreement so as to restore balance among investments in the linguistic objectives of Canada's Action Plan for Official Languages". The Canada-Yukon Agreement on Minority-Language Education and Second Official Language Instruction 2005-06 to 2008-09 was signed on March 31, 2006 (exhibit 56). The preamble of this agreement confirms that the protocol for agreements (exhibit 209) was signed on November 3, 2005. This agreement was between the Canadian government and the GY. The CSFY was not party to this agreement. Clause 5.2.1 of the Canada-community agreement confirms regular funding of \$695, 000.00 for the four years of the agreement, exactly the same amount identified in the Appendix I budget of the protocol of agreements (exhibit 209). However, as for the additional funding set out in clause 5.3.1, the agreement contemplates minority language instruction costs for 2005-06 of \$715,500.00, instead of \$1,099,525.00 as provided for in the protocol signed five months earlier. The amount of the additional funding for minority language instruction for 2006-07 would be \$717,000.00 instead of \$1,230,401.00, as set out in the protocol. Similarly, the additional funding for 2007-08 is \$717,000.00, instead of the anticipated amount of \$1,245,401.00. For 2008-09, the same amount is set out for additional funding in the Canada-Yukon agreement, \$717,000.00 instead of \$1,245,401.00, as contemplated in the protocol. The difference between the additional amount negotiated in the protocol for French minority language instruction is exactly the same as the amount which the GY requested be transferred from the French language program to the French second language program: \$1,954,228.00 disbursed over four years.

[843] Mr. André Bourcier, chair of the CSFY, wrote a letter to Guylain Thorne on April 8, 2008 (exhibit 96). In this letter, the CSFY stated that Gilbert Lamarche's letter of January 30, 2006 was a falsehood and a lie. He maintains that no one, including the CSFY, had been consulted prior to this transfer. Mr. Guylain Thorne acknowledged receipt on May 9, 2008, with a copy to Gilbert Lamarche (exhibit 98). Mr. Thorne again wrote to Mr. Bourcier on December 15, 2008, repeating Canadian Heritage's wish to participate in a tripartite meeting between Canadian Heritage, the CSFY and the MEY (exhibit 99).

[844] The most relevant testimony in relation to this issue is that of Lee Kubica, Edmond Ruest, André Bourcier, Lorraine Taillefer, Elizabeth Lemay, Anita Simpson, Cyndy Dekuysscher and Christey Whitley. Mr. Kubica stated that Mr. Lamarche was an MEY employee under his direction, but not with respect to the bilateral agreements with the federal government. Mr. Lamarche was under the direction of the director of finances in that respect. Generally, Mr. Kubica confirmed that the CSFY would have apprised the GY of its needs, in anticipation of the upcoming negotiations with the Canadian government regarding the bilateral agreement. He stated that the CSFY did not participate in the negotiations. Mr. Kubica confirmed that he received the letter from Hubert Lussier of Canadian Heritage dated January 18, 2006 (exhibit 51). Mr. Kubica denied having received or seen a copy of the letter sent on January 30, 2006 by Mr. Lamarche to Mr. Thorne at Canadian Heritage (exhibit 37). It bears noting that Mr. Kubica is not one of the individuals indicated as having received a carbon copy of the letter. According to Mr. Kubica, he would not have approved the letter.

[845] In 2005-06, Mr. Ruest was director general of the CSFY. He said that he had never seen

the letters dated January 23, 2006 (exhibit 36) and January 30, 2006 (exhibit 37). According to Mr. Ruest, he was never consulted by anyone, including Mr. Lamarche, regarding the transfer of funding from the minority first language program to the French second language program. He would not have approved such a transfer. According to him, it would be ridiculous to accede to such a transfer. In fact, if he had known about these funds, he could have allocated them to other projects and needs. M. Ruest confirmed that the amounts reflected in the Canada-Yukon agreement dated March 31, 2006 (clause 5.3.1, exhibit 56) are the additional funds which he had indicated to Mr. Lamarche and other MEY employees. However, he said that he had calculated the proposed budget in consultation with Mr. Lamarche and the MEY employees, relying on their advice that the standard increase would be around 10% over the amounts in the prior bilateral agreement which ended in 2004. The CSFY's requests were prepared on the basis of this advice. The CSFY had no idea what amount had been negotiated between the federal government and the GY.

