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
(Appellants/Plaintiffs)

AND:

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

RESPONDENTS
(Respondents/Defendants)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is not the first time this Court has been asked to consider the scope and application of s. 23 of the *Canadian Charter of Rights and Freedoms*,[1] a positive right that requires governments to provide minority-language education out of public funds wherever the number of minority-language students so warrants. Yet the circumstances of this appeal raise a number of novel questions: How do courts determine and measure entitlement where the number of students falls in the middle of the "sliding scale"? How does the *Oakes*[2] analysis apply to breaches of a *positive* right? Are *Charter* damages available with respect to a government policy made in good faith, which is later found to be unconstitutional?

2. These questions cannot be separated from the complex factual matrix within which the courts below answered them. This Court should resist the invitation of the appellants, implicit in the expansive relief they seek on appeal, to consider the voluminous evidentiary record afresh. The trial judge considered extensive evidence about minority-language education in 17 distinct communities throughout the province, in addition to the government's systems for allocating capital and operating funding. Her careful findings of fact are entitled to deference.

3. The courts below did not err in their application of ss. 23 and 1 of the *Charter* in the circumstances of this case. In particular, the courts below properly applied the local and comparative approach mandated by this Court, adopted a "proportionality" analysis to determine and measure entitlement where the number of minority-language students falls at the middle of the s. 23 sliding scale, and correctly understood the s. 23 right to have a temporal dimension. They recognized that the requirement for school boards to prioritize capital project requests is consistent with the right to management and control under s. 23. In considering whether certain s. 23 breaches were justified, they applied the *Oakes* test and considered the role of costs in that analysis, as this Court has said could be relevant.[3] They did not err in concluding that some breaches were justified under s. 1.

4. The Court of Appeal applied the governing law from this Court to overturn the trial

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[2] *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].
[3] *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 49 [*RDV*].

judge's award of *Charter* damages for the s. 23 breach caused by a government policy, made in good faith, that froze school district transportation funding from 2002/2003 to 2011/2012. That conclusion should be upheld.

5. The appeal should be dismissed and the parties should bear their own costs of all proceedings, including this appeal.

B. Statement of facts

6. This appeal arises from a far-reaching challenge to the delivery of minority-language education across the province of British Columbia (**"BC"**). The trial judge granted the appellants some, but not all, of the remedies they sought. The Court of Appeal upheld that decision, with the exception of the trial judge's award of *Charter* damages for one s. 23 breach.

1. Procedural history

7. The appellants first served their statement of claim in June 2010, one month after a related petition proceeding was launched with respect to minority-language education at École élémentaire Rose-des-vents in Vancouver, west of Main Street (**"RDV Petition"**).

8. The RDV Petition was divided into two phases: i) whether rightsholders, previously determined to fall at the upper end of the sliding scale,[4] were receiving substantively equivalent educational facilities; and ii) who bore responsibility for any s. 23 *Charter* breach, whether the breach could be justified under s. 1, and remedies. This Court's decision in *RDV* arose out of the first phase. The second phase is addressed in the decision of the trial judge in this matter, but was not appealed.

9. In this action, the appellants advanced an extensive challenge under s. 23 of the *Charter* to the Ministry of Education's (**"Ministry"**) educational funding processes and associated legislation. They also brought 17 "community claims" that sought specific relief in discrete catchment areas of the Conseil scolaire francophone de la Colombie-Britannique (**"CSF"**) around the province.[5]

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[4] *Association des Parents Francophones de la Colombie-Britannique v British Columbia* (1996), 27 BCLR (3d) 83 (SC); *RDV* at paras 5, 34, 53.

[5] See *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 at paras 33-35 [TJ]. The respondents distinguish between the named appellants and the CSF, which is the statutory entity (i.e. minority-language school board) responsible for

10. At the appellants' option, the action proceeded as a broad systemic challenge rather than by way of a test case or cases.[6] The trial lasted 238 days (in addition to a separate three-day hearing on costs) and culminated in the longest decision in the history of the BC Supreme Court.

2. Decisions below – BC Supreme Court and BC Court of Appeal

(a) Trial judgment

11. The description of the trial judgment provided by the appellants is selective and argumentative.[7] The trial judge's findings—insofar as they are directly relevant to this appeal—are more accurately summarized here.

12. The trial judge made the following findings with respect to the appellants' discrete claims for facilities and funding:

a. The CSF faces more challenges in securing capital funding than majority-language school boards. These disadvantages are not sufficient to ground a s. 23 breach in their own right.[8]

b. Most of the appellants' claims for increased Annual Facilities Grant (**"AFG"**) funding are without merit. The exception is the Ministry's delay in applying the AFG "Rural Factor" to the CSF between 2009/2010 and 2011/2012. This s. 23 breach is justified under s. 1.[9]

c. The policy that froze the transportation supplement from 2002/2003 to 2011/2012 is an unjustified infringement of s. 23. The trial judge awarded $6 million in *Charter* damages.[10]

13. With respect to the community claims, there was no s. 23 *Charter* breach in seven out of 17 communities: Nelson, Richmond, Kelowna, Nanaimo, Chilliwack, Port Coquitlam, and Whistler (elementary level). In each of Pemberton and Victoria, the trial judge found a s. 23 breach but held it to be justified under s. 1 of the *Charter*. In Mission, the trial judge assumed (without deciding) a breach of s. 23, but found it justified.

14. In four communities, the trial judge found an unjustified breach of the *Charter*, but held that the fault for the breach lay with the CSF and/or a majority-language school board and not

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delivering francophone education in British Columbia under the *School Act*, RSBC 1996, c 412.

[6] The appellants' final pleading is 185 pages long: see 6th Further Amended Notice of Civil Claim [6th FANOCC]; TJ at paras 6838-6841.

[7] Appellants' Factum at paras 4-8 [AF].

[8] TJ at paras 1416-1438.

[9] TJ at paras 1493-1511, 1518-1527.

[10] TJ at paras 1687-1705, 1759-1793.

with the respondents (**"Province"**): Whistler (secondary level), Squamish, Vancouver (Northeast), and Burnaby. The trial judge found the Province at fault (in whole or in part) for unjustified breaches of s. 23 in four communities: Sechelt, Penticton, Vancouver (West), and Abbotsford/Central Fraser Valley.[11]

15. In addressing the capital funding systemic claims, the trial judge held:

a. The Ministry's system for prioritizing building condition projects is not ideally suited to remedying substandard CSF facilities. However, any s. 23 breach is justified under s. 1.[12]

b. The requirement that school boards, including the CSF, prioritize capital projects does not infringe s. 23 of the *Charter*.[13]

16. In separate reasons, the trial judge ordered the parties to bear their own costs.[14]

(b) Appeal decision

17. The appellants appealed numerous aspects of the trial decision, but challenged only one finding of fact.[15] The respondents brought a cross-appeal on the sole issue of *Charter* damages for the transportation funding breach.

18. The BC Court of Appeal dismissed the appeal in its entirety, and allowed the Province's cross-appeal. In separate reasons, the Court upheld the trial judge's order with respect to costs, and ordered the parties to bear their own costs of the appeal.[16]

PART II – ISSUES ON APPEAL

19. The appellants state the issues as follows:

a. How should the number of students in a French-language school be situated on the sliding scale when that number is less than the number of students in the neighbouring English-language schools?

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[11] The trial judge generally found declaratory relief appropriate for community claims in which she found an unjustified s. 23 breach. For a summary of remedies in the TJ, see paras 6834-6843.

[12] TJ at paras 6087-6137.

[13] TJ at paras 6492-6504.

[14] *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCSC 105 at paras 79-80 [TJ Costs].

[15] See *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305 at paras 11-12, 14 [BCCA].

[16] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 423 [BCCA Costs].

b. What is the test for assessing whether parents are receiving what they are entitled to receive?

c. Can the Province require the CSF to prioritize capital projects that address breaches of s. 23?

d. Did the courts below take into account irrelevant factors in the s. 1 analysis?

e. Are *Charter* damages an appropriate and just remedy for violations of s. 23 in this case?

PART III – ARGUMENT

A. Principles relevant to s. 23

20. Section 23 of the *Charter* is a unique constitutional right. It imposes positive obligations on government to provide minority-language educational services and facilities, paid for out of public funds, wherever in the province the number of children so warrants.[17] The right also affords the minority a degree of management and control over cultural and linguistic aspects of the educational program.[18] Section 23 is remedial, designed to "preserve and promote" both official languages and their cultures by requiring government to alter or develop major institutional structures.[19] While its scope requires careful interpretation, this Court has cautioned that the unusual nature of s. 23 should not discourage courts from breathing life into its obligations, especially given its vulnerability to government inaction.[20]

21. At the same time, s. 23 is not an absolute right. This Court has recognized that it was a "carefully crafted compromise"[21] and that the remedial approach to linguistic rights should "not undermine the primacy of the written text."[22] The language of s. 23 is contextual and fact-specific; its application in any given case is informed by a number of "complex and subtle factors," in addition to the specific numbers of children in, and the circumstances of, the particular community at issue.[23] Due to the unique linguistic dynamics that exist across Canada,

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[17] *Mahe v Alberta*, [1990] 1 SCR 342 at 365-366 [*Mahe*].
[18] *Mahe* at 371-373, 377-380.
[19] *Mahe* at 362-366.
[20] *Arsenault-Cameron v PEI*, 2000 SCC 1 at para 27 [*Arsenault*]; *Mahe* at 365; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 29 [*Doucet-Boudreau*].
[21] *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 2.
[22] *Caron v Alberta*, 2015 SCC 56 at paras 36-38 [*Caron*].
[23] *Mahe* at 386, 366; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SCR 839 at 856 [*Manitoba Reference*]; *Reference re Education Act of Ontario and Minority Language Education Rights* (1984) 47 OR (2d) 1 (CA) at 522 [*Ontario Reference*]; *Arsenault* at paras 56-

this Court has said the interpretive approach to s. 23 may differ between jurisdictions.[24]

22. Unlike other *Charter* provisions, s. 23 "grants a right which *must be* subject to financial constraints."[25] Section 23 also does not preclude provincial regulation; it coexists with the province's responsibility for, and legitimate interest in, the provision of public education.[26]

23. In addition to its "internal qualifications and … balancing,"[27] s. 23 is also subject to s. 1 of the *Charter*.[28] This Court has recognized "a perpetual tension in balancing competing priorities"[29] that requires courts to consider the overall costs and practicalities of providing public education to all children in the province, both in the justification analysis and in fashioning an appropriate and just remedy for a breach.[30]

24. There is no rigid formula for implementing s. 23.[31] Instead, the "sliding scale" framework developed by this Court in *Mahe* recognizes and confirms that the concept of practicality must infuse every element of the analysis.[32] Ultimately, government's obligation is to do whatever is "practically possible"[33] in the circumstances.

