



SUPREME COURT OF CANADA

CITATION: Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment), 2023 SCC 31

APPEAL HEARD: February 9, 2023

JUDGMENT RENDERED:

December 8, 2023

DOCKET: 39915

BETWEEN:

Commission scolaire francophone des Territoires du Nord-Ouest and A.B.
Appellants

and

Minister of Education, Culture and Employment of the Northwest Territories
Respondent

AND BETWEEN:

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

and

Minister of Education, Culture and Employment of the Northwest Territories
Respondent

- and -

**Attorney General of Canada, Attorney General of Quebec, Attorney General
of Manitoba, Attorney General of the Yukon Territory, Canadian
Francophonie Research Chair on Language Rights, Commissioner of Official
Languages of Canada, Fédération nationale des conseils scolaires**

**francophones, Commission nationale des parents francophones, Société de
l'Acadie du Nouveau-Brunswick and Yukon Francophone School Board**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal and
O'Bonsawin JJ.

REASONS FOR Côté J. (Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal
JUDGMENT: and O'Bonsawin JJ. concurring)
(paras. 1 to 114)

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**Commission scolaire francophone des Territoires du Nord-Ouest and
A.B.**

Appellants

v.

**Minister of Education, Culture and Employment
of the Northwest Territories**

Respondent

- and -

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

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v.

**Minister of Education, Culture and Employment
of the Northwest Territories**

Respondent

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**Attorney General of Canada,
Attorney General of Quebec,
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Attorney General of the Yukon Territory,
Canadian Francophonie Research Chair on Language Rights,
Commissioner of Official Languages of Canada,
Fédération nationale des conseils scolaires francophones,
Commission nationale des parents francophones,
Société de l'Acadie du Nouveau-Brunswick and
Yukon Francophone School Board**

Intervenors

Indexed as: Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)

2023 SCC 31

File No.: 39915.

2023: February 9; 2023: December 8.

Present: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Administrative law — Judicial review — Discretionary administrative decisions engaging Charter protections — Charter values — Territorial ministerial directive allowing categories of parents not holding right to have their children receive instruction in one of two official languages, where it is minority language, to apply to enrol their children in French first language education program — Minister responsible denying applications for enrolment on ground that non-rights holder parents concerned did not meet conditions for various categories established by directive — Whether Minister had to consider purpose of minority language educational rights guaranteed by Charter in exercising her discretion — Whether decisions made by Minister are reasonable.

Constitutional law — Charter of Rights — Minority language educational rights — Non-rights holder parents applying to enrol their children in French first language education program in Northwest Territories — Minister responsible denying applications for enrolment — Whether Minister’s decisions engage Charter protections — Canadian Charter of Rights and Freedoms, s. 23.

Five parents not holding the right guaranteed by s. 23 of the *Charter* to have their children receive instruction in one of the two official languages, where it is the minority language, applied to the Minister of Education, Culture and Employment of the Northwest Territories (“Minister”) for their children’s admission to a French first language education program. In each case, the Commission scolaire francophone des Territoires du Nord-Ouest (“CSFTNO”) recommended admission because it would promote the development of the Francophone community of the Northwest Territories. In spite of those recommendations, the Minister denied each of the applications for admission on the ground that the non-rights holder parents did not meet the conditions established by the ministerial directive on enrolment in French first language education programs, which created categories of eligible non-rights holders.

The parents and the CSFTNO applied for judicial review. They were successful in the Supreme Court of the Northwest Territories, which set aside the decisions and referred the applications for admission back to the Minister for reconsideration, chiefly because the Minister’s decisions did not reflect a proportionate balancing of the protections conferred by s. 23. However, on appeals by the Minister,

the Court of Appeal for the Northwest Territories restored the decisions that had been set aside. The majority of the Court of Appeal found that the Minister was not required to consider s. 23 in exercising her discretion because the parents were not rights holders under this provision.

Held: The appeal should be allowed.

The Minister was required not only to consider s. 23 of the *Charter* in exercising her discretion to admit the children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories, but also to conduct a proportionate balancing of the values reflected in the three purposes of s. 23 with the government's interests. The Minister's decisions had a significant impact on the values enshrined in this provision. It follows from the requirements laid down in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, that those decisions were unreasonable. The Minister attached too much importance to her duty to make consistent decisions and gave disproportionate weight to the cost of the contemplated services in the exercise of her discretion. Given the remedial nature of s. 23, pedagogical requirements had to have more weight. The orders made by the Court of Appeal are therefore set aside.

Under the approach set out in *Doré*, which governs the judicial review of discretionary administrative decisions that engage the *Charter*, a reviewing court must first determine whether the decision limits *Charter* protections. The *Doré* framework applies not only where an administrative decision directly infringes *Charter* rights but

also where it simply engages a value underlying one or more *Charter* rights. *Charter* values are inseparable from *Charter* rights, which reflect them, and give meaning to these rights. The choice made by the framers to entrench certain rights in the text of the supreme law of Canada means that the purpose of these rights is important for Canadian society as a whole and must be reflected in the decision-making process of the various branches of government. Administrative decision makers must always consider the values relevant to the exercise of their discretion.

If the discretionary decision limits *Charter* protections at the first step of the *Doré* analysis, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them. The focus of judicial review in this context is on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. To be reasonable, a decision must reflect the fact that the decision maker considered the *Charter* values that were relevant to the exercise of its discretion. It will often be evident that a value is relevant, whether because of the nature of the governing statutory scheme, because the parties raised the value before the administrative decision maker, or because of the link between the value and the matter under consideration. The decision must also show that the decision maker meaningfully addressed the *Charter* protections to reflect the impact that its decision may have on the concerned group or individual. The standard of reasonableness here requires a robust analysis that works the same justificatory muscles as s. 1 of the *Charter*. The

approach must take into account the role of the courts as guardians of the Constitution and must reflect the particular importance of justification in decisions that engage *Charter* protections. The prescribed approach requires reviewing courts to inquire into the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker. The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the applicable objectives, beyond simply asking whether the decision falls within a range of reasonable outcomes. In this sense, reasonableness and proportionality become synonymous.

The Minister's decisions in this case engage the protections of s. 23. First, the values underlying s. 23 are relevant to the exercise of the Minister's discretion, having regard to the purposes of this provision. This constitutional provision has three purposes: the right to instruction in the minority official language is at once preventive, remedial and unifying in nature. The provision is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of these communities. This means that the preservation and development of minority language communities are among the values underlying s. 23. Protection of the right to instruction in the minority official language is a reflection of these values, insofar as education is a means of realizing the societal ideal that they embody.

Second, the admission of children of parents who are not rights holders under s. 23 of the *Charter* can have an impact on the preservation and development of minority language communities. Population growth in the minority language community helps to ensure its development and prevent its decline, including by reducing the likelihood of assimilation and cultural erosion. The admission of children of non-rights holder parents also contributes to fulfilling the promise of s. 23, which is to give effect to the equal partnership of Canada's two official language groups in the context of education. It follows that these values are always relevant when the government exercises its discretion to admit children of non-rights holder parents to minority language schools and that they must therefore always be taken into account, even when there is no direct infringement of the right guaranteed by s. 23.

Here, the values of preservation and development of minority language communities were limited by the Minister's decisions. Because of their collective dimension, the protections conferred by s. 23 of the *Charter* must be assessed in light of the unique language dynamics of a province or territory. At the time the Minister made her decisions, there was a positive link between the admission of children of non-rights holder parents to French-language schools in the Northwest Territories and the preservation and development of the Francophone community there. The Minister acknowledged, among other things, that the assimilation rate and exogamous marriages were challenges to be overcome for the transmission of the French language within the Francophone community of the Northwest Territories. The admission of the children

in question would thus have helped to reduce the likelihood of assimilation and to prevent cultural erosion.