[846] Mr. Bourcier, chair of the CSFY, confirmed that he had never been consulted regarding the transfer of the funds. He stated that the tripartite meeting between Canadian Heritage, the CSFY and the GY never took place.

[847] Ms. Taillefer stated that she first saw the January 30, 2006 letter following a meeting with Mr. Lamarche. He had given her the letter, asking her to keep it confidential. He had added that the letter could assist the CSFY in its negotiations with the GY. She stated that Mr. Lamarche told her: [TRANSLATION] "You'll have the government by the balls". Ms. Taillefer immediately checked at the CSFY office and determined that the CSFY had never received the

letter. Further, Ms. Taillefer said that she obtained a letter from all of the board members and employees confirming that they had never received the letter.

[848] According to Ms. Whitley, her department requested a tripartite meeting as mentioned in the letter dated December 13, 2008 (exhibit 99), in spite of the letter's content. She stated that the meeting never took place because Canadian Heritage decided that it would not attend.

[849] Ms. Simpson was manager of administrative services until 2008. She played an important role with respect to the bilateral agreements. She explained that Mr. Lamarche had prepared the documents entitled "Canadian Heritage - Action Plan Financial Mapping by Objectives 2004-2005" (exhibit 184) and "Canadian Heritage - Action Plan Explanations by Objectives 2004-2009" (exhibit 185). The purpose of these documents was to obtain core funding and additional funding. Ms. Simpson confirmed that she received a copy of the January 30, 2006 letter. She tried to explain the letter by stating that the protocol was looked at (exhibit 209) before the difference of \$1.9 million between French first language and French second language was requested. She added that the request for the transfer was made only two months after signature of the protocol in November 2005, in order to avoid having to return monies to the federal government. If the money was not spent, it would be lost. Ms. Simpson did not ask whether the CSFY would be able to spend the money. She never answered the question as to how the GY would be able to decide, four years in advance, that the money would not be spent. She stated: "I can't answer that".

[850] Ms. Dekuysscher is the director of finances at the MEY. On July 3, 2008, the GY and the

CSFY signed an agreement protocol (exhibit 82). When she was asked to explain why the funding for 2008-09 of \$1,340,617.00 was not paid by the GY to the CSFY, she replied that the document seemed to indicate that the \$716,800.00 was an annual operations grants and that the new funding requested in the amount of \$623,817.00 had not been anticipated. In fact, the amount for new expenses or new funding for 2008-09 of \$623,817.00 was never paid by the GY. It is significant that this request by the CSFY for additional funding in the amount of \$623,817.00 for 2008-09, could have been paid almost in its entirety if the GY had not transferred \$528,401.00 of the additional funds for the French first language program to French second language.

[851] Having reviewed the most relevant documentary evidence and testimony regarding the fiduciary duty issue, the Court must determine whether the plaintiff has established the three general characteristics of a relationship resulting in a fiduciary duty.

[852] The first characteristic deals with the exercise of a certain discretionary power. The evidence establishes that the bilateral agreement allows the GY to transfer additional funds earmarked for French first language, providing that it obtains the federal government's consent (clause 6.4.3.3 of the Protocol of Agreement, exhibit 209). The protocol contemplates as well the type of consultation which would take place between the GY and the CSFY in order to determine the CSFY's needs. Clause 8 of the protocol sets out the methods of consultation. The Court accepts Edmond Ruest's evidence as being truthful. Mr. Lamarche told him that he thought he would be able to obtain 10% increase over the prior year. Mr. Lamarche also asked Mr. Ruest to submit projects based on that amount. Mr. Lamarche said the same thing to Mr.

