SCC File No.: 38332

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

CONSEIL SCOLAIRE FRANCOPHONE DE LA COLOMBIE-BRITANNIQUE, FÉDÉRATION DES PARENTS FRANCOPHONES DE COLOMBIE-BRITANNIQUE, ANNETTE AZAR-DIEHL, STÉPHANE PERRON AND MARIE-NICOLE DUBOIS

APPELLANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, AND THE MINISTER OF EDUCATION OF BRITISH COLUMBIA

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(Rule 42(5) of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

Overview of facts

1. The Attorney General of the Northwest Territories ("AGNWT") relies on the facts as set out in the factum of the Respondents, Her Majesty the Queen in Right of the Province of British Columbia and the Minister of Education of British Columbia.

2. The AGNWT does not take a position in relation to any factual dispute as between the parties and seeks to assist this Court with a contextual interpretation and application of section 23 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

Overview of position

3. Section 23 is a carefully crafted political compromise whereby the provinces and territories agreed to provide minority-language education to the children of certain explicitly-defined categories of individuals.

4. The sliding scale is well established in the case law as a method for determining entitlement of right-holders under s. 23. In order to determine placement on the sliding scale, a contextual analysis must occur. If the test becomes too rigid, the outcome will be impractical.

5. At the top of the sliding scale, rights-holders will be entitled to separate homogenous facilities. At the bottom of the sliding scale, there is no right to programs and services. The extent of the entitlements are clear at the two ends of the spectrum.

6. This case is focused on the middle of the sliding scale, where entitlement will vary along a spectrum. The analysis will need to be fact-specific, contextual, and holistic. There will be a range of reasonable outcomes in the middle of the sliding scale, and governments need the flexibility to make assessments considering both s. 23 and the greater public good.

7. Each jurisdiction has unique geographic, cultural, linguistic and budgetary considerations that must be recognized in the interpretation of s. 23.

8. In the Northwest Territories (NWT), the population of s. 23 right-holders is relatively small, considering that the Territory has a total population of less than 45,000 people. There are many communities in which the numbers do not warrant programs and services in French. When the numbers do warrant a French-language school, but do not warrant the top of the sliding scale, the existing minority school cannot be compared with a larger majority school.[1]

9. As such, the most practical way to mitigate the migration from minority schools, where entitlement is at the low or middle point of the sliding scale, is to offer an instruction program of equivalent quality and outcome, but in facilities that are "proportional" to the number of students. A "reasonable parent", as adopted in *Rose-des-Vents* ("RDV"), ought to recognise that a low number of rights holder students may not warrant a school complete with a gymnasium and science laboratories. However, the same "reasonable parent" will not be deterred from sending his or her child to the minority school if the curriculum and educational program are met and are of equivalent quality. Moreover, even if school facilities must be shared with the majority, a "reasonable parent" would not be deterred if, from a holistic standpoint, the educational experience is equivalent. This allows for proportionality to form part of the sliding scale analysis.

10. Although minority language students may not have facilities that are "equivalent" to the majority language school, their s. 23 rights may still be fulfilled. This is the only practical interpretation of the sliding scale.

11. A practical and contextual approach to s. 23 also demands that costs be considered as part of both the s. 23 analysis and any potential analysis under s. 1, as this Court affirmed in *Rose-des-Vents*.

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[1] *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 SCR 139 at para 35 [*RDV*].

12. An analysis of costs underpins all government decisions. There are continually competing priorities and limited financial resources in all jurisdictions. This is especially true in a thinly populated northern jurisdiction such as the NWT.

PART II – QUESTIONS IN ISSUE

13. The AGNWT will be focusing its argument on the following questions:
    a) How is entitlement determined for rights-holders at the middle of the sliding scale?
    b) Are costs a relevant consideration in a s. 23 analysis?
    c) Are costs a relevant consideration in a s. 1 analysis?

PART III – ARGUMENT

A. Context of the Northwest Territories

14. The NWT covers 1.17 million square kilometers and has a population of 44,420.[2] Over half of the population is located in 32 smaller communities, with the remainder located in the territory's only city of Yellowknife.[3] Approximately 50% of the population of the NWT is Indigenous.[4]

15. The 2016 Census results demonstrate that 3.3% of the population in the NWT identified French as their mother tongue. In contrast, the 2016 Census reports that 11.2% of the population report an Indigenous language as their mother tongue.