25. The sliding scale analysis requires a court to make three findings: i) the "numbers" of minority-language students in each community likely to eventually take advantage of the proposed service or facility; ii) the rightsholders' position along the sliding scale—that is, the services appropriate for the particular numbers involved; and iii) whether the students are receiving the services and facilities to which the rightsholders are entitled.[34]

57; *RDV* at para 39.
[24] *Manitoba Reference* at 848-849, 851.
[25] *Mahe* at 385 [emphasis added].
[26] Section 93 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 68; *Arsenault* at para 53; *Mahe* at 380.
[27] *Mahe* at 369.
[28] *Mahe* at 393-394; *Quebec (Education, Recreation and Sports) v Nguyen*, 2009 SCC 47 at para 37; *RDV* at paras 49-50, 61; *Ontario Reference* at 518.
[29] *RDV* at para 49.
[30] *RDV* at para 49-50.
[31] *Mahe* at 376, 386; *Arsenault* at para 57.
[32] *Mahe* at 366-368, 378, 384-385.
[33] *Arsenault* at para 26.
[34] *Mahe* at 365-366, 378, 384-387; *Arsenault* at 32-42, 54, 59-62; *Manitoba Reference* at 850, 852-856; *RDV* at paras 5, 15, 30, 34, 45-46, 50.

26. The "numbers" ground the entire s. 23 analysis.[35] The relevant number is somewhere between known demand and the total number of persons who could potentially take advantage of the service.[36] Even at this first stage, the analysis is contextual; it may include consideration of, among other things, catchment area boundaries, differences between rural and urban areas, or the experience of growth (or otherwise) in nearby communities.[37] The numbers analysis is also prospective in nature, contemplating reasonably foreseeable future growth.[38] Since the numbers are not static,[39] there is necessarily a temporal aspect to any s. 23 analysis.[40]

27. Once the number of children of rightsholders in a particular community has been determined, the court must situate the rightsholding community along the sliding scale by deciding the services to which they are entitled. This Court has consistently rejected an analytical approach that would treat instruction and facilities as "separate rights" under s. 23.[41] Instead, they must be considered together. In deciding what is required, courts must consider the pedagogical needs of the children and the costs of the proposed services, with pedagogical considerations being given more weight.[42] This too is a local analysis: the services appropriate for rightsholders in one geographic area may not be appropriate in another community.[43]

28. Where the numbers in a community are very small, s. 23 may not require any services. At a certain point along the sliding scale, the numbers will require instruction in the minority language. The nature of that instruction—whether several courses or a full curriculum—is dependent on the numbers. Where there is "a relatively large number of s. 23 students," the community will approach the upper end of the sliding scale, warranting both instruction in separate homogeneous facilities and a measure of management and control.[44]

29. Between the lower and upper ends of the sliding scale, there are myriad potential points of entitlement. In this middle section, where rightsholders are entitled to something more than

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[35] *Mahe* at 366-368, 379-380, 384; *Manitoba Reference* at 857-859; *Arsenault* at para 57.
[36] *Mahe* at 384; *Arsenault* at para 32; *Manitoba Reference* at 850.
[37] *Mahe* at 386-387; *Arsenault* at paras 10, 33, 57.
[38] *Arsenault* at para 33; *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 at para 99 [*NWTCA*]; *Mahe* at 378, 384.
[39] *Mahe* at 386.
[40] *Mahe* at 389.
[41] *Mahe* at 366-367; *RDV* at para 38.
[42] *Mahe* at 384-385; *RDV* at paras 30, 47.
[43] *Mahe* at 385-386, citing *Ontario Reference* at 522; *Arsenault* at paras 44, 56-57.
[44] *Mahe* at 367-368, 379-380, 387-389; *RDV* at para 29.

simple instruction, but less than fully distinct homogeneous facilities, the exact services to which a specific group of rightsholders is entitled is less clear. *Mahe* says there is no explicit standard, given the great variety of educational circumstances which might face the courts,[45] and instead prescribes that entitlement be "worked out over time by examining *the particular facts* of each situation."[46] The courts below determined that entitlement at the middle of the sliding scale is to proportionate programs, amenities, and services, having regard to what is practical, in terms of pedagogy and costs, for the specific numbers involved.[47]

30. At the third stage of the s. 23 analysis, courts must consider whether rightsholders are receiving that to which they are entitled. In the context of rightsholders at the *upper end* of the sliding scale, the question is whether the overall educational experience, viewed contextually and holistically, is substantively equivalent to that provided to the majority. In other words, would reasonable rightsholder parents be deterred from sending their children to a minority-language school because it is meaningfully inferior to an available majority-language school?[48]

31. This is the first case in which this Court must grapple with the type of instruction and facilities required in communities where the number of students warrants *some* instruction and facilities, but does not reach the upper end of the sliding scale. For these communities, the courts below concluded that the test of "substantive equivalence" was ill-suited, since it could be expected that parents would see meaningful differences by virtue of the different sizes of schools.[49] To account for that, the courts below framed the relevant question as whether a reasonable rightsholder parent would find the overall educational experience to be meaningfully disproportionate.[50]

B. The courts below properly analysed s. 23 in the circumstances of this case

32. The appellants submit the courts below erred by: i) misinterpreting the sliding scale analysis;[51] ii) substituting "proportionality" for "substantive equivalence" in the s. 23 analysis;[52]

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[45] *Mahe* at 376, 385-386.
[46] *Mahe* at 385 [emphasis added].
[47] TJ at paras 859-860; BCCA at paras 144, 149-154.
[48] *RDV* at paras 30, 33 citing *Mahe* at 371, 378. See also *RDV* at paras 35, 39.
[49] TJ at para 852; BCCA at paras 150, 153.
[50] TJ at para 853; BCCA at paras 152-153.
[51] AF at paras 18, 24-51.
[52] AF at paras 19, 52-77.

and iii) upholding a requirement that the CSF prioritize its requests for capital projects even when those projects seek to address s. 23 breaches.[53] To remedy these asserted errors, and those alleged in relation to s. 1,[54] the appellants invite this Court to make declarations that would alter fact-driven findings and orders made in respect of 14 of the 17 communities at issue in the claim.[55]

33. Practically understood, the appellants ask this Court to: determine that all 14 groups of rightsholders are *entitled* to the highest level of facilities and services (e.g. equivalent homogeneous facilities); measure whether each group is receiving "substantively equivalent" facilities and services against those provided in all majority-language comparator schools;[56] and find unjustified breaches of s. 23 in all 14 communities. The Province would then have to address those breaches immediately.

34. The appellants seek to overturn virtually every aspect of the trial judge's conclusions on the community claims, but do not allege a single error of fact. The trial judge reviewed the extensive evidence and made factual findings in each community. The Court of Appeal was correct to reject the appellants' invitation, in the guise of legal argument, to reweigh the evidence and reach different conclusions.[57]

1. The correct interpretation of the sliding scale

35. The appellants argue the courts below misinterpreted the sliding scale analysis by: i) focusing on local comparator schools; ii) considering only the costs of newly constructed schools; and iii) importing a "temporal aspect" to artificially decrease the numbers.[58] The s. 23 case law supports the approach of the courts below.

(a) Entitlement is determined by reference to the specific services proposed for a particular community

36. The first two of the appellants' three arguments, set out in paragraph 35 above, are premised on the theory that entitlement can be determined without reference to the particular community at issue and the specific services contemplated.[59]

37. This theory is inconsistent with this Court's jurisprudence and must be rejected. This

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[53] AF at paras 20, 78-81.
[54] AF at paras 82-123.
[55] AF at paras 41, 51, 74-77, 81, 122, 123, 150-151.
[56] Re: comparator schools, see TJ at paras 817-824, 2125-2127; *RDV* at para 37.
[57] See e.g. BCCA at paras 141, 171, 212, 215, 231, 241, 253, 300.
[58] AF at para 24.
[59] See AF at para 18: the appellants' proposed test for the sliding scale reflects these arguments.

Court has confirmed that, to determine entitlement, courts must assess pedagogical and cost considerations in view of the specific services proposed for a particular community. This necessarily requires reference to local comparators. The case law does not support a prescriptive or formulaic approach, such as the one the appellants advance.