The Minister therefore had to proportionately balance these values with the government's interests. The reasons for the Minister's decisions do not show that she truly took into account the constitutional values at stake or that she meaningfully addressed the considerations arising therefrom. Several factors showed that the children's admission was beneficial for the development of the Francophone community of the Northwest Territories. First, the Minister did not duly consider the fact that the applications for admission were supported by the CSFTNO, a body with the expertise needed to assess the educational needs of the linguistic minority. Second, the Minister also did not duly consider the individual characteristics of each application in relation to the benefits that could result from a decision to grant it. Among other things, each child concerned had a sound knowledge of French, had significant ties to the Francophone community of the Northwest Territories through their parents, and had the support and commitment of their parents in learning that language. A refusal of admission does not always mean that there was a disproportionate balancing, but in this case, the parents' motivation for applying for their children's admission was mistakenly reduced to a mere desire to provide the children with a linguistic advantage.

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Colombie-Britannique v. British Columbia, 2020 SCC 13, [2020] 1 S.C.R. 678; *Mahe v. Alberta* (1987), 42 D.L.R. (4th) 514; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Dr Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Public Schools Act (Man.), s. 79(3)*,

(4) and (7), [1993] 1 S.C.R. 839; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *R. v. McGregor*, 2023 SCC 4; *Attorney General (Que.) v. Cumming*, [1978] 2 S.C.R. 605; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535.

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Appeal allowed.

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Paul Daly, for the intervener the Yukon Francophone School Board.

English version of the judgment of the Court delivered by

CÔTÉ J. —

TABLE OF CONTENTS

	Paragraph
I. <u>Overview</u>	1
II. <u>Background</u>	10
A. <i>Situation of the Appellant Parents</i>	23
(1) <u>A.B. (Mother of Child W.)</u>	23
(2) <u>F.A. (Mother of Child A.)</u>	29
(3) <u>T.B. (Father of Child V.)</u>	35
(4) <u>E.S. (Mother of Child E.)</u>	38
(5) <u>J.J. (Father of Children T. and N.)</u>	40
III. <u>Judicial History</u>	44
A. <i>Supreme Court of the Northwest Territories, 2019 NWTSC 25 (Rouleau J.)</i>	44
B. <i>Supreme Court of the Northwest Territories, 2020 NWTSC 28 (Rouleau J.)</i>	46
C. <i>Court of Appeal for the Northwest Territories, 2021 NWTCA 8, 463 D.L.R. (4th) 277 (Slatter, Rowbotham and Crighton JJ.A.)</i>	50

(1) <u>Majority Reasons (Slatter and Crighton JJ.A.)</u>	52
(2) <u>Concurring Reasons (Rowbotham J.A.)</u>	55
IV. <u>Issues</u>	58
V. <u>Analysis</u>	59
A. <i>Doré Framework</i>	60
B. <i>The Decisions Engage the Protections of Section 23</i>	75
(1) <u>The Values Underlying Section 23 Are Relevant to the Exercise of the Minister’s Discretion</u>	75
(2) <u>The Minister’s Decisions Have the Effect of Limiting the Values Underlying Section 23</u>	84
C. <i>The Minister Did Not Proportionately Balance the Values Underlying Section 23 With the Government’s Interests</i>	92
D. <i>It Is Neither Necessary nor Appropriate for This Court To Rule on the Allegation That the Right To Use French or the Right To Be Heard Was Infringed</i>	104
VI. <u>Disposition</u>	114
I. <u>Overview</u>	

[1] A legal guarantee with unique features, s. 23 of the *Canadian Charter of Rights and Freedoms* grants a defined category of Canadian citizens the right to have their children receive instruction in one of the two official languages where it is the minority language (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 365). The provision has three purposes; it is at once preventive, remedial and unifying (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 15).

[2] Section 23 has two features that make it stand out from the rest of Canada’s constitutional landscape. First, unlike certain other constitutional provisions that

impose only negative obligations, s. 23 imposes positive obligations on the state. This is the case because the very existence of s. 23 “implies the inadequacy of the present regime” (*Mahe*, at p. 363, quoting *Mahe v. Alberta* (1987), 42 D.L.R. (4th) 514 (C.A.), at p. 534, per Kerans J.A.; *Conseil scolaire francophone de la Colombie-Britannique*, at para. 15). Section 23 is therefore meant to alter the status quo, and its application “will of necessity affect the future of minority language communities” (*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 23).

[3] Second, s. 23 differs from other provisions of the *Charter* because of the collective scope of the individual rights it grants (*Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at paras. 27 and 29; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23; *Solski*, at para. 33; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 23; *Conseil scolaire francophone de la Colombie-Britannique*, at para. 17).

[4] It is important to note that minority language schools play a vital role in fulfilling the promise contained in s. 23 of the *Charter*, which is to “give effect to the equal partnership of the two official language groups in the context of education” (*Arsenault-Cameron*, at para. 26; see also *Mahe*, at p. 364; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, at para. 27). These schools are settings for socialization where the language of minority language communities is passed on and where their culture can be expressed.

The preservation and vitality of these educational environments promote the development of the minority language communities they serve (*Mahe*, at p. 363; *Conseil scolaire francophone de la Colombie-Britannique*, at para. 1).

[5] There has been a Francophone presence in the Northwest Territories since the 18th century, but instruction in French has been offered only since 1989 in Yellowknife and since 1998 in Hay River. This appeal is about whether the refusal to admit children of non-rights holder parents to minority language schools in the Northwest Territories gave due consideration to the protections conferred by s. 23 of the *Charter*, having regard to the three purposes of this section, which is at once preventive, remedial and unifying in nature.

[6] Five non-rights holder parents asked the then Minister of Education, Culture and Employment (“Minister”) to exercise her discretion to admit their children to a French first language education program. In each case, the Commission scolaire francophone des Territoires du Nord-Ouest (“CSFTNO”) recommended admission, essentially because it would promote the development of the Francophone community of the Northwest Territories. It is important to note that the CSFTNO represents the interests of the holders of s. 23 rights, including in their collective aspect. Nevertheless, in spite of the CSFTNO’s recommendations, the Minister denied each of the applications for admission.

[7] The parents and the CSFTNO applied for judicial review. They were successful in the Supreme Court of the Northwest Territories, which set aside the

decisions and referred the applications for admission back to the Minister for reconsideration, chiefly because the Minister's decisions did not reflect a proportionate balancing of the protections conferred by s. 23. However, on appeals by the Minister, the Court of Appeal for the Northwest Territories restored the decisions that had been set aside. The majority of the Court of Appeal found that the Minister was not required to consider s. 23 in exercising her residual discretion given the fact that the appellant parents were not rights holders under this provision. The children of the appellant parents have since been admitted or have ceased residing in the Northwest Territories. However, it remains important for this Court to determine what role, if any, s. 23 had to play in the Minister's decision-making process. If this Court does not intervene, it might be argued that governments need not give due consideration to the values reflected in the three purposes of s. 23 when making decisions that affect s. 23 rights holders or that engage this provision.

[8] For the reasons that follow, I conclude that the Minister was required not only to consider the values embodied in s. 23 in exercising her discretion to admit the children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories, but also to conduct a proportionate balancing of these values and the government's interests. Since she did not do so, I am of the view that the appeal should be allowed and the orders made by the Court of Appeal set aside on the basis of this first ground of appeal.

[9] As a second ground of appeal, the appellants allege that their right to use French, guaranteed to them by s. 19(1) of the *Charter* and s. 9(1) of the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 (“*OLA*”), was infringed by the Court of Appeal because they could not be understood by that court without an interpreter. In the alternative, they argue that their right to natural justice was infringed because of the quality of the interpretation services. Given my conclusion on the first ground of appeal, I am of the view that it is neither necessary nor appropriate for me to rule on this second ground.

II. Background

[10] Two public schools offer a French first language education program in the Northwest Territories. The first, École Allain St-Cyr, was built in 1999 and is located in Yellowknife. The second, École Boréale, was built in 2005 and is located in Hay River.

[11] On July 7, 2008, the Northwest Territories Department of Education, Culture and Employment adopted the *Ministerial Directive — Enrolment of Students in French First Language Education Programs* (“2008 Directive”) to govern the admission of children of rights holder and non-rights holder parents to French first language education programs. In the case of children of non-rights holder parents, the 2008 Directive simply stated that the minister could approve their admission to a French first language education program. However, it said nothing about the basis for making such a decision.