16. The NWT is the only jurisdiction in Canada that protects nine (9) official Indigenous languages alongside English and French through its *Official Languages Act*[5]: Chipewyan (Yatıé), Cree (Nēhiyawēwin),Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North

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[2] NWT Bureau of Statistics, online: https://www.statsnwt.ca/.
[3] NWT Bureau of Statistics: "Population Estimates by Community", online: https://www.statsnwt.ca/population/population-estimates/bycommunity.php.
[4] *Ibid.*
[5] *Official Languages Act*, RSNWT 1988, c O-1 at ss. 4.

Slavey (Sahtúǫt'ıne Yatı́), South Slavey (Dene Zhatıé) and Tłı̨chǫ. The *Official Languages Act* recognizes that many languages are spoken and used by people of the NWT, and the Government of the Northwest Territories is committed the preservation, development, and enhancement of Indigenous languages.

17. The Department of Education, Culture and Employment (ECE) is responsible for the delivery of early childhood, primary, secondary and advanced education. This includes responsibility for the public school system including Junior Kindergarten (JK) through Grade 12.

18. There are 10 "education bodies"[6] composed of elected and/or appointed individuals who represent their community's interests in the planning and delivery of educational programming for their school(s). This role is mandated by statute.[7] The Education Bodies are responsible for the delivery of education services to slightly over 8,500 students enrolled in 49 publicly funded schools. There are no private schools in the JK-12 system.

19. The Commission Scolaire Francophone du Territories de Nord-Ouest (CSTNO) is one of the ten Education Bodies. The CSTNO is responsible for two French-language schools in the Northwest Territories. École Boréale in Hay River and École Alain St. Cyr in Yellowknife. In 2018-2019, the enrolment numbers were 93 and 131 students, respectively. These numbers represent less than 3% of the overall student population in the NWT.

B. Sliding Scale is Fact-Driven

20. Section 23 is a carefully crafted political compromise whereby the provinces and territories agreed to provide minority-language education to the children of certain explicitly-defined categories of individuals.

[6] *Education Act,* SNWT 1995, c 28 [*Education Act*] at ss. 1.
[7] *Ibid* at ss. 117-119.

21. While s. 23 is remedial in nature, the "courts should be careful in interpreting language rights"[8]. The language of s. 23 is contextual and fact-specific. Courts have consistently applied this lens to s. 23 interpretation[9]. As held by this Court in *Nguyen*:

> [25] This Court has considered s. 23 several times since the Canadian Charter came into force in 1982. This provision lays down a comprehensive code that establishes the nature and scope of the educational rights of an English or French linguistic minority. Section 23 applies in particular to minority language communities throughout Canada. Moreover, it was not enacted in a vacuum. Well aware of the situations of linguistic minorities and the existing legislative schemes with respect to the language of instruction in Canada, the framers wanted to remedy the most serious defects in the legal rules being applied to such minorities and to implement uniform corrective measures for past injustices (Quebec Association of Protestant School Boards, at p. 79; Mahe v. Alberta, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at pp. 363-64; Solski, at para. 21). Section 23 was thus conceived as a tool for achieving equality between Canada's two official language groups (*Mahe*, at p. 369; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), [2000] 1 S.C.R. 3, at para. 26).[10] [Emphasis added].

22. The sliding scale approach established in *Mahe* has been applied in s. 23 jurisprudence to determine entitlement of rights holders. The sliding scale creates a spectrum of entitlement. Placement of rights holders on the sliding scale is fact-driven.

23. At each end of the sliding scale, there is reasonable clarity about entitlement. At the low end of the scale, the number of rights holders in a community may not warrant instruction. Section 23(1) must be interpreted as establishing a threshold where services become required - i.e. *where the numbers warrant*. At the high end of the sliding scale, rights holders are entitled to substantive equality: instruction and educational facilities equivalent in quality to that provided to the official language majority of the province or territory. This Court's past jurisprudence has recognized that, because of the remedial nature of s. 23 rights, equality may mean something different than formal equality.

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8 *Mahe v. Alberta,* [1990] 1 S.C.R. 342 [*Mahe*] at p. 365.
9 *Mahe*; *Arsenault-Cameron v. Prince Edward Island,* [2000] 1 S.C.R 3 [*Arsenault-Cameron*].
10 *Nguyen v. Quebec (Education, Recreation and Sports),* [2009] 3 S.C.R. 208 at para 25.

24. This Appeal focuses on the entitlement of rights holders who fall at the middle of the sliding scale. *Mahe* is clear that there is no explicit standard, but there are criteria which guide the assessment. All that can be said with certainty is that rights holders are entitled to more than instruction and something less than separate homogenous facilities. Consequently, *Mahe* encourages a fact-specific analysis in each case.