38. In the *Manitoba Reference*, this Court declined to determine the particular facilities required by s. 23 because there was no "specific factual or … geographical setting." Citing *Mahe*, Lamer C.J. recognized there might be "significant differences" in the requirements for urban, rural, and traditional francophone areas, as informed by pedagogy and costs. He held that "the financial impact of the provision of specific facilities will vary from region to region," such that the assessment of appropriate facilities "should only be undertaken on the basis of a distinct geographic unit within the province."[60]

39. This Court has repeatedly affirmed that the entitlement analysis "should be applied on a local basis."[61] *Mahe* held that the s. 23 analysis is specific to "the particular number of students involved" and, as a result, what the numbers warrant, in terms of instruction and facilities, "will have to be worked out over time by examining *the particular facts of each situation*."[62]

40. The courts below applied the correct approach to determining entitlement: a fact-specific, contextual inquiry that is informed, but not dictated, by reference to local comparators.

(i) Pedagogical and cost factors are assessed on a community-specific basis

41. The appellants submit the entitlement analysis determines only the "level" of constitutionally required services, not the "means".[63]

42. This view cannot be reconciled with the practical, location-specific inquiry mandated by this Court. The entitlement analysis is designed to recognize that what is pedagogically and cost appropriate may differ, for example, between urban and rural areas, or based on the type of instruction proposed.[64] The language of s. 23(3)(a) also supports a local analysis: the rights apply "wherever" in the province the numbers warrant.[65] Contrary to the appellants' submission

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[60] *Manitoba Reference* at 856.
[61] *Mahe* at 386, citing *Ontario Reference* at 522. See also *Arsenault* at paras 54, 56-57.
[62] At 366, 385 [emphasis added]. See also *Ontario Reference* at 532-533.
[63] AF at paras 18, 29-40 (esp 30-34).
[64] *Mahe* at 385-386; *Ontario Reference* at 522; *RDV* at para 47; *Manitoba Reference* at 856.
[65] *Ontario Reference* at 522; *Mahe* at 386; *Arsenault* at para 56; *Caron* at para 36.

otherwise,[66] it is precisely this local focus that distinguishes the s. 23 analysis from the broader inquiry under s. 1 of the *Charter*. Further, a local focus does not, in itself, elevate the significance of cost factors:[67] both costs *and* pedagogical requirements must be considered at the community-specific level, but the balance will be different in different places.

43. By its nature, the "sliding scale" contemplates a spectrum of possible entitlements. Where a community falls on the spectrum is governed by the particular numbers in the context of that specific community. In contrast, the appellants essentially argue that a community is entitled to homogeneous facilities as soon as the number of minority-language students is "at least as large as the smallest [majority-language] school anywhere in the province."[68] On this theory, the Province would have to provide homogeneous facilities in any community with 50 francophone students, irrespective of the often variable local considerations.[69] Such an approach would replace the sliding nature of the scale, and the contextual elements of the analysis, with the bright-line "thresholds" approach that this Court has previously rejected.[70]

44. Relatedly, the appellants allege the courts below unduly focused on the costs of building new schools instead of the more general "level" of services required by s. 23. They say this improperly conflates the remedies sought with entitlement.[71]

45. This argument must be rejected for two reasons. First, it fails to account for the fact that the right of management and control requires the Province to defer, at least to some extent, to the minority's determination of what is pedagogically appropriate.[72] While s. 23 does not require "programmes and facilities which are inappropriate for the number of students involved,"[73] it remains for the CSF to propose specific services so that the pedagogical and cost implications *of those services* can be assessed. The requirement for the CSF to identify what it considers pedagogically appropriate in each community does not impose an insurmountable burden of

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[66] AF at para 38.
[67] AF at para 37.
[68] BCCA at para 142. See AF at para 41; see also AF at paras 28, 33.
[69] AF at paras 30, 33, 37, 41-43. See also BCCA at para 149.
[70] *Mahe* at 366-367, 385; *Manitoba Reference* at 854; *RDV* at paras 38-40. See also TJ at paras 826-837.
[71] AF at paras 31-40.
[72] *Arsenault* at paras 30, 38, 40, 43-44, 51-55, 57, 60-62; TJ at paras 381-406, 840, 859, 2122.
[73] *Mahe* at 385.

proof.[74] To the contrary: it properly respects the separate responsibilities of the minority-language school board and government to provide minority-language education.[75]

46. Second, the CSF identified only one level of services that, in its view, would be appropriate: the construction of a new, homogeneous school in each community. Both in requests the CSF made to the Ministry, and in the appellants' pleadings, the appellants identified newly constructed facilities as "the only solution" that would meet the requirements of s. 23.[76] At no time did the appellants identify (let alone quantify the cost of) any less expensive alternatives.[77] The trial judge's analysis was thus constrained by the pedagogical and costs evidence that was actually before her; she could not determine entitlement "in the abstract".[78] The record equally does not permit this Court to assess the costs and practicalities of hypothetical, less-expensive alternatives to new, homogeneous schools.[79] The appellants are bound by the case they advanced: the courts below did not err in considering the pedagogical and cost implications of the only option the appellants presented.[80]

(ii) Reference to local comparators is necessary and appropriate

47. The appellants assert the courts below erroneously focused on local comparators, and found that rightsholders are only entitled to homogeneous schools if the minority-language student population is comparable to that of typical majority-language schools in the area. The appellants say the existence of small majority-language schools elsewhere in the province should

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[74] AF at paras 39-40.

[75] See e.g. TJ at paras 398-406, 444-448, 1215, 1218-1221, 3985-3990, 6049-6050, 6763-6765, 6759-6760; *Arsenault* at paras 51-53. In response to the appellants' reference to the legislative authority to order disposal of school board assets in Québec (AF at para 40), there is no challenge to the BC *School Act*, which does not grant that kind of authority (see TJ at paras 1146-1157).

[76] See Exhibits ("Ex") 734, 779 (Whistler); 735, 780 (Pemberton); 736, 781 (Sechelt); 729, 778 (Squamish); 797-798, 808-811, 814, 816 (Victoria); 839-840 (Abbotsford); 841-842 (Mission – new gym only); 844, 846 (Chilliwack); 852-854, 856 (Kelowna); 857-858 (Nelson); 876-877 (Penticton); 888-889 (Nanaimo); 919 (Port Coquitlam); 920-921 (Burnaby); 930-933 (Vancouver East); 962-965, 1027 (Vancouver West); 744, 1037 (Richmond). See also 6th FANOCC, e.g. at paras 133(b), 134(b), 135, 285(c) (Chilliwack); 166, 168, 288(c) & (d) (Whistler); 179, 181, 281(c) & (d) (Pemberton) (repeated for every community claim).

[77] AF at paras 30, 33, 37; BCCA at paras 14, 140.

[78] BCCA at paras 144, 147.

[79] AF at paras 30, 33, 39-43.

[80] BCCA at paras 132, 139-141.

have led the courts below to find the numbers in Whistler, Chilliwack, and Pemberton warranted homogeneous schools.[81]

48. The appellants mischaracterize the analysis and conclusions of the courts below. The trial judge recognized she was engaged in a practical, contextual analysis, which required some form of comparison.[82] She did not treat comparator school populations and operating capacities as determinative; rather, she considered them "useful" references that could provide "insight" into what might be practical to provide to a similar number of minority-language students in a given community.[83] As the Court of Appeal properly acknowledged, "[j]ust because local enrolment should not be controlling, does not mean it is irrelevant."[84]

49. The courts below recognized that rightsholders are owed some deference in determining what is pedagogically appropriate in order to maintain the proper focus on the needs of the minority.[85] But having found that the Province's obligation is to do what is "practically possible",[86] the trial judge concluded the need to defer to the CSF cannot impose "an impractical obligation on government to incur disproportionate costs" for relatively small numbers.[87]

50. The results below reflect this balance. While the trial judge concluded there is "no question", in terms of pedagogy and costs, that equivalent, homogeneous facilities are warranted where the numbers are comparable,[88] the fact that the numbers differed in some communities did not *preclude* a finding of entitlement to homogeneous facilities. Where numbers were not comparable, the trial judge further considered what s. 23 required, based on the evidence of pedagogical considerations and costs.[89] The trial judge considered factors like the nature of the particular francophone community, its demographics, and the location of francophone students in

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[81] AF at paras 25 (citing TJ at para 793, BCCA at paras 134-142), 26-28, 36, 39, 41-43.
[82] TJ at paras 788-791 (citing *Mahe* at 366-367, 384-386), 840, 854, 2112.
[83] TJ at paras 856, 2203.
[84] BCCA at para 136.
[85] Re: AF at para 27, see e.g. TJ at paras 791, 840, 859 (see also *ibid* at paras 387-388, 390, 392, 787); BCCA at para 136. See also *Arsenault* at paras 38, 51-55.
[86] TJ at paras 415-416, citing *Mahe* at 367 and *Arsenault* at para 26. See also *NWTCA* at para 43; *Mahe* at 384-385.
[87] TJ at paras 789, 840, 847-848.
[88] TJ at para 793.
[89] TJ at para 859; BCCA at para 142.

relation to the proposed facility.[90] The trial judge also considered evidence about small schools elsewhere in the province.[91] In certain cases, differences between minority and comparator enrolments led the trial judge to specify the parameters of the homogeneous facility to be provided. For example, in both Mission and Squamish, the trial judge found entitlement to homogeneous schools with proportionate core facilities.[92]

51. This approach does not allow the needs of the majority to trump those of the minority.[93] Rather, it recognizes that the required assessment cannot be completed in the abstract.[94]

52. The appellants suggest the courts below ought to have given more weight to comparator evidence of small schools across the province. In support, they rely on this Court's reference, in *Mahe*, to evidence about other school districts in Alberta.[95] In *Mahe*, the sole issue was whether the number of rightsholders in Edmonton justified the creation of an independent school board. This Court only considered evidence about other school districts—as comparators to the proposed francophone school board—to answer *that* question. The parties agreed that the existing francophone school in Edmonton satisfied the requirements of s. 23. As a result, and in contrast to this case, in *Mahe*, there was no need for this Court to consider comparator evidence to determine entitlement to educational facilities based on pedagogical and costs considerations.[96]

53. The appellants appear to concede that most of the small schools they have identified were not purpose-built for less than 100 students, but they maintain that evidence of schools the Province has "agreed to allow … to run" is still relevant.[97] Even recognizing that s. 23 is a special circumstance, the courts below correctly held that province-wide evidence of small

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[90] TJ at paras 469, 2112; 2450-2451, 2454, 2489 (Squamish); 2850-2859, 2878-2879, 2975 (Nelson); 5159-5163, 5168, 5234 (Coquitlam).