[12] The 2008 Directive remained in force until a new directive was adopted in 2016 further to the *Final Report: Review of the Ministerial Directive — Enrolment of Students in French First Language Education Programs* prepared on June 30, 2016, by the Department of Education, Culture and Employment (online).

[13] The *Report* recognizes that “the sustainability of the school and broader community is dependent on the ability to expand” (p. 10). It notes a lack of transparency in the handling of admissions of children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories (p. 17). In addition, the *Report* points out that natural growth of the rights holder population and the migration of rights holders “may not be sufficient to maintain a level of population sufficient for supporting French first language schools, particularly in Hay River” (p. 20).

[14] To “[a]llow for the sustainment and growth of the French first language communities” (p. 21), the *Report* therefore recommends that the minister revise the 2008 Directive to allow the admission of the following categories of children of non-rights holder parents:

- (a) Children of parents who would have been rights holders but for their parent’s or grandparent’s lack of opportunity to attend a French first language school,
- (b) Those who meet the criteria of section 23 of the *Charter* but are not Canadian citizens, and
- (c) Immigrants to Canada, who upon arrival, do not speak English or French and are enrolling in a Canadian school for the first time

(p. 21)

[15] The *Report* also recommends that children of non-rights holder parents not be admitted to a school of the Francophone minority in the Northwest Territories if enrolment at the school is at or exceeds 85 percent capacity, as per the Northwest Territories Schools Capital Standards and Criteria (p. 21).

[16] On August 11, 2016, the then Minister of Education, Culture and Employment adopted the *Ministerial Directive — Enrolment of Students in French First Language Education Programs (2016)* (“2016 Directive”) (reproduced in A.R., vol. III, at p. 34). The 2016 Directive stated that the Government of the Northwest Territories is “committed to supporting language and culture revitalization”, an “inherent part” of which is supporting “population growth”. To this end, the 2016 Directive provided for the admission of children of “eligible non-rights holder parents”.

[17] To be eligible under the 2016 Directive, non-rights holder parents had to meet the conditions for one of the following streams:

Reacquisition — The parent would have been a rights holder but for his or her lack of opportunity to attend a French first language school or his or her parent’s lack of opportunity to attend a French first language school (i.e. the child’s grandparent);

Non-citizen francophone — The parent meets the criteria of section 23 of the *Canadian Charter of Rights and Freedoms* except for the fact that he or she is not a Canadian citizen; or

New immigrant — The parent is an immigrant to Canada, whose child upon arrival, does not speak English or French and is enrolling in a Canadian school for the first time.

[18] An eligible non-rights holder parent could therefore apply for their child's admission to a French first language education program managed by the CSFTNO, except where enrolment at the school in question exceeded 85 percent capacity, as per the Schools Capital Standards and Criteria. In such a situation, the 2016 Directive provided that new enrolment was limited to children of rights holder parents until such time as the enrolment numbers dropped below 85 percent capacity.

[19] An eligible non-rights holder parent wishing to enrol their child in a French first language education program had to provide the school administration with an enrolment form, a statement of eligibility for non-rights holder parents and official documents in support of the statement. The CSFTNO then verified that all the required documentation had been provided and assessed the child's language skills and the impact of the proposed admission on the quality and delivery of the education program, using an assessment tool approved by the minister. Following the assessment, the CSFTNO made a recommendation to the minister.

[20] If the CSFTNO recommended denying the application, the unsuccessful parent could submit a written appeal to the minister, who then made a final decision that could not be appealed. If, on the other hand, the CSFTNO recommended that the child be admitted, the minister in turn assessed the admissions file. Approval of enrolment in such a case was based on "whether the correct documentation has been

provided in full, the assessment of CSFTNO with respect to language skills, the current capacity of the school and any other relevant considerations” (2016 Directive). The decision was final and could not be appealed.

[21] Also on August 11, 2016, the then Minister of Education, Culture and Employment adopted the *French First Language School Non-Rights Holder Admission Policy* (online). The *Policy* specified how applications for admission were to be transmitted and how the minister’s decisions under the 2016 Directive were to be communicated. It also set out the time within which the minister’s decision had to be communicated and the time limit for appealing a negative recommendation by the CSFTNO.

[22] It should be noted that the 2016 Directive is no longer in force. On August 28, 2020, the *Commission scolaire francophone, Territoires du Nord-Ouest Regulations*, N.W.T. Reg. 071-2000, were amended to introduce a scheme for the admission of children of non-rights holder parents to a French first language education program that is similar to the scheme in the 2016 Directive but is directly managed by the CSFTNO (*Regulations*, s. 11(2)). This scheme provides for a new class of eligible children, the “Francophile” category, for children who have at least one parent who is proficient in French (*Regulations*, s. 11(1)).

A. *Situation of the Appellant Parents*

(1) A.B. (Mother of Child W.)

[23] On April 9, 2018, A.B. applied for the admission of her child, W., to the preschool program at École Allain St-Cyr. The application was made in the “New immigrant” stream. A.B. and W.’s father are citizens of the Netherlands who settled in Yellowknife in 2014. W. was born in Canada. At the time of the first application for admission, W. was attending Garderie Plein Soleil, a French daycare centre in Yellowknife. The CSFTNO recommended that the application for admission be granted.

[24] On May 28, 2018, the Minister denied the application for admission on the ground that W. had been born in Canada and that his situation therefore did not meet the criteria for the “New immigrant” stream of the 2016 Directive. On August 3, 2018, the CSFTNO requested that the Minister reconsider her decision and exercise her residual discretion. In the CSFTNO’s opinion, it was unfair and unreasonable to deny the application for W.’s admission on the basis of an overly restrictive interpretation of the “New immigrant” stream.

[25] On August 29, 2018, the Minister denied the request for reconsideration because admission to École Allain St-Cyr was limited to children of rights holder parents as well as children of non-rights holder parents who were eligible under the 2016 Directive. A.B. and the CSFTNO filed an application for judicial review.

[26] On July 2, 2019, the Supreme Court of the Northwest Territories set aside the initial decision of May 28, 2018, and the decision of August 29, 2018, on the request for reconsideration on the ground that the Minister had fettered her discretion by

refusing to admit W. because his situation did not fit into one of the streams of the 2016 Directive. The Supreme Court of the Northwest Territories accordingly referred the application for admission back to the Minister for reconsideration. I will come back to this. The Minister announced her intention to appeal the Supreme Court's judgment, but she abided by it in the meantime.

[27] On the occasion of this reconsideration, A.B. sent the Minister a letter dated August 6, 2019, in which she described her family's ties to Yellowknife's Francophone community. A.B. sat on the board of directors of Garderie Plein Soleil. All of her children attended that French daycare centre. Her family participated in the activities organized by Yellowknife's Francophone community. A.B. also explained that, as a result of the Minister's negative decisions, W. had to attend a French immersion school, which had a negative impact on his level of French.

[28] On August 30, 2019, the Minister again denied the application for W.'s admission on the ground that his situation involved no distinctive element, apart from the fact that his admission would support his development and that he already spoke French. The Minister was of the opinion that, if she granted the application for admission on that basis, she would, in the interests of fairness, have to grant applications for the admission of all children in the same situation, which would have unforeseen and unpredictable budgetary consequences for the government. In a notice of application dated September 25, 2019, A.B. and the CSFTNO sought judicial review of that decision.

(2) F.A. (Mother of Child A.)

[29] On February 18, 2019, F.A. applied for the admission of her child, A., to École Allain St-Cyr. A.'s parents had arrived in Yellowknife in 2013. French is their second language, and they routinely spoke it with their children. Since arriving in Yellowknife, the parents had been involved in Francophone community life in the Northwest Territories. F.A.'s spouse was on the board of directors of Garderie Plein Soleil, and A. attended that daycare centre. In addition, F.A. and her spouse, who are both physicians, made an effort to offer their patients services in French. F.A. applied for admission in the "Reacquisition" stream of the 2016 Directive and, alternatively, on the basis of the Minister's residual discretion.