25. The courts below applied the approach from *Mahe* and held that entitlement at the middle of the sliding scale is best determined using a "proportionality" approach. The proportionality approach is not simply a mathematical application, it is a holistic and contextual exercise, and one which provides the greatest degree of flexibility to meet the unique needs of rights holders wherever they are throughout Canada.

C. Entitlement should be determined based on community-specific factors

26. Community-specific factors should be the paramount consideration when determining whether an entitlement is being met. This is particularly relevant for a jurisdiction like the NWT. There are unique linguistic and cultural dynamics in each of the NWT's thirty-three (33) communities which must be accounted for.

27. The most striking example of the unique linguistic context of the NWT is the *Official Languages Act*, which designates eleven (11) official languages. Resources dedicated to official languages must be divided not just between English and French but also with the nine Indigenous languages recognized in the *Official Languages Act*. Government is required to carefully balance s. 23 rights with the need to support all languages in the NWT. An interpretation of the appropriate entitlement under s. 23 must allow for such delicate balancing of interests.

28. Many communities in the Northwest Territories have a very small number of rights holders. It is difficult, if not impossible, to generate a meaningful comparison between programs and facilities for minority language and majority language students. In order to assess entitlement, the entire picture of the community must be considered.

29. The AGNWT agrees with the trial judge in this case that "unlike entitlement at the high end of the sliding scale, it is impossible to delineate with precision what a small number of rights holders' children is entitled to. The government could meet the appropriate standard of entitlement by funding any range of amenities and services. Thus, the overall context of what is pedagogically and financially realistic for a given group will inform the question whether the amenities and services the minority is receiving are proportionate."[11]

30. There are also significant costs associated with building and maintaining facilities in remote Northern communities. These costs should also form part of the community-specific focus.

31. The trial judge specifically commented on the need to consider practicality in determining entitlement at the middle of the sliding scale. The trial judge considered the cases of a minority-language school that was significantly smaller than a neighbouring school (about 1/10 of the enrollment). In those instances, the trial judge found that proportionality was the correct approach as it allowed for governments to be practical about what can be offered on such a scale.[12] It is not reasonable or practical to expect that students in a school with 50 students will have facilities that are equivalent to a school with 500 students. However, on balance, the schools may be "proportional" in that they offer the prescribed curriculum and provide adequate facilities for students, such that they would satisfy a reasonable rights holder parent.

32. This example from the trial judgment translates well to the Northwest Territories context. It must be recognized that what is pedagogically and cost appropriate may differ depending on the realities of a specific community. This is particularly true for our remote Northern communities.

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[11] *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education),* 2016 BCSC 1764 [TJ] at para 866.
[12] *Ibid* at paras 2207 and 2343.

33. When assessing equivalence, a purposive approach requires a court to consider the educational choices available from the perspective of a reasonable s. 23 rights holder. Would reasonable rights holder parents be deterred from sending their children to a minority language school because the size of the school is meaningfully inferior as compared with an available majority language school, when the difference may be rationally explained by the size of enrollment?[13] "The precise geographic scope of the comparator group, and the relative usefulness of this sort of comparison, will vary with the circumstances".[14] Moreover, in the case at hand, it is not contested that the "education program" and education outcomes are equivalent.[15] Only the physical school facilities are contested.

34. The most effective manner to assess entitlement is to consider the "reasonable rights holding parent". The reasonable rights holder will take into account proportionality when weighing educational choices for their child. In a community where numbers of rights holders are relatively small, there must be some recognition that a compromise is required.

35. Substantive equality does not equate with equivalent size of school in that scenario. It rather means that the "reasonable parent" will not be deterred from sending his or her child to the minority school because the curriculum and educational program are met and are of equivalent quality (teaching and graduation outcomes). Even if to achieve this, the sharing of facilities is necessary, a "reasonable parent" would not be deterred if, from a holistic standpoint, the educational experience in equivalent. This is how proportionality applies and forms part of the sliding scale analysis.