Bourcier. The Court accepts Mr. Bourcier's evidence to the effect that the amounts suggested by Mr. Lamarche did not correspond to the CSFY's needs. This manner of operating allowed Mr. Lamarche and the GY to have a degree of control over level of funding which would be requested for the CSFY. It must be recalled that it was not contested, and the evidence of the GY witnesses confirms, that the CSFY did not participate at all in the negotiations regarding the terms of the Protocol of Agreement (exhibit 209) nor of the bilateral agreement (exhibit 56). The lack of transparency and accountability regarding the additional funds for French first language allowed for the exercise of discretionary power by the GY. In short, the evidence establishes that the GY was able to exercise a certain discretionary power.

[853] The second general characteristic in relation to fiduciary duty is the unilateral exercise of discretionary power so as to impact the legal or practical interests of the beneficiary. In other words, could the GY make decisions unilaterally which would have a legal or practical effect on the CSFY? The evidence establishes that the protocol was signed on November 3, 2005. Under the protocol, the federal government and the Yukon had negotiated additional funds for French first language instruction in the amount of \$4,820,728.00 for 2005 to 2009. The amount negotiated by the GY with the federal government for second language instruction was \$102,131.00 for the same period. Despite this commitment in November 2005, the GY signed the Canada-Yukon agreement on March 31, 2006, reducing the additional funds for minority language instruction by \$1,954,228.00 and, at the same time, increasing the additional funds for second language instruction by \$2,951,369.00 (clause 5.3.1, exhibit 56). It is important to recall that this occurred between November 3, 2005 and March 31, 2006. Ms. Simpson confirmed that the details in the documents prepared by Gilbert Lamarche entitled "Canadian Heritage - Action

Plan Financial Mapping Objectives” for 2004-05 and 2004-09 (exhibits 184 and 185) resulted from conversations between Mr. Lamarche, Mr. Ruest and Mr. Bourcier to the effect that the additional funding for the CSFY for 2005 to 2009 would be around the same amount as in the previous years, which was \$700,000.00 per year. The evidence shows that the GY was not required to include the CSFY in its negotiations with the federal government. Indeed, it did not do so. Further, the GY was not required to reveal the amount that it requested and negotiated with the federal government as additional funding for French first language instruction. Indeed, it did not reveal it. The letters of January 18 and 30, 2006 and February 6, 2006 demonstrate that Canadian Heritage accepted the transfer of additional funds earmarked for French first language instruction, in the amount of \$1,954,228.00, to French second language. The transfer was allowed on the condition that the GY would consult the CSFY and that the CSFY agreed. I accept the evidence of Mr. Kubica, Mr. Ruest, Mr. Bourcier and Ms. Taillefer, to the effect that they never agreed to such a transfer.

[854] In other words, the GY unilaterally exercised its discretionary power, relying on clause 6.4.3.3 of the protocol (exhibit 209). As a result, there was a \$1,954,228.00 reduction in the additional funding for French first language. The alleged reason for the transfer was that the CSFY did not need this money, and the funds would have otherwise been lost. However, the evidence indicates the contrary. Exhibit 82 shows, for example, that for 2008, the CSFY required more than \$600,000.00 more than the additional funding in the amount of \$717,000.00 that it received under the Canada-Yukon agreement. The Court accepts André Bourcier’s evidence that the CSFY would have submitted necessary and desirable projects, if it had been aware of the situation. The GY’s unilateral exercise of discretionary power definitely had a negative effective

on the CSFY's legal and practical interests.