[30] The CSFTNO supported F.A.'s applications. In its report, the CSFTNO explained that the child's admission would help "cur[b] losses to the community, where parents are free to enrol their children in majority-language schools. There is also the loss of rights holder status when parents choose schools outside the CSFTNO", and admission would enable the child to continue living in French as well (A.R., vol. V, at p. 194). In addition, the CSFTNO noted that admitting A. "would be a way of recognizing and supporting diversity in the school system" in the Northwest Territories (p. 196).

[31] On April 18, 2019, the Minister refused to admit A. in the "Reacquisition" stream of the 2016 Directive because there was nothing to show that one of A.'s parents

or grandparents would have been a rights holder but for a lack of opportunity to attend a French first language education program.

[32] In a letter dated June 20, 2019, F.A. asked the Minister to reconsider her decision and exercise her residual discretion to admit her child to École Allain St-Cyr. In that letter, F.A. reiterated the close professional and personal ties between her family and Yellowknife's Francophone community.

[33] On July 26, 2019, the Minister informed F.A. that she would reconsider the application for A.'s admission in light of the decision rendered by the Supreme Court of the Northwest Territories in A.B.'s case.

[34] On August 30, 2019, following that reconsideration, the Minister denied the application for admission, essentially for the same reasons as in A.B.'s case. The Minister found that, if she admitted A., she would have to admit every child of non-rights holder parents if the child spoke French and the parents were involved in Francophone community life. This would impose too heavy a financial burden on the government and create intolerable budgetary unpredictability.

(3) T.B. (Father of Child V.)

[35] On February 13, 2019, T.B. applied for the admission of his child, V., to École Allain St-Cyr in the "New immigrant" stream of the 2016 Directive. The CSFTNO supported the application. On April 10, 2019, the Minister denied the

application for admission because V. had been born in Canada and therefore could not be admitted in the stream in question. In its report, the CSFTNO recommended admission, in part because it would have a positive impact on the vitality of the school and of the Francophone community of the Northwest Territories.

[36] Following the decision of the Supreme Court of the Northwest Territories in A.B.'s case, the Minister reconsidered V.'s file. For that purpose, T.B. sent the Minister a letter explaining the ties between his family and the Francophone community of the Northwest Territories. T.B. noted that some members of his spouse's family spoke French. He mentioned that he and his spouse were members of the Association franco-culturelle de Yellowknife, had Francophone friends and had several books in French at home. Finally, T.B. stated that he and his spouse had tried in vain to register V. at Garderie Plein Soleil.

[37] On August 30, 2019, the Minister denied the application for admission. Once again, the Minister expressed the opinion that, if she admitted V. to École Allain St-Cyr on the basis that an education in French would support his development and enable him to connect with his cultural heritage, she would have to authorize the admission of too many children in similar circumstances, which would lead to budgetary unpredictability for the government.

(4) E.S. (Mother of Child E.)

[38] E.S. applied for the admission of her child, E., to École Boréale in the “New immigrant” stream. The CSFTNO supported the application for admission, because the child’s admission would have a positive impact on the vitality of the school and of the Francophone community and would not require any additional resources. Admitting E. would also recognize and support diversity in the school system in the Northwest Territories. In a letter dated April 10, 2019, the Minister denied the application for admission because the child in question had been born in Canada.

[39] On August 30, 2019, after reconsidering her decision in light of the judgment rendered by the Supreme Court of the Northwest Territories in A.B.’s case, the Minister upheld the denial of the application for admission for the same reasons as in the cases of the other appellant parents.

(5) J.J. (Father of Children T. and N.)

[40] On August 2, 2019, J.J. applied for the admission of his children, T. and N., to École Allain St-Cyr in the “New immigrant” stream and, alternatively, on the basis of the Minister’s residual discretion.

[41] At the time, J.J. and his spouse were in the process of becoming permanent residents. J.J. is a geotechnical engineer. His spouse is a teacher but was not working at the time the applications for admission were made. Her parents had lived in France for several years. T. and N. were both at the top of their class. They were in a late immersion program at an English school. They had also been learning French in

tutoring sessions three times a week since October 2018, and they had taken part in summer French classes offered in Vichy, France.

[42] The CSFTNO supported the applications for admission, because the admission of T. and N. would contribute to the vitality of École Allain St-Cyr and of the Francophone community and would allow the children to continue living their Francophone identity. The CSFTNO noted the family's commitment to learning French. Admitting students who already knew French would help to maintain École Allain St-Cyr as a French educational environment and would not represent an additional burden.

[43] In a decision dated August 30, 2019, the Minister denied the applications for admission on the basis that they were motivated by a desire to support the children's development and facilitate their continued learning of French. In the Minister's opinion, these elements were not sufficiently distinctive. Admitting T. and N. would therefore mean that many other children would have to be admitted, which could create budgetary unpredictability for the government.

III. Judicial History

A. *Supreme Court of the Northwest Territories, 2019 NWTSC 25 (Rouleau J.)*

[44] As mentioned above, A.B. and the CSFTNO applied for judicial review of the decisions rendered by the Minister on, respectively, May 28 and August 29, 2018.

Rouleau J. set aside the initial decision of May 28, 2018, as well as the decision of August 29, 2018, denying the request for reconsideration. He referred the application for W.'s admission back to the Minister for reconsideration.

[45] By refusing to admit W. because his situation did not fit into one of the streams of the 2016 Directive, the Minister had fettered her discretion. The Minister had residual discretion outside the 2016 Directive. In exercising her discretion, the Minister had to strike a balance between the discretionary authority conferred on her in this area and the “broad” objectives of s. 23 of the *Charter*. In such cases, the Minister could take budgetary considerations and the best interests of the child into account, but she also had to consider the purpose of s. 23 and the rights of the linguistic minority. This last point meant that, at a minimum, the Minister had to consider the impact of a child's admission on the development and vitality of the Francophone community of the Northwest Territories.

B. *Supreme Court of the Northwest Territories, 2020 NWTSC 28 (Rouleau J.)*

[46] Rouleau J. heard the application for judicial review of the decision made by the Minister on August 30, 2019, concerning the application for W.'s admission further to his 2019 judgment. In addition, Rouleau J. had before him the decisions, also dated August 30, 2019, upholding the denial of admission to A., V., T., N. and E.

[47] Rouleau J. found that the impugned decisions had to be reviewed on the reasonableness standard and held that all of the decisions were unreasonable.

[48] The impugned decisions engaged s. 23 of the *Charter*, as there was a link between the handling of applications for the admission of children of non-rights holder parents and the vitality and development of schools and of the Francophone community of the Northwest Territories. In Rouleau J.'s view, the decisions related indirectly to the rights of rights holder parents under s. 23 and the values underpinning those rights. The reasons for the impugned decisions showed that the Minister had failed to proportionately balance the protections guaranteed by s. 23 with the government's interests, contrary to what was required by the framework established by this Court in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. Those reasons showed that the Minister had not taken into account the benefits that the children's admission would have for the Francophone community of the Northwest Territories and that she had not given the necessary weight to the CSFTNO's recommendations. Those errors were compounded by other errors made by the Minister in assessing the state of the French-language school system, the costs that would result from the admissions and the manner in which the admission of the children in question would affect the consistency and fairness of the admissions process in the future.

[49] Rouleau J. therefore set aside the decisions and referred the applications for admission back to the Minister for reconsideration.

C. *Court of Appeal for the Northwest Territories*, 2021 NWTCA 8, 463 D.L.R. (4th) 277 (*Slatter, Rowbotham and Crighton J.J.A.*)

[50] The Court of Appeal heard the appeals from the judgments rendered by Rouleau J. in 2019 and 2020 on judicial review.

[51] The Court of Appeal panel was unanimous about the standard of review that applied in reviewing the Minister's decisions, namely reasonableness. However, the panel disagreed on the application of this standard to the impugned decisions.