[91] AF at para 26. See e.g. TJ at paras 842 (general); 2204-2209 (Whistler); 2342-2344 (Pemberton); 2489 (Squamish); 2693-2697 (Sechelt); 2888, 2890-2903 (Nelson); 4764-4766 (Chilliwack); 4922-4929 (Mission).

[92] TJ at paras 2491 (Squamish); 4929 (Mission). See also e.g. TJ at paras 2697 (Sechelt); 5064, 5067, 5143-44 (Abbotsford – longer term). The Province adopts the same short-form for grade configurations as the trial judge: i.e. K-7 denotes Kindergarten to Grade 7.

[93] AF at paras 27, 36.

[94] BCCA at para 144.

[95] AF at paras 26, 28, 41-43. *Mahe* at 388.

[96] See *Mahe* at 360-361, 387-388.

[97] AF at paras 39, 41-43; see footnotes ("FN") 109, 112-113 for *purpose-built* small schools.

schools is not determinative of the pedagogical and cost considerations *everywhere*. The appellants' reliance on this evidence ignores: the broader evidentiary context, including the design, funding, and location of those schools;[98] the capacities and compositions for which those schools were built and the impact of provincial enrolment decline;[99] and the difference between capital funding (to build/acquire) and operating funding (to staff, equip, and operate).[100] The courts below did not err in discounting the evidence of small schools elsewhere in BC: the "unique circumstances" underlying those examples renders the appellants' reliance on them inappropriate.[101]

54. The trial judge made findings of fact that the Ministry rarely builds schools for a capacity

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[98] For example, re: Port Clements multiplex and Big White school (AF at paras 28, 43), see TJ at para 2205; Ex 1401A, V1 at pp 209-210, 230-231 (community funding) and 284, 302-303 (developer funding). Re: Crawford Bay, see TJ at paras 2890-2892; Transcript ("TR"), K. Miller, 9 Mar 2015 at pp 53(L21)-54(L9); TR, L. Godin, 17 Apr 2014 at pp 24(L38)-25(L4), 25(L45)-26(L8), 41(LL4-43). Re: Blackwater Creek (K-3), see TJ at paras 1925, 2307, 2336; Exs 1Q, 587: A11-01. Re: Winlaw and Jewett, see TJ at paras 2875, 2887-2888, 2937-2944; Exs 1V, 587: A05-12 and A05-16. Re: Oyama, see TJ at paras 1912-1913, 4279, 4321-4322; Exs 1S, 587: A04-18.

[99] The appellants' assertions at para 41 (FNs 101, 104) are misleading. Ex 1401A (V6 at pp 94-100) is a point-in-time snapshot of September 2010 enrolments that does not reflect the operating capacities for which those schools were built: e.g. North Oyster was built for 19K/256 elementary (Ex 587: A03-20-01), but enrolment declined from 175 in September 2002 to 95 in September 2010 (Ex 1401A, V6 at pp 21, 45, 94, 98). Re: AF FN 101: the appellants note small enrolments at Dewdney and Deroche elementaries, but omit the findings that those schools were built for greater than 100 students and are "operating at 50% or less" of capacity (TJ at paras 4924-4925). Sea Island is a K-3 school and only uses part of a building; 29 students was a five-year low for enrolment (TJ at paras 1911, 3292-3293; Ex 1600B [Respondents' Record, Vol VIII, Tab 152, p 44]). Annexes are generally for primary grades (K-3) and have limited facilities: *L'Association des parents de l'école Rose-des-vents v Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614 at paras 72, 153-154. Re: enrolment decline, see TJ at paras 77-79; Ex 1569; TR, K. Miller, 9 Mar 2015 at pp 71(L20)-72(L24).

[100] TJ at paras 60-114, 1273-1291, 1587; Exs 1094-1096, 1099-1101, 1103-1104; TR, K. Miller, 9 Mar 2015 at pp 36(L36)-49(L14), 10 Mar 2015 at pp 71(L29)-75(L25), 97(L21)-108(L43); TR, J. Palmer, 20 Apr 2015 at pp 95(L12)-96(L38).

[101] BCCA at paras 131, 137-139. The appellants made very similar arguments before the BCCA.

less than 100 students and, where it has, the school was built to serve an isolated and remote community devoid of other options, including opportunities for space sharing.[102] The appellants do not challenge those findings. The fact that the Province decided that building a small school would be practical, cost-effective, and pedagogically appropriate for a particular community[103] does not support the conclusion that small schools are justified in every location. To adopt that approach would defeat the contextual nature of the entitlement analysis.

55. Further, the trial judge had other evidence on which to base her conclusion that educating smaller numbers in homogeneous facilities in certain communities would deprive students of the pedagogical benefit of interacting with large populations, and was not cost-effective or practical.[104] For all these reasons, the courts below correctly declined to find entitlement to homogeneous minority-language facilities in Whistler, Chilliwack, and Pemberton.[105]

(b) As "the numbers" are not static, s. 23 has an inherent temporal aspect

56. The appellants ask this Court to substitute the trial judge's short-term declarations of entitlement to shared facilities in four communities with declarations of immediate entitlement to stand-alone facilities.[106] They say the s. 23 analysis has no "temporal aspect".[107]

57. Yet s. 23 rights are not determined in perpetuity. The Court of Appeal correctly held that "[i]f the entitlement analysis did not vary over time it would be unresponsive to circumstances and may disadvantage either the government or rightsholders."[108]

58. In recognizing the inherently temporal nature of the right to education under s. 23,[109] the trial judge was not breaking new ground. In *RDV*, this Court acknowledged that the Province

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[102] AF at para 43. See TJ at paras 2204-2206, 2340-2342, 2895-2896, 4764-4765; TR, K. Miller, 9 Mar 2015 at pp 31(L43)-32(L27); Exs 1400A at pp 239-245, 1095 [Respondents' Record, Vol V, Tab 122, p 256].
[103] Re: École Mer-et-montagne (Campbell River), see Ex 937; TJ at paras 2329-2332, 6193-6203.
[104] TR, C. Picard, 23 June 2014 at pp 6(L29)-7(L7); TR, M.C. Gilbert, 15 Sept 2014 at pp 73(L7)-74(L6); TR, A. Bedard, 18 Sept 2014 at pp 22(L33)-25(L15); TJ at paras 95-99, 613, 619, 2053-2067, 4376-4379, 5987-5996; Exs 1437, 1579 at p 9 and Tab A at p 2 (admission that larger school can offer more programs); BCCA at paras 132, 136, 139, 145. See also *Mahe* at 384-385; *RDV* at para 47.
[105] BCCA at paras 137-138, 142 (see also *ibid* at para 149). See also TJ at paras 2204-2207 (Whistler); 2340-2343 (Pemberton); 4762-4766 (Chilliwack).
[106] AF at paras 24, 51, 150(b): Burnaby, North-East Vancouver, Victoria, Central Fraser Valley.
[107] AF at paras 44, 47, 50; see also BCCA at para 171.
[108] BCCA at paras 165-166.
[109] TJ at paras 475, 795, 843; see also BCCA at para 166.

could have adduced evidence of enrolment decline to show that, despite findings of fact about the "numbers" in earlier court decisions, rightsholders in Vancouver (West) were no longer situated at the upper end of the sliding scale.[110] In *Mahe*, after finding the numbers did not warrant an independent school board, this Court allowed that "[i]f actual experience reveals a larger than anticipated demand … it may be necessary to reconsider."[111] In *Arsenault*, this Court restored the decision of the trial judge, who had held that *future enrolment* might necessitate different entitlement: "Only time will dictate the appropriate s. 23 sliding scale response."[112]

59. The submission that the trial judge improperly focused on actual demand[113] mischaracterizes her factual findings and ignores her careful treatment of contextual evidence.