[855] Under the third general characteristic, it must be established that the beneficiary is particularly vulnerable or at the mercy of the fiduciary having the discretionary power. In this respect, the GY is the sole source of funding for the CSFY (see exhibit 341). The CSFY cannot receive funding other than that provided by the GY or approved by the GY (s. 116(1)(e), 178, 182 et 184, *Education Act*). The negotiations for additional funds for French first language take place only between the federal government and the GY. The CSFY had no way of knowing the requests put forward by the GY, nor the amount negotiated at the end of the day (see Appendix 1 of exhibit 209). The GY succeeded in arranging for the transfer of \$1,954,228.00, even before the bilateral agreement was signed. Thanks to the erroneous letter of January 30, 2006 stating not only that the CSFY had been consulted, but also that it had consented to the transfer, the bilateral agreement was ultimately signed on March 31, 2006. There is no mention of the \$4,820,718.00 negotiated at the outset by the GY as additional funding for French first language instruction. Even after the CSFY wrote a letter dated April 8, 2008 describing the January 30, 2006 letter as untruthful or a lie and stating that neither the community nor the CSFY had been consulted regarding the transfer, the GY refused to retransfer the funds. Further, the tripartite meeting recommended by Canadian Heritage never took place. At the time of the trial, there had been no transfer to the CSFY of the \$1,954,228.00. Moreover, numerous exhibits generally entitled "Memorandum of Understanding" and "Contribution Agreement" between the GY and the CSFY from 2006 to 2009, and filed in evidence, identify many projects which were negotiated in a piecemeal fashion because the CSFY lacked additional funding for French first language and the GY had told it that there was no more money. All of the evidence establishes that the CSFY

was, and continues to be, particularly vulnerable and at the mercy of the GY.

[856] Taken as a whole, the evidence establishes the three general characteristics which reveal that the GY had a fiduciary obligation toward the CSFY.

[857] According to the case law, there must also be “something more” (“a reasonable expectation”). It is true that the GY has duties and responsibilities not only toward the French first language program, but also toward the second language program. However, minority language instruction is distinguishable, in a specific way, from second language instruction. Section 23 does not grant any protection to second language instruction. What is more, the GY specifically created the CSFY in order to fulfill its duties under s. 23 of the *Charter* (s. 56 of the *Education Act*). The preamble to s. 10 of the *French Language Instruction Regulation* (1996/099) provides: “The School Board for Education, Area No. 23 shall have jurisdiction over and shall administer French language instruction in the Yukon in accordance with the Act and Regulations”.

[858] It is clear from the preambles of the protocol and the Canada-Yukon agreement that the main reason for the transfer of funds from the federal government to the Yukon is to enable the GY to comply with the duties imposed on it under s. 23.

[859] Having concluded that the general criteria are met, the Court must consider the fiduciary obligations in the specific governmental context. The Supreme Court in *Elder Advocates* held that the first criterion is a duty on the Crown arising by statute or by implication. In the present

case, there is not only a commitment, but also a duty, which flows from *The Constitution Act*, 1982. Section 23 of the *Charter* requires the government not only to provide minority language instruction, but also to provide it in minority instruction facilities financed with public funds (where numbers warrant). This case is similar to the aboriginal (*Guerin*) and veteran (*Authorson*) cases. The GY has constitutional exclusivity in the area of education. However, this is subject to other constitutional duties such as those contained in s. 23 (see *Arsenault-Cameron*).

[860] The second criterion is that the GY's exercise of its discretionary power must relate to a defined person or group. Section 23 of the *Charter* specifically lists the vulnerable persons, being the rights holders as defined in s. 23. The Supreme Court in *Elder Advocates* held that it does not suffice to acknowledge the existence of a duty toward an individual. It is also necessary that this individual be a member of an intended group. The Court stated: "... but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation" (para. 50). Section 23 of the *Charter* mainly targets a linguistic minority, either francophone or anglophone. A member of the minority in question can only invoke the constitutional guarantee if he or she falls within the definition of a rights holder. Clearly, the fiduciary duty in this case, is toward a person or groups of persons which is very well defined.

[861] Under the third criterion, the power of the Crown in question must have a significant impact on the legal or practical interests. It goes without saying that the evidence in this lawsuit establishes that this criterion is met. Section 23 of the *Charter* and s. 56 of the *Education Act* guarantee minority francophone language instruction. Neither the *Charter*, nor the *Education Act*

provides any guarantee to second language instruction. The GY granted the CSFY authority over French first language instruction in the Yukon as well as the duty to administer that instruction. As set out above, the GY is the only source of financing for the CSFY. The GY and the federal government recognized that the implementation of s. 23 of the *Charter* gives rise to additional costs. Therefore, the Canada-Yukon agreements provide for additional funds specifically dedicated to French first language instruction, in order to enable the CSFY to fulfill its obligation of transmitting language and culture under s. 23, according to the principles established in the case law. Therefore, if the funds which are designated to cover these additional costs are diverted to other purposes, there will be a direct impact on the legal and practical interest in respecting the rights and fulfilling the obligations imposed by s. 23.