(1) Majority Reasons (Slatter and Crighton JJ.A.)

[52] Slatter and Crighton JJ.A. found that Rouleau J. had erred in proceeding as if the protections afforded by s. 23 of the *Charter* were engaged. In fact, none of the rejected applications for admission concerned children of rights holder parents. The collective aspect of s. 23 provided no basis for extending the scope of this provision beyond the categories of persons specifically identified in it. Consequently, the Minister did not have to proportionately balance the government's interests with the protections of s. 23 of the *Charter*. The Minister had no legal or constitutional obligation to admit a child of a non-rights holder parent.

[53] Moreover, the Minister could require exceptional circumstances in order to exercise her residual discretion and grant the applications for admission. Similarly, she was entitled to be concerned about consistency in decision-making and fairness in the admissions process for children of non-rights holder parents. The Government of the Northwest Territories controlled admission to the schools of the Francophone

minority in the Northwest Territories, and there was no indication that the Minister had considered irrelevant factors or failed to consider relevant ones.

[54] The majority therefore allowed the appeals, set aside the orders being appealed and restored the Minister's decisions.

(2) Concurring Reasons (Rowbotham J.A.)

[55] Rowbotham J.A. was of the view that Rouleau J. had not erred in finding that the decisions rendered by the Minister in 2018 with respect to W. were unreasonable. The Minister was required to consider s. 23 of the *Charter* and its purpose in order to promote the flourishing and development of the Francophone community of the Northwest Territories. Rowbotham J.A. would accordingly have dismissed the appeal from the judgment rendered in 2019 on judicial review.

[56] However, the decisions rendered by the Minister in 2019 concerning W. and the other children were reasonable. The Minister had addressed the relevant factors in reasons that were coherent, intelligible and transparent. She had justified her decisions. The reasonableness standard did not allow the reviewing judge to substitute his assessment of those factors for that of the Minister.

[57] Like her colleagues, Rowbotham J.A. would therefore have allowed the appeal from the judgment rendered by Rouleau J. in 2020 on judicial review.

IV. Issues

[58] This appeal raises the following issues:

- (1) Did the Minister have to consider the purpose of s. 23 of the *Charter* in exercising her discretion with respect to the admission of children of non-rights holder parents to French first language education programs?
- (2) Are the Minister's decisions reasonable?
- (3) Was the appellants' right to use French before the Court of Appeal for the Northwest Territories under s. 19 of the *Charter* or s. 9(1) of the *OLA* infringed?
- (4) In the alternative, was the appellants' right to be heard infringed before the Court of Appeal for the Northwest Territories?

V. Analysis

[59] In oral argument before this Court, counsel for the appellants, before turning to the approach established in *Doré*, first submitted that the Minister's decisions were contrary to the requirements of s. 23 of the *Charter* as set out in this Court's jurisprudence. It is through the lens of *Doré*, which governs the judicial review of administrative decisions that engage the *Charter*, that the Minister's decisions must be considered. This case is a straightforward application of that precedent.

A. *Doré* Framework

[60] In *Doré*, this Court, per Abella J., established an approach for reviewing discretionary administrative decisions that limit *Charter* protections. Abella J. found that reviewing courts must show deference to decisions of this nature (para. 54). In this regard, the parties agree that the standard of review applicable in reviewing the Minister’s decisions is reasonableness. I see no reason to depart from this standard of review in this case (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 16-17).

[61] Under the *Doré* approach, a reviewing court must begin by determining whether the administrative decision at issue “engages the *Charter* by limiting *Charter* protections — both rights and values” (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 58; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 39; see also G. Régimbald, *Canadian Administrative Law* (3rd ed. 2021), at p. 99).

[62] Here is where the essence of the parties’ disagreement lies: the appellants submit that the impugned decisions engage the values underlying s. 23 of the *Charter*, whereas the respondent takes the opposite view. The respondent maintains that the protections afforded by s. 23 are not engaged because the appellant parents are not rights holders under this provision; as non-rights holders, they are unable to show that the right guaranteed by s. 23 was infringed by the Minister’s decisions. In other words, the respondent argues that the *Doré* framework applies only in cases where an

administrative decision *directly* infringes a *right* (R.F., at para. 57). According to the respondent, *Charter* values serve only to interpret the scope of the rights that reflect them (*Loyola*, at paras. 4 and 36).

[63] I note that it is not in dispute that no infringement of s. 23 can be established with respect to the appellant parents, as non-rights holders. The CSFTNO does, of course, represent the interests of rights holders and plays a fundamental role in managing and controlling minority language schools and in expressing their special needs (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 86; *Arsenault-Cameron*, at para. 44; *Mahe*, at pp. 373-80). However, it is not necessary to determine whether the CSFTNO, as a representative of rights holders, might itself enjoy the benefit of the s. 23 rights for the purposes of this case.

[64] Indeed, it has consistently been held that the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights (*Doré*, at paras. 35 et seq.; *Loyola*, at para. 4; *Trinity Western University*, at para. 57).

[65] This is the case because administrative decision makers have an obligation to consider the values relevant to the exercise of their discretion, in addition to respecting *Charter* rights. There can be no doubt about this, because “[t]he Constitution — both written and unwritten — dictates the limits of all state action” (*Vavilov*, at para. 56). As L’Heureux-Dubé J. clearly stated in *Baker v. Canada (Minister of*

Citizenship and Immigration), [1999] 2 S.C.R. 817, a discretionary decision, to be reasonable, must be made in accordance with the “fundamental values of Canadian society” as reflected in the *Charter* (para. 56). Relying on this statement, Abella J. held in *Doré* that discretionary decisions must “*always*” take *Charter* values into consideration (para. 35 (emphasis in original)).

[66] An administrative decision maker must consider the *relevant* values embodied in the *Charter*, which act as constraints on the exercise of the powers delegated to the decision maker. I refer in this regard to the considerations identified by this Court in *Vavilov*: “. . . a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision . . .” (para. 105). In practice, it will often be evident that a value must be considered, whether because of the nature of the governing statutory scheme (at para. 108), because the parties raised the value before the administrative decision maker (at paras. 127-28), or because of the link between the value and the matter under consideration (P. Daly, “The *Doré* Duty: Fundamental Rights in Public Administration” (2023), 101 *Can. Bar Rev.* 297, at p. 309). For example, it is obvious that the development of policies and the making of decisions that are likely to have an impact on a minority language educational environment require consideration of the values underlying s. 23 of the *Charter* (p. 309). A decision cannot be unreasonable because the decision maker failed to consider a *Charter* value that was not relevant for the purposes of its decision. However, if the decision maker takes a relevant value into account in its decision while

opting to prioritize another objective, it must be concluded that the decision engages the *Charter*.

[67] Once the reviewing court has determined that the impugned administrative decision infringes *Charter* rights or limits the values underlying them, the court must, under the approach laid down in *Doré*, determine whether the decision is reasonable through an analysis of its proportionality. This involves assessing whether the exercise of discretion reflects a “proportionate balancing” of *Charter* rights and the values underlying them, on the one hand, with the statutory objectives in respect of which the discretion was granted, on the other (para. 57; *Loyola*, at paras. 37 and 39; *Trinity Western University*, at para. 58).

[68] The focus of judicial review is “on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*Vavilov*, at para. 83). As is the case for any other decision, the context constrains “what will be reasonable for an administrative decision maker to decide” when it exercises its discretion in a manner that limits *Charter* protections (para. 89; *Loyola*, at para. 41; *Trinity Western University*, at para. 81). To be reasonable, a decision must reflect the fact that the decision maker considered the *Charter* values that were relevant to the exercise of its discretion (E. Fox-Decent and A. Pless, “The Charter and Administrative Law: Substantive Review”, in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 399, at p. 410). The decision must also show that the decision maker “meaningfully” (*Vavilov*, at para. 128) addressed the

Charter protections to “reflect” the impact that its decision may have on the concerned group or individual (para. 133).