60. The relevant figure for s. 23 is "the number of persons who will eventually take advantage of the contemplated programme or facility."[114] While it may be impossible to determine the exact number,[115] it falls somewhere between "the known demand and the total number of persons who *could potentially* take advantage of the service."[116] This approach recognizes that while demand will, "to some extent", follow the provision of instruction or facilities, it is also "highly unlikely" that all potential students will in fact attend minority-language schools.[117]

61. The evidence in this case included lay and expert testimony, as well as historic enrolment figures and projections to 2023.[118] As the trial judge found the projections "reasonably accurate" within three years, and less so within ten years, she allowed for reasonably foreseeable future growth.[119] Consistent with *Mahe*, the trial judge also considered other "complex and subtle

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[110] *RDV* at paras 48, 53.
[111] *Mahe* at 389. See also *NWTCA* at paras 99, 102; *Ontario Reference* at 522.
[112] *Arsenault v Prince Edward Island* (1997), Nfld & PEIR 308 (SC) at para 111 [*Arsenault PEISC*]; *Arsenault* at para 63.
[113] AF at paras 45-47.
[114] *Mahe* at 384; TJ at para 464.
[115] TJ at para 465, 469; BCCA at para 120. See also *Mahe* at 384.
[116] *Mahe* at 384 [emphasis added]; see also *Arsenault* at para 32; TJ at paras 458, 466, 480.
[117] AF at para 45; *Mahe* at 384.
[118] TJ at paras 449-778 (esp 771-778), 1935-1989, 2107-2117; Exs 1A-1DD, 7, 20-21, 42, 46, 896, 1079, 1106, 1108, 1357-1358, 1394-1395; TR, R. Landry, 24 Jan 2014 at pp 27 (LL1-15), 33(LL1-3); testimony of G. Bonnefoy, S. Allison, K. Miller, J. Palmer, D. Stewart re: enrolment projections, participation rates; Closing Argument of the Province, Figure 26.
[119] TJ at paras 467-474 (citing *Arsenault* at para 33 and *NWTCA* at para 99), 778; see BCCA at para 164 for the short-term and long-term timeframes. The trial judge found the CSF's enrolment

factors," like rural versus urban settings, the number and composition of competing majority-language schools, whether the CSF proposed to subdivide a catchment area, and the nature of the specific francophone community.[120] She took into account the pattern of incremental growth in CSF programs, fueled in part by parental reluctance to withdraw children from existing programs.[121] As in *Arsenault*, where this Court found it was reasonable for the trial judge to infer similar enrolment growth in Summerside based on the experience in Charlottetown, here the trial judge also factored the experience of growth at previous CSF programs into her analysis.[122]

62. As evidence that the temporal approach is unworkable, the appellants point to the fact that in certain areas, the trial judge's short-term forecasts are lower than actual known demand at existing CSF schools.[123] This argument must fail. The appellants' position reflects the kind of simple counting exercise, without regard for contextual factors, that the case law prohibits.[124] In the communities concerned, the proposal was to subdivide the existing catchment area. There was no evidence of how many children would relocate from an existing CSF school to a new one, but there was evidence on which the trial judge could reasonably infer some would not.[125] As reflected in the trial judge's factual findings about likely attendance in the short-term, known demand at one location is not determinative of attendance at a new program.[126]

63. To reject the trial judge's temporal approach would undermine the concern for practicality

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projections needed to be treated with extreme caution: see e.g. TJ at paras 1970-1971, 2117, 2674-2676, 4043-4045.

[120] See *Mahe* at 386. See e.g. TJ at paras 2168, 2190, 2196 (Whistler); 2308, 2327, 2336-2337 (Pemberton); 2454, 2485, 2515-2516 (Squamish); 2656-2657, 2661-2663 (Sechelt); 3753-3754, 3765 (Vancouver Northeast); 3999-4002, 4007-4022, 4048-53 (Victoria); 4267-4268, 4279-4280, 4300-4308 (Kelowna); 4518-4520, 4537-4548 (Nanaimo); 4889-4891, 5014-5017 (Mission/Central Fraser Valley); 5157-5168, 5193-5198 (Burnaby/Coquitlam).

[121] See e.g. TJ at paras 620-625, 2112, 3795, 4051, 5194; Ex 1079; TR, A. Bedard, 18 Sept 2014 at pp 23(L30)-24(L33); TR, N. Chagnon, 10 Sept 2014 at p 78(LL22-30), 11 Sept 2014 at pp 8(L31)-9(L11); TR, C. Bossavit, 12 Feb 2015 at p 22(LL12-39).

[122] *Arsenault* at paras 10, 33. See e.g. TJ at paras 2477-2482 (Squamish/Comox); 3782-3797 (Vancouver East/ West); 4043-4055 (Victoria/Richmond); 4295-4309 (Kelowna/Victoria and Richmond); 5034-5040 (Abbotsford/Richmond); 5044-5051 (Central Fraser Valley – nothing similar); 5199-5209 (Port Coquitlam/Victoria).

[123] AF at para 50.

[124] *Mahe* at 386: determining the numbers goes "beyond simply counting" the students.

[125] See e.g. TJ at paras 620-622, 5225-5233; TR, C. Bossavit, 12 Feb 2015 at pp 5(L 41)-6(L 15), 29 (L4)-30(L29); BCCA at paras 165, 173.

[126] TJ at paras 3780-3797 (Vancouver East); 4041-4059 (Victoria); 5190-5208 (Burnaby).

that is central to the s. 23 entitlement analysis. The Central Fraser Valley provides an excellent example. In the absence of a temporal dimension, the Province would be required to build a K-12 school for 205 students despite the fact that there is neither an existing program nor evidence of parental demand for one, and notwithstanding the limits of the trial judge's factual finding: i.e. that the numbers *may*, not would, warrant a school in the long term.[127] To require the province to immediately build or transfer facilities to the CSF, even where they would not be fully used for a decade or more, would crystallize "the real risk of imposing impractical solutions."[128]

64. The trial judge's declarations of short-term and long-term entitlement provide guidance to the Province and to the CSF, allowing each to "budget for"[129] the reasonably foreseeable needs of the minority-language population in a practical way. Rather than an entitlement that only crystallizes at the ten-year mark, the trial judge's temporal declarations encourage the Province to plan for and build toward the long-term facilities in the intervening period.[130] There is no reason to interfere with this inherently practical approach.

2. <u>Proportionality is the appropriate measure at the middle of the sliding scale</u>

65. The appellants maintain "substantive equivalence" should govern the s. 23 analysis no matter where rightsholders are located along the sliding scale. They assert that the lower courts improperly adopted an unworkable proportionality standard and failed to consider all majority-language comparator schools when measuring what rightsholders are receiving in each community.[131] The appellants ask this Court to modify the trial judge's declarations, or to grant new declarations, providing entitlement in 11 communities to homogeneous facilities that are substantively equivalent to all comparators.[132]

66. The approach the appellants advance ignores the relative size of comparator schools, as

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[127] BCCA at paras 167-168; TJ at paras 5040, 5144.
[128] *Mahe* at 376. Contrary to AF at paras 48-49, see *NWTCA* at para 107. The appellants' reliance, at para 49, on majority-language school boards' use of surplus space, including for revenue, is misplaced. The Province builds to expected demand. As operational funding is enrolment-based, where enrolments decline, boards must supplement operational expenses in other ways: see FN 100 above.
[129] *Mahe* at 378.
[130] BCCA at para 170.
[131] AF at paras 19, 52-77.
[132] AF at paras 73-77, 150(c)-(f).

well as costs and practicalities, and should therefore be rejected.

(a) The courts below did not err in adopting a proportionality analysis

67. To address the 17 factually distinct communities at issue, and the specific "numbers" involved, the courts below engaged with the full spectrum of the sliding scale. At the lower end of the sliding scale, the trial judge found that rightsholders are entitled to instruction. At the upper end of the sliding scale, consistent with this Court's guidance in *RDV*, she found entitlement to "full educational facilities" that are "distinct from, and equivalent to" those of the majority.[133]

68. Between those two extremes, the trial judge found the numbers warranted more than instruction, "but less than fully equivalent homogeneous school facilities."[134] The trial judge found it would be impractical, and thus contrary to this Court's guidance in *Mahe*, to require "substantively equivalent" facilities and services at the middle of the sliding scale.[135] Instead, the trial judge found rightsholders entitled to facilities, programs, and services "proportionate" to those offered at majority-language schools in the same area.[136] She held the exact entitlement of a minority-language community in the middle of the scale would have to be determined based on what is practical, in terms of pedagogy and cost.[137]

69. To assess what rightsholders were receiving, for communities at the upper end of the sliding scale, the trial judge applied the "substantive equivalence" test this Court formulated in *RDV*: would a reasonable rightsholder be deterred from sending his or her child to a minority-language school because it is meaningfully inferior?[138] The trial judge recognized that, because *RDV* involved a large number of students, those rightsholders were firmly located at the upper end of the scale.[139] Accordingly, the courts below correctly concluded that the analysis from *RDV* about when "substantive equivalence" applies must be viewed through the lens of that specific context: a situation where "the number of children mandates the highest level of services."[140]

70. However, in a majority of the communities before her, the trial judge found the numbers

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[133] TJ at paras 792-793, 796-798, 841, 856-857 (citing *RDV* at para 29), 2121, 2123.
[134] TJ at paras 794, 839.
[135] TJ at paras 844-848.
[136] TJ at paras 849, 860.
[137] TJ at paras 839-842, 859.
[138] TJ at paras 799, 811-816, 829-837, 2123. See also *RDV* at paras 30, 33, 35.
[139] TJ at paras 803, 844; *RDV* at paras 5, 9 (344 students), 34, 53.
[140] TJ at paras 844, 857, 865-866; BCCA at paras 125, 148. See also *RDV* at paras 3, 5, 29, 30 (citing *Mahe* at 371-372), 31, 33-35, 45, 48, 50, 53, 61.

did not reach the upper level of the sliding scale, and that the substantive equivalence analysis was therefore ill-suited.[141] To account for that difference, when considering whether students at the middle of the sliding scale were receiving appropriate services, the trial judge considered an adjusted question: would a reasonable rightsholder "find a minority school to be meaningfully disproportionate to the facilities offered to the majority, based on a local comparison of the global educational experience"?[142] The trial judge was clear that the proportionality analysis should "mirror" the perspective used in the substantive equivalence analysis.[143] Her refinement of the analysis was not a radical departure from *RDV*; rather, it was an adjustment necessitated by the facts before her.