[862] Finally, it must be emphasized that the GY exercises a very high level of control over the CSFY, through direct administration. The CSFY is not party to the Canada-Yukon bilateral agreements, due to the territories' exclusive jurisdiction over education. This exclusive jurisdiction brings with it, however, consequences and duties. These duties are set out in the *Education Act* and through the laws and obligations under s. 23 of the *Charter*, as recognized in the *Education Act*. The GY receives additional funds from the federal government specifically to enable it (through the CSFY) to fulfill its duties under s. 23. In effect, the CSFY is at the GY's mercy regarding the funds necessary to fulfill these constitutional obligations. The GY has a legal duty to provide sufficient financial resources to enable the CSFY to satisfy its obligations. Section 178 of the *Education Act* provides: "The Minister shall provide each School Board with funding sufficient to meet the requirements of its approved annual operations and maintenance budget..." Thus, the GY exercises direct control over the CSFY's interests.

[863] In summary, the evidence establishes that the general criteria for a fiduciary duty are met, as well as the specific criteria which apply in the governmental context. Further, the GY has acted in bad faith in breaching its fiduciary duty toward the CSFY by transferring, without the CSFY's knowledge or consent, the amount of \$1,954,228.00 from the program of first language instruction to the second language instruction program.

VIII. Conclusion

[864] Section 24(1) of the *Charter* gives courts the power to grant a remedy which is just and appropriate in the circumstances when there has been a breach of rights guaranteed under the *Charter*, in this case, s. 23. The Supreme Court of Canada, in *Doucet- Boudreau* held that courts must provide effective remedies:

Section 24(1) of the Charter requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of Charter rights and freedoms. The meaningful protection of Charter rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities.

(Doucet-Boudreau, at para. 87)

The determination of what remedy is just and appropriate will depend on the particular situation before the Court, cautiously taking into account the nature of the right and of the breach, as well as application of the established legal principles. The remedy must be based on the *Charter* and protection of the right to minority instruction. Section 24 must be able to evolve to meet the challenges and circumstances of each case (*Doucet-Boudreau*, paras. 50-59).

[865] The Supreme Court of Canada also recognized that there are particular situations which allow a court to remain seized in order to ensure that its decision and the language rights guaranteed by the *Charter* are respected (*Doucet-Boudreau*, para. 52, 55-58, 83-85). In this case, the particular facts, including the following, require the Court to remain seized of the matter in order to ensure respect language rights:

- the GY demonstrated bad faith in relation to the breach of a fiduciary obligation;
- the GY consciously decided not to comply with the provisions of the *Education Act*;
- the assistant deputy minister of MEY did not act in good faith.

i) Management

[866] To summarize, the Court finds that the evidence establishes that there are between 400

and 435 rights holder children in the Yukon under s. 23. The Court recognizes that it is not realistic to expect that 100% of the rights holders will ultimately invoke their right to attend a francophone school. However, as the Court has noted above, the goals of redress and francization in the Yukon justify the addition of other groups of individuals, being pre-school age, kindergarten 4, ancestors, immigrants, and even anglophones on occasion. Therefore, even if one could only expect a registration rate of 70 to 80% for rights holders under s. 23, the number of children who might be eligible to be admitted to the francophone school is approximately 400. This is not an optimistic figure; it is realistic.

[867] In the context and reality of the Yukon, this figure justifies a school board with powers as set out currently in the *Education Act*. Moreover, in the particular context of the Yukon, the current number of students attending EET (183) justifies a school board. The GY made the decision, in passing the *Education Act*, to allow any school having a school council to become a school board if the majority of the parents so desire. The *Education Act* does not impose any prerequisite relating to the number of students for such a request.