[69] This means that when the decision maker gives precedence to the legislature’s intention over *Charter* protections in order to achieve the statutory objectives, it must do so in a manner that is “proportionate to the resulting limitation on the *Charter* right” (*Trinity Western University*, at para. 82). A decision that has a “disproportionate impact” on *Charter* protections can in no way show that the decision maker meaningfully considered these protections or that its reasoning reflects the significant impact that the decision may have (para. 80). Such a decision is therefore unreasonable.

[70] In the context of discretionary decisions that engage *Charter* protections, the standard of reasonableness must allow for a “robust . . . analysis” (*Loyola*, at para. 3 (emphasis in original)) that works the same “justificatory muscles” as the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (*Doré*, at para. 5; *Loyola*, at para. 40; *Trinity Western University*, at paras. 79-82). The approach must take into account the role of the courts as guardians of the Constitution and must reflect the particular importance of justification in decisions that engage *Charter* protections (*Vavilov*, at para. 133). When a decision engages *Charter* values, “reasonableness and proportionality become synonymous” (*Trinity Western University*, at para. 80).

[71] As a general rule, a reviewing court must not, in assessing the reasonableness of a decision, reweigh the factors underlying the decision or conduct a

de novo analysis of the issues raised. If the decision maker took into account all the considerations that were relevant in the context, the reviewing court must uphold its decision (*Vavilov*, at para. 83; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 38; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72, at para. 16; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 42; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 39; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 64; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 91; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 40).

[72] On the other hand, the *Doré* approach requires reviewing courts to inquire into the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker (*Fox-Decent and Pless*, at pp. 406-7). In making this assessment, the reviewing court must “consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives”, while asking “whether the decision falls within a range of reasonable outcomes” (*Trinity Western University*, at para. 81). In cases where the reviewing court finds that “there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant . . . objectives”,

the administrative decision will be unreasonable (para. 81 (emphasis in original)). This is a necessary consequence of the robust analysis required by *Doré*.

[73] It follows from the foregoing that, under the *Doré* approach, a reviewing court must first determine whether the discretionary decision limits *Charter* protections. If this is the case, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them. If not, the decision is unreasonable.

[74] While no infringement of the right guaranteed by s. 23 of the *Charter* can be established with respect to the appellant parents in this case, the *Doré* framework is still applicable in reviewing the Minister's decisions if the relevant values underlying this right were limited by those decisions. I therefore turn now to the preliminary question of whether the Minister's decisions engage the protections afforded by s. 23.

B. *The Decisions Engage the Protections of Section 23*

(1) The Values Underlying Section 23 Are Relevant to the Exercise of the Minister's Discretion

[75] *Charter* values are those that “underpin each right and give it meaning” (*Loyola*, at para. 36). *Charter* values are inseparable from *Charter* rights, which “reflect” them (para. 4). The choice made by the framers to entrench certain rights in

the text of the supreme law of Canada means that the purpose of these rights is important for Canadian society as a whole and must be reflected in the decision-making process of the various branches of government.

[76] This Court has recognized in its decisions that *Charter* values have various functions, depending on the context in which they come into play. For example, these values can be used in the development of common law rules (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 602-3; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 85 et seq.; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at paras. 22-23 and 30). In statutory interpretation, *Charter* values are an important tool, because courts must, in circumstances of ambiguity, prefer an interpretation that is respectful of these values (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 62).

[77] In addition, as I explained above, administrative decision makers must always consider the values relevant to the exercise of their discretion. The manner in which *Charter* values are dealt with is thus adapted to the specific context of administrative law (L. Sossin and M. Friedman, “Charter Values and Administrative Justice” (2014), 67 *S.C.L.R.* (2d) 391, at p. 408). In this sense, these values engage the *Doré* framework, even in the absence of any infringement of a right. Where a *Charter* right is infringed, the values “help determine the extent of any . . . infringement” of that right “and, correlatively, when limitations on that right are proportionate in light of the

applicable statutory objectives” (*Trinity Western University*, at para. 57, quoting *Loyola*, at para. 36).

[78] Here, there is a clear link between s. 23 of the *Charter* and the Minister’s decisions, because the decisions were likely to have an impact on a minority language educational environment. Moreover, on judicial review of the two decisions made by the Minister in 2018, the chambers judge ordered the Minister to take into account the purpose of s. 23 when reconsidering A.B.’s application for admission. The Minister herself acknowledged, in the decisions she made following the 2019 judgment, that she had to consider the purpose of s. 23, particularly its remedial nature, in exercising her discretion (A.R., vol. IV, at p. 151). To identify the values that governed the Minister’s discretion, I must therefore begin by determining the purpose of s. 23 and the relevant values underlying it, and I must then assess whether the admission of children of non-rights holder parents could have an impact on those values.

[79] Section 23(3)(a) of the *Charter* guarantees certain categories of citizens the right to instruction in the minority official language where “the number of children of citizens who have such a right is sufficient”. This Court has interpreted this constitutional provision as having three purposes: the right is “at once preventive, remedial and unifying” in nature (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 15). As the Court stated about the provision in *Conseil scolaire francophone de la Colombie-Britannique*, “[i]t is intended not only to prevent

the erosion of official language communities, but also to redress past injustices and promote the development of those communities” (para. 15).

[80] In practical terms, this means that the preservation and development of minority language communities are among the values underlying s. 23. Protection of the right to instruction in the minority official language, explicitly entrenched in the Constitution, is a reflection of these values, insofar as education is a *means* of realizing the societal ideal that they embody. These values require preserving and developing the vitality not only of the minority language, but also of the minority culture. In *Mahe*, Dickson C.J. rightly noted the “vital role of education in preserving and encouraging linguistic and cultural vitality” in the minority language community (p. 350). Since *Mahe*, this Court has repeatedly reiterated that education is an essential means of ensuring the preservation and development of minority language communities (*Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at pp. 849-50; *Arsenault-Cameron*, at para. 26; *Doucet-Boudreau*, at para. 26; *Solski*, at para. 3; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238, at para. 28; *Nguyen*, at para. 26). Schools also play this role as a “setting for socialization where students can converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture” (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 1).

[81] The admission of children of parents who are not rights holders under s. 23 of the *Charter* can have an impact on the preservation and development of minority

language communities. In *Gosselin*, this Court pointed out that minority language schools must not become “centres of assimilation” by allowing the presence of children from the majority language community to end up swamping the children from the minority language community (para. 31). A few years later, in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, this Court noted that, although the Yukon Francophone School Board had no authority to set admission criteria for children of non-rights holders because such authority had not been delegated to it, “nothing stops the Board from arguing that the Yukon’s approach to admissions prevents the realization of s. 23’s purpose” (para. 74).

[82] It goes without saying that population growth in the minority language community helps to ensure its development and prevent its decline, including by reducing the likelihood of assimilation and cultural erosion (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 156). Population growth in the minority language community also contributes to fulfilling the promise of s. 23, which is to give effect to “the equal partnership of Canada’s two official language groups in the context of education” (*Rose-des-vents*, at para. 27).

[83] Thus, the decisions rendered by provincial and territorial governments regarding the admission of children of non-rights holder parents to minority language schools, even when they do not directly infringe the right guaranteed by s. 23, can nevertheless have a significant impact on the preservation and development of minority

language communities. It follows that these values are always relevant when the government exercises such a discretion and that they must therefore be taken into account. For the purposes of this appeal, this means that the Minister was required to consider the values of preservation and development of minority language communities in exercising her discretion to decide whether to admit children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories.

(2) The Minister's Decisions Have the Effect of Limiting the Values Underlying Section 23

[84] It is not in dispute that the appellant parents have no constitutional right to have their children receive instruction in French. That being said, viewing the protections of s. 23 of the *Charter* as being engaged only in cases where an infringement of this section has been shown is contrary to the approach set out in *Doré*. As I explained above, the *Doré* framework applies when limitations are imposed on *Charter* values. I add that taking such a strict view would also be contrary to the remedial purpose of s. 23, which is aimed at “promoting the development of official language minority communities and changing the status quo” (*Conseil scolaire francophone de la Colombie-Britannique*, at paras. 3 and 16; see also *Doucet-Boudreau*, at para. 29), as well as contrary to its preventive purpose.