71. The Court of Appeal correctly upheld the proportionality standard, finding that to accept the appellants' approach would place an "impractical duty" on the government, inconsistent with the practical interpretation of s. 23 urged by this Court in *Mahe*.[144]

(b) Proportionality does not translate to inferiority

72. The application of the proportionality standard does not automatically lead to inferior educational experiences for rightsholder communities at the middle of the sliding scale.[145] Recognizing the breadth of possible s. 23 scenarios, there are no universal parameters on what proportionality requires; rather, pedagogy, costs, and practicalities will govern in each case.[146]

73. The courts below did not suggest that the proportionality analysis is a novel framework, or that it allows governments to provide less than that to which rightsholders are entitled. To the contrary: the proportionality analysis is still concerned with the factors that influence parental choice, but it takes into account (and expects reasonable parents to recognize) the very practical differences that arise from the different school populations being compared.[147] This is consistent with this Court's guidance in *RDV* that rightsholders cannot reasonably expect, and s. 23 does not guarantee, the "very best" of every aspect of an educational experience.[148] The appellants' submission that the application of "substantive equivalence" all along the sliding scale is

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[141] Guide: Schools/Communities in Issue at Trial; TJ at paras 844, 848-853, 866.
[142] TJ at para 853.
[143] TJ at paras 849-850, 860, 2124.
[144] BCCA at paras 14-16, 149-152.
[145] AF at paras 53, 59.
[146] TJ at paras 859-860; BCCA at paras 151, 154.
[147] TJ at paras 837, 844, 847-848, 852, 865-866; BCCA at paras 153, 154.
[148] *RDV* at para 40 (see also *ibid* at para 38).

"simple"[149] misses the point. Determining and measuring entitlement is not governed by simplicity, but by practicality.[150] A practical analysis recognizes that the educational experience of students educated in a wing or several classrooms of a shared school may well differ from the experience of students educated in a much larger, stand-alone facility that, due to economies of scale, can offer different programs and amenities. The proportionality standard simply allows those differences to be recognized.[151]

74. Nor did the courts below propose that the proportionality standard be applied in a mathematical way.[152] Rather, they recognized the need for flexibility and acknowledged that some cases may demand a higher level of entitlement than the comparative numbers (as between enrolments in majority and minority-language schools) might suggest.[153] To the extent the appellants suggest that it will be impractical to determine what is proportionate in specific cases, their argument ignores the fact that entitlement is always determined on a case-by-case basis.[154]

75. Further, it is appellants who have conflated the two steps in the s. 23 analysis.[155] The Court of Appeal's comments about pedagogical and costs factors helping to determine the "specific proportion" of services were directed at the entitlement analysis.[156] There is nothing illogical or unprincipled in that approach.

(c) The proportionality analysis is supported by Mahe and the concept of practicality

76. The role of proportionality in the s. 23 analysis is not without precedent. In fact, it derives from this Court's decision in *Mahe* and the practicality inherent in the "numbers warrant" test.

77. *Mahe* held that, where the numbers warrant, s. 23 encompasses a measure of management and control over the minority-language facilities and instruction.[157] This Court held that the numbers in Edmonton were not sufficient to warrant "the maximum level of management and control": an independent school board.[158] Nevertheless, rightsholders were entitled to a number

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[149] AF at para 57 (see also *ibid* at para 61).
[150] *Mahe* at 367, 376; *Arsenault* at para 26; *RDV* at paras 47, 49.
[151] BCCA at para 150.
[152] AF at paras 60-63.
[153] Contrary to AF at para 67, see TJ at paras 804, 830, 849-851; BCCA at para 154.
[154] AF at paras 60-62. See above at paras 21, 26-27, 36-55.
[155] AF at paras 62-63.
[156] BCCA at para 147 (see also *ibid* at para 154).
[157] At 369.
[158] *Mahe* at 377, 388-389.

of representatives on the majority-language school board *proportional* to the number of minority-language students for whom the board was responsible.[159] In other words, the Court accepted that rightsholders may be entitled to something less than "substantive equivalence" where the numbers are "moving towards the upper end of the sliding scale."[160] The Court was not concerned with questions of democratic representation, as the appellants submit,[161] but with determining, in a practical sense, the scope of the minority-language community's right to management and control, recognizing that the number of students, though large, was lower than the number of majority-language students.

78. The "numbers warrant" test also encompasses an assessment of relative population sizes. Taking into account pedagogy and costs is a comparative exercise, whether between minority-language populations or between those of the majority and minority. Applying the proportionality standard does not transform the analysis into a "formalistic comparison". The courts below acknowledged the importance of a substantive, rather than formal, approach, and the potential need for different treatment to give effect to minority rights.[162]

79. To the extent there were formal comparisons, it was the appellants who invited the trial judge to make them. They advanced their case through detailed tables summarizing the evidence of the sizes of physical spaces in majority and minority-language schools, but without reference to comparative populations.[163] The trial judge properly confined her analysis to what a reasonable rightsholder might expect or consider in making school choices.[164]

80. As noted above, the proportionality standard does not alter the determination of whether rightsholders are receiving the facilities and services to which they are entitled. The appellants

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[159] *Mahe* at 377, 379, 394. Even in *RDV*, this Court appears to have recognized the possibility of entitlement to separate, but not fully equivalent facilities: see para 29.

[160] *Mahe* at 379.

[161] AF at paras 71-72.

[162] AF at paras 66-68. See e.g. TJ at paras 804, 830, 846, 849-851, 858, 1408, 4765, 4778, 6644-6646, 6657; BCCA at paras 122, 136, 154.

[163] See e.g. Schedules to Plaintiffs' Written Submissions (31 Dec 2015), Tables 11G, 12C (classroom sizes); 21C, 26H (library room sizes); 25A, 26S (administrative space). See also Ex 1437 at exhibit J.

[164] See e.g. TJ at paras 2481, 2496-2497, 2881, 2905, 2954, 2970-2976, 3136, 3157-3171, 4393-4409, 4767, 4824-4843.

approach both tests too literally.[165] The shift to asking whether the global educational experience is meaningfully *disproportionate*, rather than inferior, simply takes into account that there will necessarily be differences between what is provided to larger and smaller numbers of students, whether majority or minority.[166] On a common sense basis, this is consistent with how reasonable parents make choices in both educational contexts. As this Court noted in *RDV*, recognition of such differences does not inexorably render an educational experience deficient.[167]

81. The appellants suggest that the trial judge erroneously "excluded" relevant comparator majority-language schools when measuring what rightsholders were receiving. They assert this negatively impacted five of the trial judge's community declarations, and seek new orders for rightsholders in six other communities.[168]

82. The trial judge selected the appropriate comparator schools for each community based on her assessment of which majority-language facilities represented a "realistic alternative" for rightsholders. She excluded certain facilities because their size, nature, or distance from rightsholders' residences meant they were not realistic options.[169] These findings are entitled to deference.[170] In any event, the trial judge did not *exclude* relevant middle school or secondary school comparators from her assessments with respect to Nelson, Penticton, Nanaimo, and Kelowna. Rather, she determined the numbers at the middle and secondary school levels did not *entitle* the rightsholders to middle or secondary school facilities equivalent to those of the majority, taking into account pedagogical and cost implications.[171] The same reasoning applies to the trial judge's determinations that rightsholders in Squamish, Sechelt, Central Fraser Valley, and Burnaby were entitled to facilities that are proportionate and/or substantively equivalent to other subsets of comparator schools, and that rightsholders in Whistler, Pemberton, and

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[165] AF at paras 57, 64.
[166] TJ at paras 850-853; BCCA at paras 150, 153, 160. See also *RDV* at para 38.
[167] *RDV* at para 38. See AF at para 59.
[168] AF at paras 54, 64, 73-77. Declarations were made in: Squamish, Sechelt, Penticton, Central Fraser Valley, and Burnaby; the declaration in Whistler was for secondary students (TJ at para 6834).
[169] TJ at paras 2336 (Pemberton); 2689-2690 (Sechelt); 2886-2892 (Nelson); 3068-3070 (Penticton); 4553-4555 (Nanaimo); 4753-4756 (Chilliwack).
[170] *NWTCA* at para 72.
[171] TJ at paras 2902-2904 (Nelson); 3078-3079 (Penticton); 4559-4561 (Nanaimo); 4325-4237 (Kelowna).