[868] Generally, regarding management of facilities, staff, programs and finances, the Court orders the GY not only to respect the powers and obligations of the CSFY as set out in the *Education Act*, but also 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*. In fact, the GY has already committed itself to do so, in passing the *Education Act*, and specifically the preamble to the Act which attests to the respect of the rights and privileges of the francophone minority guaranteed not only by s. 23, but also by the *Education Act* and its regulations.

[869] Having said this, and in spite of the clear and explicit language of the *Education Act*, certain obligations should be specified. Pursuant to the *Education Act* and ss. 23 and 24 of the *Charter*, the Court grants, by way of declaration or order, as applicable, the following remedial measures:

- the MEY shall consult the CSFY regarding the annual operations and maintenance budget within the time limits set out in the *Education Act*, as defined in s. 174;
- the GY shall consult the CSFY regarding all collective bargaining regarding CSFY employees;
- the GY, in consultation with the CSFY, shall establish a staffing formula taking into account the CSFY's particular needs and the requirements imposed by s. 23 of the *Charter*;
- the CSFY may appoint the school principal for a fixed term, under a contract which is renewable at its pleasure;
- 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*;

- the GY shall 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* (O.I.C. 1996/099);
- the CSFY has the power to establish its school calendar in compliance with s. 46 of the *Education Act*;
- the GY shall respect the CSFY duty to appoint a secretary-treasurer as provided under s. 127, and to provide a budget for the hiring of the secretary-treasurer, as provided under s. 174 of the *Education Act*;
- the GY shall establish financing formulas for the CSFY, taking into account the specific needs which arise from s. 23 of the *Charter*;
- the GY, in consultation with the CSFY, shall establish a professional development budget for its teachers, and provide funds according to that budget;
- 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;

- the CSFY has the right to enlarge EET school on the existing grounds to accommodate a secondary program offering courses similar to those available in the other secondary schools in Whitehorse;
- the GY shall provide the capital budget necessary for the expansion of the secondary school;
- 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 (computer 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 specialists and cleaning and storage space;
- the GY shall immediately undertake steps toward the construction, and the

expansion work shall be completed within 24 months;

- the GY may make a request to the Court to push back the deadline if it proves to be impossible to comply with it;
- the GY shall give updates on its progress on a quarterly basis to the CSFY and the Court;
- the GY shall 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;
- the CSFY may manage the admission of individuals not expressly contemplated in s. 23 of the *Charter*.

[870] For the reasons set out above, the Court grants, under s. 52(1) of *The Constitution Act of 1982*, a general declaration of invalidity regarding ss. 5, 6 and 9 of the *French Language Instruction Regulation* (O.I.C. 1996/099), as they are inconsistent with s. 23 of the *Charter*.

ii) Language

[871] Policy 1.3.2.1 makes English the administrative language of work in the Yukon public

service. Given s. 6 of the *Languages Act* and s. 12 of the *French Language Instruction Regulation* (O.I.C. 1996/099) which establish French as the CSFY's language of work, the GY's departmental policy 1.7 on French services, and ss. 23 and 24 of the *Charter*, the Court finds that policy 1.3.2.1 does not apply to CSFY, nor to its staff. For the above reasons, the Court orders:

- that all communications between the GY 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*.

iii) Fiduciary Obligation

[872] The GY breached its fiduciary duties toward the CSFY. For the reasons set out above, the Court finds that the GY had a fiduciary duty to consult the CSFY prior to transferring, for other purposes, \$1,954,228.00 which was designated by the federal government for teaching French first language from 2005 to 2009. The Court therefore grants a declaration imposing upon the GY a constructive trust whereby \$1,954,228.00 is held in trust for the CSFY.

IX. Costs

[873] The CSFY and the GY agreed to provide to the Court, within 14 days following the filing of this decision, briefs regarding costs. They agreed not to make oral representations unless the Court deemed the same to be necessary.

V.O. Ouellette

J.S.C.Y.