36. In our submission, the s. 23 test is sufficiently contextual, practical, and holistic to be adapted to different factual scenarios so as to result in outcomes that are fair and consistent. The proportionality analysis considers the very same primary factors as the substantive equality

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[13] *RDV*, *supra* note 1 at para 35.
[14] *Arsenault-Cameron*, *supra* note 9 at para 57.
[15] TJ, *supra* note 11 at paras 2757, 2959, 3152, 3337, 3870, 3888, 4626, and 4639: evidence at trial was that graduation rates were consistently higher for CSF students compared to minority language students.

analysis: costs and pedagogy. It also considers the practical differences that may arise in schools of different sizes. Further, the courts below did not suggest that proportionality is simply a mathematical exercise, as suggested by the Appellants[16]. It remains flexible and fact-specific[17].

D. Costs are relevant in a s. 23 analysis

37. Costs are also a relevant component of the s. 23 analysis. In *NWT v. Association des parents ayant droit de Yellowknife* ("APADY"), the NWT Court of Appeal stated:

> "Shortages of resources are particularly acute in smaller jurisdictions like the Northwest Territories. Minority language schools must exist within the larger educational system, and must be realistic about the availability of resources". [18]

38. In APADY, the Court also concluded that costs of building a facility are an essential component to the appropriate constitutional analysis, or whether the facility is "warranted" out of public funds.[19]

39. It is the AGNWT's position that "[t]he government should have the widest possible discretion in selecting the institutional means by which s. 23 obligations are to be met."[20] A government is entitled to make efficient use of public resources while discharging its s. 23 obligations[21] which will necessarily involve a cost-benefit analysis.[22] For example, in *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest*, the NWT Court of Appeal held that it was reasonable for the government to

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[16] Appellant's Factum at para 61.
[17] *Conseil scolaire francophone de la Colombie-Britannique, Federation des parents francophones de Colombie-Britannique et al v. British Columbia (Education)*, 2018 BCCA 305 [BCCA] at para 150.
[18] *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 [*APADY*] at para 77.
[19] *Ibid* at para 142, referencing *Reference Re Public Schools Act (Manitoba)*, [1993] 1 S.C.R 839 at 856.
[20] *Mahe*, supra note 8 at para 392, as quoted in *APADY, supra* note 18 at para 156.
[21] *APADY, supra* note 18 at para 124.
[22] *Ibid at* para 136 and *Mahe, supra* note 8 at para 385.

maximise the use of existing facilities and require the sharing of spaces, instead of building new school facilities.[23]

40. As previously mentioned, there is an obligation on the Government of the Northwest Territories, through its' *Official Languages Act*,[24] to preserve and support all of the NWT's official languages, and the cost of doing so is a relevant factor in any contextual analysis of s. 23.

E. There is a temporal aspect inherent to s. 23

41. Student numbers will vary over time. There is a direct correlation between numbers and placement on the sliding scale. Placement on the sliding scale determines entitlement. Therefore, there has to be a temporal aspect to the right.

42. Section 23 is a remedial measure that must be responsive to rights holders, numbers of which will shift over time in either direction. This requires that the entitlement analysis may also vary over time, to ensure that both governments and rights holders are not disadvantaged by changes in numbers[25].

43. This temporal dimension is also necessary in order to apply a practical approach to the s. 23 entitlement analysis. For example, a government cannot be obligated to build a school because the numbers "may" warrant. This would be an impractical outcome that would put unnecessary strain on government budgets. The numbers either warrant or they do not, and that answer may change over time.

44. *Mahe* and *Arsenault-Cameron* established that the relevant figure for s. 23 is "the number of persons who can eventually be expected to take advantage of a given programme or facility" or "the number who will potentially take advantage of the service, which can be roughly

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[23] *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWTCA 1.
[24] *Official Languages Act, supra* note 5.
[25] BCCA, *supra* note 17 at paras 165-166; Respondent's Factum [RF] at para 58.

estimated as being somewhere between the known demand and the total number of persons who could potentially take advantage of the service".[26] The AGNWT submits that the courts below properly applied this dimension of the s. 23 analysis by going beyond a simple counting exercise and considering "likely attendance in the short term".[27]

F. The Courts below properly considered costs under the s. 1 analysis

45. The Appellants argue that the courts below considered cost saving at the third step of the proportionality stage of *Oakes*, rather than at the minimal impairment step, and that this led to the Respondent being allowed to "dodge its burden" to demonstrate that the infringing measures impaired s. 23 as little as possible.

46. This Court has been clear that application of the *Oakes* test should not be approached in a mechanistic fashion; rather, it should be applied flexibly, having regard to the factual and social context of each case.[28]

47. Cost and/or administrative convenience alone have not traditionally been accepted by this Court as a pressing and substantial objective for the justification of an infringement.