Chilliwack were entitled to instruction with access to core facilities.[172]

83. Finally, to the extent the appellants imply the courts below erred by dismissing interpretive principles articulated in the context of s. 15 of the *Charter*, this Court has repeatedly affirmed that those principles have no application in the unique context of s. 23.[173]

3. The requirement to prioritize capital plan requests is consistent with s. 23

84. The Ministry requires all school districts to rank capital project requests in order of priority in their annual capital plan submissions.[174] The trial judge found this requirement supports the Ministry in securing capital funding approval from Treasury Board and ensures there is agreement between the Ministry and each school district about the district's greatest needs.[175] The Court of Appeal upheld the trial judge's finding that prioritization furthers the right of management and control because it is the CSF that is "best placed" to make difficult decisions about its own priorities; the Province can only give sufficient deference to the minority's needs if the CSF makes those needs known.[176]

85. The appellants concede the prioritization requirement is *Charter*-compliant in some situations, but seek a declaration exempting the CSF from the requirement to prioritize where the proposed capital projects seek to address "clear breaches of s. 23."[177] In a situation of "clear" infringement,[178] the appellants argue that allowing the Province to avoid addressing a breach because of a lower priority ranking essentially requires the CSF to support delayed implementation of s. 23 rights.[179] This submission should be rejected for three reasons.

86. First, the requirement to prioritize is consistent with both the right of management and

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[172] TJ at paras 823-824, 2112 (subsets of comparators); 2491 (Squamish); 2697 (Sechelt); 5064, 5067 (Abbotsford/Central Fraser Valley); 5221 (Burnaby); 2207-2209 (Whistler); 2343-2344 (Pemberton); 4765-4766 (Chilliwack).

[173] AF at para 69 (see also at para 99); *Mahe* at 369; BCCA at para 117. See also *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para 20; *Manitoba Reference* at 856-857.

[174] TJ at para 69 (see also *ibid* at paras 64, 66-68, 70-74); BCCA at paras 29-34. TR, K. Miller, 9 Mar 2015 at pp 49(LL15-32), 63(L41)-64(L17), 65(L12)-66(L30).

[175] TJ at paras 6482, 6499.

[176] TJ at paras 6499-6504; BCCA at paras 176-178.

[177] AF at paras 78-81, 150(g); see also BCCA at para 174.

[178] AF at para 81. Any suggestion that the Province does not immediately address catastrophic loss situations is disingenuous: TJ at paras 6159-6163; TR, D. Stewart, 8 June 2015 at pp 13(L27)-15(L43).

[179] AF at paras 78-79.

control and the CSF's responsibility as a school board. The Ministry and the 60 elected school boards share responsibility for managing capital assets: boards prioritize the projects that are most needed and the Ministry funds as many of them as possible across the province within its capital allocation.[180] By refusing, since this litigation began, to identify its most pressing priorities,[181] the CSF "forced the Province to guess" which projects would best fulfill s. 23's remedial goals.[182] Taking the position that the CSF has "been waiting long enough"[183] is no answer. The responsibility for making "challenging decisions" can be, and is properly, exercised by the CSF as a school board, particularly given its right of management and control.[184]

87. Second, there are legitimate constraints on the ability of both the Province and the CSF to remedy breaches instantly. The 25 major project requests the CSF ranked as "Project Priority #1" in its 2013/2014 capital plan submission, which the appellants conservatively estimated to cost more than $350 million,[185] significantly exceeded the available capital project funding for all 60 school districts that fiscal year.[186] The trial judge found that the CSF lacked the institutional capacity to manage that many capital projects at the same time.[187] Requiring the Province to immediately fund all of those projects would cause large sums of public money to languish in the CSF's dedicated capital envelope until the CSF has capacity, thus denying the availability of that money for other priorities.[188] Section 23 does not guarantee the right to such impractical

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[180] TJ at paras 60-63, 66-74, 6481; BCCA at paras 29-34.

[181] TJ at paras 6459, 6472-6474, 6476, 6503; Exs 731, 765, 767-768, 770, 772, 796; TR, S. Allison, 29 Jan 2015 at pp 75(L44)-92(L9).

[182] BCCA at para 178; TJ at para 6503; Ex 794.

[183] TR, S. Allison, 29 Jan 2015 at pp 61(LL 29-36), 77(L33)-78(L7); TJ at para 6504.

[184] TJ at paras 6502-6504, 6765; BCCA at paras 176-178; *Mahe* at 371-373; *Arsenault* at paras 43, 45-46, 51. See also TR, S. Allison, 29 Jan 2015 at p 79(LL20-33).

[185] Exs 731-732, 772. TR, J. Palmer, 4 May 2015 at pp 45(L19)-47(L46). This figure does not include costs of land acquisition or pre-construction costs: see e.g. TJ at paras 2826, 3224, 4253.

[186] TJ at paras 6477, 6504; TR, J. Palmer, 4 May 2015 at pp 46(L41)-47(L46).

[187] TJ at para 6504. The appellants conceded this point before the Court of Appeal: see BCCA at paras 92, 176. TR, S. Allison, 29 Jan 2015 at pp 58(L11)-60(L33), 78(LL35-47).

[188] TR, J. Palmer, 17 Apr 2015 at pp 87(L20)-88(L6). Consider, for example, the delays encountered with the replacement of École des Pionniers, where $24.9 million was allocated in April 2013 and, three years later, the project had not yet really begun: TJ at paras 5284-5318; Ex 901; TR, J. Palmer, 17 Apr 2015 at pp 85(L21)-89(L5), 20 Apr 2015 at p 17(LL4-10).

results.[189]

88. Finally, to accept that the CSF need not prioritize proposed projects would override the government's legitimate oversight role in capital planning. The trial judge declined to grant the appellants the trust remedy they sought for this same reason. Instead, she ordered the creation of a dedicated capital envelope. The trial judge found this would uphold the "legitimate administrative requirements" of the capital planning system and respect "the proper role of the legislature and executive" in decisions regarding capital funding, while still ensuring "that the CSF's needs are considered separate and apart from the needs of the majority."[190] Preservation of the prioritization requirement, one of Ministry's "valid capital planning tools," is critical to the remedial balance the trial judge struck.[191] Absent any error in principle in the trial judge's exercise of her remedial discretion, there is no basis for this Court to interfere.[192]

C. The courts below applied the correct approach to s. 1 of the *Charter*

89. The courts below applied the correct approach to s. 1 of the *Charter* in the unique context of a positive *Charter* right. Applying the *Oakes* test, the trial judge held that, out of a total of 12 breaches of s. 23 for which the Province was responsible, only four were reasonable limits that were demonstrably justified in a free and democratic society under s. 1 of the *Charter*.[193] The Court of Appeal upheld those findings. Neither court made a reviewable error in so deciding.

1. The s. 1 framework and findings below

(a) The Oakes test

90. Like other *Charter* rights, s. 23 is not absolute. This Court has affirmed that "*Charter* rights must yield when the requisites of s. 1 are satisfied."[194]

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[189] *Mahe* at 367, 376. See also *Arsenault* at para 26; *RDV* at paras 47, 49.
[190] TJ at paras 1221, 6050, 6763. See also TJ at paras 25, 6756, 6760, 6764; *Arsenault* at para 51.
[191] TJ at paras 6760, 6764-6765.
[192] *Doucet-Boudreau* at para 52.
[193] See TJ at paras 5-23. The breaches that were justified are: the Ministry's failure to apply the AFG rural factor to the CSF from 2009-2012; the community breaches in Pemberton and Victoria; and the Ministry's application of the Building Condition Driver to prioritize building condition projects in Mission. In Mission, the trial judge assumed, without deciding, that there was a breach of s. 23: TJ at paras 4962-4963, 4991, 5003; BCCA at para 243.
[194] *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at para 82 [*N.A.P.E.*].

91. The two-stage *Oakes* analysis is the governing framework for s. 1.[195] The first stage considers whether the objective of the infringing measure is pressing and substantial. The second stage is a proportionality analysis that asks three questions: i) is the infringing measure rationally connected to the objective? ii) does the infringing measure minimally impair the *Charter* right? iii) do the benefits of the measure outweigh its deleterious effects?[196]

(b) Interpretive principles: context and deference

92. The correct approach to the *Oakes* analysis is "contextual and deferential".[197]

93. Close attention to "detail and factual setting" is essential to determining whether government has struck a proportionate balance between the means it has chosen to further its pressing and substantial objective, and the extent to which those means limit (or, in the case of a s. 23 breach, do not fully realize) a *Charter* right.[198] Context shapes the type of proof necessary to justify a *Charter* breach in any given case.[199]

94. Two contextual facts are particularly relevant here. First, this Court has explicitly recognized the relevance of "economic context".[200] In this sense, s. 23 is unique in that it requires the government to spend money "to alter or develop major institutional structures."[201] The government must therefore mediate between many legitimate, but competing demands on the public purse.[202] Second, s. 23 also guarantees the CSF a degree of management and control.[203] This means that the government must generally defer to the CSF's assessment of pedagogical needs (to the extent they touch on matters of language and culture) in various minority-language communities.

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[195] See TJ at para 967; BCCA at para 202.
[196] *Oakes* at 138-139.
[197] *R v Bryan*, 2007 SCC 12 at para 50 [*Bryan*]; *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 at para 87 [*Thomson Newspapers*]; TJ at paras 972-976; BCCA at para 203.
[198] *Thomson Newspapers* at para 87.
[199] *Thomson Newspapers* at para 111.
[200] *RJR-Macdonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 134 [*RJR-MacDonald*].
[201] *Mahe* at 365. In this sense, the courts below did not "monetize" (*monnayer*) s. 23, as the appellants suggest (AF at para 100). Rather, the right inherently concerns the expenditure of money (*Mahe* at 385).
[202] See *RDV* at para 49; *M. v H.*, [1999] 2 SCR 3 at para 79 [*M. v H.*].
[203] *RDV* at para 30; *Mahe* at 369.