[85] A contextual approach must be adopted to determine whether the values of preservation and development of minority language communities were limited by the Minister's decisions against admitting the children of the appellant parents to the

schools of the Francophone minority in the Northwest Territories. Because of their collective dimension, the protections conferred by s. 23 of the *Charter* must be assessed in light of the unique language dynamics of a province or territory (*Reference re Public Schools Act (Man.)*, at p. 851; *Solski*, at paras. 34 and 44). This requires an analysis of the relationship between the minority and majority language groups in order to understand “the historical and social context of the situation to be redressed” (*Arsenault-Cameron*, at para. 27).

[86] The evidence shows that, within the specific language dynamics of the Northwest Territories at the time, the preservation and development of the Francophone community were supported through, among other things, the admission of a certain number of children of non-rights holder parents. Such admissions contributed to the growth of the Francophone community of the Northwest Territories and promoted its development, in such a way as to reduce the likelihood of assimilation and prevent cultural erosion. It must therefore be concluded that, at the time the Minister made her decisions, there was a link between the admission of children of non-rights holder parents to French-language schools in the Northwest Territories and the preservation and development of the Francophone community there.

[87] In fact, at the time the impugned decisions were made, the Minister acknowledged that the assimilation rate and exogamous marriages were challenges to be overcome for the transmission of the French language within the Francophone community of the Northwest Territories. As the 2016 Directive recognized, the

admission of a certain number of children of non-rights holder parents to French first language schools in the Northwest Territories supported the growth of the rights holders population, which was an “inherent part” of the revitalization of the French language.

[88] The *Report* reviewing the 2008 Directive was to the same effect. After noting that natural growth of the rights holder population and the migration of rights holders “may not be sufficient to maintain a level of population sufficient for supporting French first language schools, particularly in Hay River” (p. 20), this report recommended the admission of certain children of non-rights holder parents, particularly to allow for the sustainment and growth of the Francophone community of the Northwest Territories (p. 21).

[89] Depending on the circumstances, the admission of children of non-rights holder parents may have a positive or a negative impact on the minority language community. This means that the government’s refusal to admit a child of non-rights holder parents will not have the effect of limiting the preservation and development of minority language communities in every case. On the contrary, in some cases, the values underlying s. 23 of the *Charter* will militate against the admission of children of non-rights holder parents. As I mentioned above, minority language schools may become centres of assimilation if the admission of children of non-rights holder parents undermines the linguistic and cultural vitality of the linguistic minority in the schools. Here, however, several factors showed that the children’s admission would not have

such consequences, including the CSFTNO's support for their admission and the individual characteristics of each application.

[90] I reiterate that in the cases before us, the appellant parents had to *undergo* and *have their children undergo* an assessment by officials at the school where enrolment was sought. Their files were then sent to the CSFTNO, which, after reviewing them, determined that the children's admission would be beneficial for the vitality of the educational environment in question and of the Francophone community in general.

[91] The admission of the children of the appellant parents would therefore have had a positive impact on the preservation and development of the Francophone community of the Northwest Territories. In this context, refusing to admit those children by prioritizing the government's interests had the effect of limiting the values of preservation and development of minority language communities, which underlie s. 23. The Minister therefore had to proportionately balance these values with the government's interests.

C. *The Minister Did Not Proportionately Balance the Values Underlying Section 23 With the Government's Interests*

[92] The balancing exercise called for by *Doré* requires an administrative decision maker to "giv[e] effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Here, this exercise

required, at a minimum, that the Minister truly take into account the constitutional values of preservation and development of official language minority communities, in other words, that she meaningfully address the considerations arising therefrom (*Vavilov*, at para. 128). The reasons for the Minister's decisions do not show that she did so. I conclude that those decisions are unreasonable.

[93] The two decisions rendered concerning W. in 2018 did not refer to s. 23 of the *Charter* or the values underlying it. Yet there is no doubt that the Minister had to consider the preservation and development of the Francophone community of the Northwest Territories in exercising her residual discretion. Failure to take the relevant values into account necessarily leads to a disproportionate balancing. Moreover, I agree with Rouleau J. that the Minister fettered the exercise of her residual discretion by refusing to admit W. solely on the basis of his ineligibility in one of the three streams of the 2016 Directive. The streams of the 2016 Directive could not bind the Minister to the point of preventing her from exercising her discretion in every case. The chambers judge was therefore correct in finding that those decisions were unreasonable.

[94] The reasons for the decisions rendered following the 2019 judgment do not show that the Minister truly considered s. 23 by meaningfully addressing this provision so as to reflect the significant impact that the decisions might have on the Francophone community of the Northwest Territories. The Minister did mention the provision, but, with respect, she did not give the proper weight to the relevant values.

[95] In those decisions, the Minister indicated that she had to admit the children in question only if their admission was “required” to protect the Francophone community of the Northwest Territories and to meet its needs. She added that, given the government’s scarce resources, the 2016 Directive “proportionally balance[d] the needs of the linguistic minority with the necessity for the Government to control and predict its investments in minority education”, which was why it was important that she exercise her residual discretion in a fair and consistent manner (A.R., vol. IV, at p. 157; A.R., vol. V, at p. 119; A.R., vol. VI, at pp. 47 and 122; A.R., vol. VII, at p. 24). In her opinion, considerations related to the cost of services were “very important” in the exercise of that discretion. However, since there was, in her view, no threat to the continued viability of the French first language education programs at École Boréale and École Allain St-Cyr, she found that “[a] refusal of admission . . . , outside the 2016 Directive, therefore does not breach the object and purpose of s. 23 of the *Charter*” (A.R., vol. IV, at p. 155; A.R., vol. V, at p. 116; A.R., vol. VI, at pp. 45 and 120; A.R., vol. VII, at p. 22).

[96] However, the existence of the 2016 Directive did not in itself discharge the Minister’s obligations under *Doré*. In stating the contrary, the majority of the Court of Appeal was reasoning from the false premise that, insofar as the 2016 Directive took into account the considerations arising from s. 23, it served to relieve the Minister of her obligation to consider the relevant constitutional values. With respect, I cannot accept that reasoning. Although the general purposes of the 2016 Directive were in line with the values embodied in s. 23 of the *Charter*, it should not be presumed that each

decision made under that directive — including by virtue of the residual discretion derived from it — was the result of a proportionate balancing of the relevant values and the government's interests in a given case.

[97] Furthermore, in this case, *Doré* required the Minister to consider how the admission of the children for whom the applications for admission had been made would promote the development of the Francophone community of the Northwest Territories. The aim of s. 23 of the *Charter* is more ambitious than simply preserving the Francophone community of the Northwest Territories; the ultimate purpose of the provision is to promote the development of that community (*Reference re Public Schools Act (Man.)*, at p. 849; *Conseil scolaire francophone de la Colombie-Britannique*, at para. 15) in order to fulfil s. 23's promise to give effect to the equal partnership of the country's two official language groups in the context of education. In short, considering s. 23 only when it has been shown that the community is threatened is inconsistent with such a purpose.

[98] Several factors showed, however, that the children's admission was beneficial for the development of the Francophone community of the Northwest Territories. First, the fact that the Minister did not duly consider the CSFTNO's support for the applications for admission made by the appellant parents is of particular importance. This Court has recognized the expertise of bodies like school boards in assessing the educational needs of the linguistic minority (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 86).

[99] Second, the Minister also did not duly consider the individual characteristics of the various applications in relation to the benefits that could result from a decision to grant them. The level of French knowledge of A.B.'s child and F.A.'s child, the ties of the families of A.B., F.A. and J.J. to the Francophone community of the Northwest Territories, and the Franco-Vietnamese identity of T.B.'s family are characteristics the Minister had to assess carefully. By disregarding these factors, the Minister mistakenly reduced the appellant parents' motivation for applying for their children's admission to a mere desire to provide the children with a linguistic advantage.