48. In *RDV*, this Court stated that:

> It may be that costs and practicalities again become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the Charter…[t]here is a perpetual tension in balancing competing priorities: between the availability of financial resources and the demand on the public purse.[29]

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[26] *Arsenault-Cameron*, *supra* note 9 at para 32.
[27] TJ, *supra* note 11 at paras 3780-3797, 4041-4059, and 5190-5208.
[28] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 63*; Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para 87.
[29] *RDV*, *supra* note 1 at para 50.

49. The AGNWT agrees with the Respondent's statement of the test: does the infringing measure fall within a range of reasonable alternatives that would achieve government's pressing and substantial objective? There is no obviously correct or obviously wrong solution.[30]

50. Overall, the AGNWT advocates for a practical, contextual, community-specific approach in the interpretation of s. 23 rights. This approach continues into the s. 1 analysis when considering minimal impairment. Costs are a part of the overall picture when considering what is reasonable in the circumstances, and were properly considered by the courts below.

51. In this case the courts did consider (for each community) the salutary effect of cost savings as compared to the projects that were identified by the CSF. Specifically, the courts below considered whether the effects of infringing measures were proportionate to the pressing and substantial objective.[31] This analysis is required by *Oakes*, and was properly applied.

G. Conclusion

52. The AGNWT submits that the courts below properly applied the sliding scale analysis to the facts of this case.

53. At the middle of the sliding scale, there are a number of considerations to apply in order to determine whether entitlement has been met. Factors such as overall number of students, comparator schools, community and social context, and the underlying purpose of s. 23 are all relevant to the contextual, holistic analysis that is required.

54. Determining entitlement under s. 23 is a complicated exercise. It requires a great degree of flexibility to fashion the right in a way that allows government to provide a service that is meaningful and proportionate. This type of flexible interpretation allows s. 23 rights to be

[30] RF, *supra* note 25 at para 120.
[31] TJ, *supra* note 11 at para 2826; BCCA, *supra* note 17 at paras 220-223.

respected, within the meaning set out by the framers of the Constitution, but does not go so far as to require the Court to re-write the comprehensive and uniform code created by s. 23.[32]

PART IV – COSTS

55. The Government of the Northwest Territories seeks no order as to costs and asks that no costs be ordered against it.

PART V – ORDER SOUGHT

56. The Government of the Northwest Territories takes no position on the disposition of the appeal.

ALL OF WHICH RESPECTFULLY SUBMITTED, this 12th day of September, 2019.

per

GOVERNMENT OF THE NORTHWEST TERRITORIES
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[32] *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 SCR 201, at para 8, 20-21.

PART VI – LIST OF AUTHORITIES

Authorities	**Mentionned at paragraph no.**
Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R 3	21, 33 and 44
Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 SCR 139	1 and 33
Canadian Broadcasting Corporation v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480	46
Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education), 2016 BCSC 1764	29, 31, 33, 44 and 51
Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique et al v. British Columbia (Education), 2018 BCCA 305	36, 42 and 51
Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326	46
Mahe v. Alberta, [1990] 1 S.C.R. 342	21-22, 24-25, 39 and 44
Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 S.C.R. 208	21
Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife, 2015 NWTCA 2	37 and 39
Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest, 2015 NWTCA 1	39
R. v. Butler, [1992] 1 S.C.R. 452	46
R. v. Keegstra, [1990] 3 S.C.R. 697	46
Reference Re Public Schools Act (Manitoba), [1993] 1 S.C.R 839	38
RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199	46
Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 SCR 201	54

PART VII – LEGLISATION

Education Act, SNWT 1995, c 28	*Loi sur l'éducation*, LTN-O 1995, c 28
1. (1) In this Act, […] ''education body'' means a District Education Authority, a Divisional Education Council or a *commission scolaire francophone de division*, or all of them, as the case may be.	1. (1) Les définitions qui suivent s'appliquent à la présente loi. […] «organisme scolaire» Administration scolaire de district, conseil scolaire de division ou commission scolaire francophone de division, ou tous ceux-ci, selon le cas.

Official Languages Act, RSNWT 1988, c O-1	*Loi sur les langues officielles*, LRTN-O 1988, c O-1
4. Chipewyan, Cree, English, French, Gwich'in, Languages Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tåîchô are the Official Languages of the Northwest Territories.	4. L'anglais, le chipewyan, le cri, l'esclave du Nord, Langues l'esclave du Sud, le français, le gwich'in, l'inuinnaqtun, officielles l'inuktitut, l'inuvialuktun et le tåîchô sont les langues officielles des Territoires du Nord-Ouest.