[100] At the time of the applications for admission, each child concerned had a sound knowledge of French, had significant ties to the Francophone community of Yellowknife or Hay River through their parents, and had the support and commitment of their parents in learning that language. When the application for W.'s admission was made, W. was able to have a conversation in French without any difficulty or need for support, using a varied vocabulary. School officials at École Allain St-Cyr anticipated that W.'s admission would not require any additional francization resources. Similarly, the CSFTNO noted that the admission of F.A.'s child and T.B.'s child to École Allain St-Cyr "would help maintain the French environment at school" and would also "promot[e] the transmission of the French language in order to curb assimilation in the French-speaking community" (A.R., vol. V, at p. 195; A.R., vol. VI, at p. 76). Likewise, the admission of E.S.'s child to École Boréale was viewed as a step that would promote the vitality of the school and of the Francophone community and that

would slow down assimilation, without requiring any additional francization resources. Lastly, when the applications for the admission of J.J.'s children, T. and N., were made, the children already knew French; their admission to École Allain St-Cyr would therefore not have imposed any additional burden for French-language instruction and would have had a “positive impact on the vitality of the school and the French-speaking community” (A.R., vol. VII, at p. 44; see also p. 45).

[101] The decisions rendered by the Minister following the 2019 judgment thus had a significant impact on the values enshrined in s. 23 of the *Charter*, since the admission of the children of the appellant parents would have had considerable benefits for the preservation and development of the language and culture of the minority language community.

[102] It follows from the *Doré* requirements that those decisions were unreasonable. The Minister attached too much importance to her duty to make consistent decisions and, in doing so, gave disproportionate weight to the cost of the contemplated services in the exercise of her discretion. The Minister was clearly entitled to take costs into account in her decision. “Obviously, however, given the remedial nature of s. 23, pedagogical requirements will have more weight than cost” (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 52; see also *Mahe*, at pp. 384-85; *Rose-des-vents*, at para. 30). The Minister has not shown that, in her decisions, she meaningfully addressed the values of preservation and development of

the Francophone community of the Northwest Territories so as to reflect the significant impact that the decisions might have on it.

[103] I pause here to make two important clarifications. Stating that the Minister did not proportionately balance the values underlying s. 23 of the *Charter* with the government's interests in this case does not amount to imposing an obligation on decision makers in her position to admit all children of non-rights holder parents. A refusal does not always mean that there was a disproportionate balancing of the relevant values and the government's interests. Nor does this amount to endorsing freedom of choice of the language of instruction, a model expressly rejected by the framers under s. 23 (*Solski*, at para. 8; *Nguyen*, at paras. 35-36). On the contrary, the freedom of choice model would imply the systematic admission of children of non-rights holder parents without a proportionate balancing of *Charter* values. In each case, the decision maker must consider the relevant values in light of the particular circumstances of the application in order to decide whether to admit children of non-rights holder parents.

D. *It Is Neither Necessary nor Appropriate for This Court To Rule on the Allegation That the Right To Use French or the Right To Be Heard Was Infringed*

[104] The appellants have raised a new ground of appeal in this Court. They argue that their right to use French in the courts as guaranteed by s. 19(1) of the *Charter* and s. 9(1) of the *OLA* includes the right to be understood directly in that language without the assistance of an interpreter. Because interpretation services were required for the hearing before the Court of Appeal for the Northwest Territories, the appellants

take the view that their right under s. 19(1) of the *Charter* and s. 9(1) of the *OLA* was infringed.

[105] Section 19(1) of the *Charter* guarantees to every person that “[e]ither English or French may be used . . . in, or in any pleading in or process issuing from, any court established by Parliament”. The wording of s. 9(1) of the *OLA* is almost identical. That provision states that “[e]ither English or French may be used by” any person “in, or in any pleading in or process issuing from, any court established by the Legislature”.

[106] By way of relief, the appellants seek a number of declaratory conclusions. First, they would like this Court to declare [TRANSLATION] “that the courts of the Territories are established by Parliament within the meaning of s. 19(1) of the *Charter*” (A.F., at para. 116). They also seek a declaration that s. 19(1) of the *Charter* and s. 9(1) of the *OLA* [TRANSLATION] “protect the right to be understood directly by the court, and that these rights were infringed” (para. 116). Second, the appellants ask this Court to declare that s. 9(1) of the *OLA* is of no force or effect to the extent of its inconsistency with s. 19(1) of the *Charter* or, in the alternative, that s. 19(1) of the *Charter* and s. 9(1) of the *OLA* protect the right to be understood by the court and that this right was infringed in this case. Lastly, if the Court denies their other conclusions, the appellants seek at least a declaration that their right to be heard flowing from natural justice was infringed.

[107] To make the principal orders sought by the appellants, this Court has to resolve some complex constitutional issues. First, the Court must determine whether the Court of Appeal for the Northwest Territories is a court established by Parliament within the meaning of s. 19(1) of the *Charter*, an exercise that requires consideration of the constitutional status of the Northwest Territories. Second, ruling in favour of the appellants also requires overturning *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, in which a majority of this Court, per Beetz J., found that the right to use either of the country's two official languages in any court referred to in s. 19 of the *Charter* does not include the right to be understood, as this right derives rather from the principles of natural justice and the right to a fair trial.

[108] In the case at bar, I am of the view that it would not be appropriate for this Court to decide the issue raised by the appellants. Judicial restraint generally requires that this Court not decide constitutional issues that are not necessary to the resolution of the parties' dispute (see *R. v. McGregor*, 2023 SCC 4, at para. 24, and the cases cited). This rule may be departed from in exceptional circumstances (para. 24, quoting *Attorney General (Que.) v. Cumming*, [1978] 2 S.C.R. 605, at p. 611). However, there are no such circumstances in this case.

[109] From the time it arose until the time it came before this Court, the parties' dispute related not to s. 19(1) of the *Charter* or s. 9(1) of the *OLA* but rather to the decisions rendered by the Minister concerning the applications for admission submitted

by the appellant parents. The appellants did not even raise this issue in the course of the hearing before the Court of Appeal for the Northwest Territories, despite having been informed months ahead of time that the members of the panel were not all bilingual.

[110] In finding that the Minister's decisions are unreasonable and in setting aside the Court of Appeal's judgment and the orders it made, this Court is ruling in favour of the appellants and bringing an end to the dispute between the parties. It is therefore unnecessary to address the issue of how s. 19(1) of the *Charter* and s. 9(1) of the *OLA* should be interpreted in order to resolve the dispute. This issue has, for all practical purposes, become moot.

[111] The appellants contend that the new constitutional issue remains relevant even if this Court sets aside the Court of Appeal's judgment. In their opinion, the Court should address it anyway because language rights are substantive rights and not purely procedural ones. There is no doubt that language rights are not purely procedural. Indeed, the Court has recognized this, first in *R. v. Beaulac*, [1999] 1 S.C.R. 768 (at para. 28), and, more recently, in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261 (at para. 20), and *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535 (at para. 38). With respect, however, such an argument reflects circular reasoning. The Court's reasons for considering an issue cannot be predicated on a presumed outcome.

If the Court accepted this argument, it would have to address most constitutional issues that have no impact on the case.

[112] For these reasons, it is preferable to leave the interpretation of s. 19(1) of the *Charter* and s. 9(1) of the *OLA*, as well as any reconsideration of *Société des Acadiens*, for another day.

[113] It is also unnecessary to decide whether the quality of the interpretation services in the Court of Appeal resulted in an infringement of the appellants' right to be heard. Since I would set aside the Court of Appeal's judgment for other reasons, there is no need to consider this ground of appeal.

VI. Disposition

[114] For the reasons given above, I would allow the appeal and set aside the orders made by the Court of Appeal for the Northwest Territories, with costs throughout. Given that the children of the appellant parents have since been admitted to a school of the Francophone minority in the Northwest Territories or have moved outside that region, there is no need to restore the orders made by the Supreme Court of the Northwest Territories setting aside the Minister's decisions and referring the applications for admission back to her.

Appeal allowed with costs throughout.

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