95. Deference also determines the nature and sufficiency of evidence required to justify a *Charter* breach under s. 1.[204] Courts will generally take a more deferential posture throughout the s. 1 proportionality analysis where the *Charter* breach arises from a complex regulatory response to a social problem, rather than from a penal statute that limits the liberty of an accused.[205]

(c) Findings below

96. The trial judge articulated the correct test from *Oakes*, stressed the importance of context, and explained the role of deference in a manner consistent with governing authority from this Court.[206] The trial judge held that the Province was entitled to a "middle level of deference … to account for the difficult task Government faces and the social priority placed on education."[207]

97. At the first stage of the *Oakes* analysis, the trial judge held that "the funding allocation system and its many components are prescribed by law."[208] She concluded (and the appellants conceded) that both the capital funding system and the operating funding system have the pressing and substantial objective of the "fair and rational allocation of limited public funds."[209] In addition, the operating funding system has the pressing and substantial objective of "further[ing] school district autonomy."[210] These objectives were central to the trial judge's consideration of the second stage of the *Oakes* test.

2. <u>The courts below properly considered "costs" under s. 1</u>

98. In *RDV*, this Court accepted that costs may "become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the *Charter*."[211] Yet the appellants contend that the courts below erred in considering "cost savings" under s. 1 of the *Charter*.[212] The appellants advance, essentially, two points: i) there is a ban (*interdiction*) on considering costs under the proportionality stage of the *Oakes* test; and ii) the Province avoided its burden under the

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[204] *Bryan* at para 28; *M. v H.* at para 78.
[205] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37 [*Hutterian Brethren*].
[206] See TJ at paras 967-980.
[207] TJ at para 981.
[208] TJ at para 1002.
[209] See TJ at paras 1065 (capital funding system), 1767-1769 (operating funding system).The trial judge also found that this "more general objective informs the specific objectives of particular infringing measures": TJ at para 1067.
[210] TJ at para 1769.
[211] *RDV* at para 49. See also *Mahe* at 385.
[212] AF at paras 22, 82, 89-102.

"minimal impairment" step of that test.

99. In order to address these criticisms, it is first necessary to understand what "cost savings" means in the context of this case, and how the lower courts considered costs under s. 1.

100. The trial judge considered costs in the sense of the Province's obligation to fairly distribute limited public funds in a manner that ensures the delivery of public education throughout British Columbia. This is reflected in her finding that the objective of the capital and operating funding systems is the fair and rational allocation of limited public funds. The courts below did not consider "cost savings" in the sense of a stand-alone, net benefit to the Province's coffers or a bare attempt to reduce the Province's overall expenditures.

101. The evidentiary record and factual findings of the trial judge support this understanding of "costs" as a weighing exercise. The Ministry approves capital projects proposed by school boards and must, in turn, justify capital expenditures for primary and secondary education to Treasury Board, in the context of competing funding requests from other ministries. Demand for funding historically exceeds supply, both within the context of primary and secondary education, and more generally across government ministries. As a result, the government must set strategic priorities about where to direct funds in any given year.[213]

(a) There is no prohibition on considering costs under s. 1

102. The appellants contend that this Court's jurisprudence—especially its 2004 decision in *N.A.P.E.*—establishes the proposition that costs can *only* be considered at the justification stage in situations of financial emergency, and that for this reason the courts below erred in taking financial considerations into account under s. 1.[214] This argument misconstrues this Court's jurisprudence and the *ratio* of *N.A.P.E.* It must be rejected.

103. In *N.A.P.E.*, this Court found that a law delaying the implementation of a pay equity agreement was a justified infringement of s. 15(1) of the *Charter*. This Court observed that its

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[213] Keith Miller testified that, in his experience with the Ministry (which dated back to 1990), capital funding requests across the province typically exceeded available funds by "multiple fold" and that requests to Treasury Board across all ministries also exceeded available funding: see TR, 9 Mar 2015 at pp 30(LL21-37), 67(L12)-70(L31). For the trial judge's explanation of the capital planning process, see TJ at paras 60-114. See also BCCA at paras 31-33, 36.

[214] AF at paras 22, 90.

previous statements on the role of financial considerations under s. 1 (including the very paragraph in *Reference re Remuneration of Judges* the appellants now invoke[215]) "have to be read in context."[216] After examining a number of its past decisions, this Court concluded: "It was thus clear from an early date that financial considerations wrapped up with other public policy considerations *could* qualify as sufficiently important objectives under s. 1."[217]

104. Contrary to the submission of the appellants,[218] *N.A.P.E.* does not limit "public policy considerations" to situations of fiscal crisis. Nor is that proposition consistent with decisions in which this Court *did* account for financial considerations under s. 1.[219] *N.A.P.E.* simply confirmed that a government measure whose "*sole* purpose is financial" will not normally be considered pressing and substantial under s. 1.[220] This Court recognized that, in that case, the allocation of limited public funds to competing priorities was properly considered under s. 1:

> It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise "whose sole purpose is financial". The weighing exercise has as much to do with social values as it has to do with dollars.[221]

105. Here, the trial judge acknowledged and applied these principles.[222] As in *N.A.P.E.*, the objective of the capital and operating funding systems is not solely financial: rather, it seeks to weigh competing, legitimate claims in the context of "the public good of education."[223] The simple fact that some claims may not engage *Charter* rights does not mean that the Province

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[215] AF at para 89, citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 284 [*Reference re Remuneration of Judges*].
[216] *N.A.P.E.* at para 64.
[217] *N.A.P.E.* at para 69 [emphasis in original].
[218] AF at paras 22, 90-91.
[219] For example, in *M. v H.* at para 106, the majority held that the objectives of "[p]roviding for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down" and "alleviating the burden on the public purse to provide for dependent spouses" were pressing and substantial. Moreover, this Court's acknowledgment in *RDV* that costs may be relevant at the justification stage is not conditional on the existence of a financial crisis: see *RDV* at para 49; BCCA at para 219.
[220] *N.A.P.E.* at para 71 [emphasis added].
[221] *N.A.P.E.* at para 72 (see also *ibid* at para 75).
[222] TJ at para 997.
[223] See e.g. TJ at para 2823.

could ignore them.[224]

106. Finally, to the extent that the appellants posit that courts do not possess institutional competence to consider costs under s. 1,[225] that argument must be rejected. It is plain from *N.A.P.E.* and *RDV* that courts have such authority and may have to consider costs under s. 1 in the future, including with respect to breaches of s. 23.

(b) Costs are relevant in determining whether s. 23 breaches were justified in this case

107. The appellants submit that the manner in which the lower courts considered costs at the justification stage improperly conflates the analyses under s. 23 and s. 1.[226] A close reading of the decisions below reveals that the opposite is true: the framework within which the lower courts considered costs at the s. 23 stage of the analysis is distinct from the framework within which they considered costs under s. 1.[227]

108. Section 23 has a narrow, local focus.[228] Since "the linguistic and cultural benefits of minority language education accrue to the local community,"[229] in determining what services are required by s. 23, courts only consider the cost of providing minority-language education *in a particular community*.[230] For example, in *Mahe*, this Court considered the cost of a minority-language school for 242 students in Edmonton.[231] Costs considerations under s. 23 "will usually be subsumed within pedagogical needs" identified by the minority-language community.[232]

109. Conversely, the consideration of "costs" at the s. 1 stage takes a broader perspective: it permits a consideration of the overall provincial budget, the budget of the CSF, and the broader public interest. Recognizing that there are "competing priorities", courts consider whether the government has achieved a reasonable balance "between the availability of financial resources

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[224] See *N.A.P.E.* at paras 93-94.
[225] AF at paras 99-100.
[226] AF at paras 101-102.
[227] Similarly, this Court has recognized that "the question is different" under s. 1 of the *Charter* than it is under s. 7, insofar as s. 1 takes into account an "overarching public goal": *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 125 [*Bedford*]. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 79 [*Carter*].
[228] See *RDV* at paras 47, 49.
[229] *RDV* at para 36. See also *Arsenault* at para 54.
[230] *RDV* at para 46; *Mahe* at 384-385; *Manitoba Reference* at 856.
[231] *Mahe* at 387.
[232] *RDV* at paras 47, 30.

and the demands on the public purse."[233] Since the s. 23 framework does not provide for this broader analysis,[234] it is appropriate to consider these concerns at the justification stage.

110. The trial judge in this case was alive to, and considered costs within, these two distinct analytical frameworks.[235]

111. This is not to say that costs will always be relevant in the justification analysis for s. 23 breaches. Each step in the proportionality stage of the *Oakes* analysis is calibrated to the objective(s) of the particular infringing measure at issue.[236] Here, the courts below properly considered costs because the pressing and substantial objective of the infringing measures in this case was the "fair and rational allocation of limited public funds."[237] In conceding, at trial, that this objective is pressing and substantial,[238] the appellants necessarily accepted that costs are relevant under the proportionality stage of the s. 1 analysis.[239] Their belated attempt to qualify that concession before this Court should be rejected.[240]

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[233] *RDV* at para 49.

[234] Indeed, in *RDV,* this Court upheld the decision of the chambers judge to strike aspects of the Province's pleading concerning the condition of other schools in the province, on the basis that those facts were not relevant to the question of equivalence at issue in the first phase of the RDV Petition: see *RDV* at paras 74-75, 77.

[235] TJ at para 989. The trial judge recognized that, in determining the scope of entitlement under s. 23, the local, comparative analysis informs when "it is financially appropriate to build a new school in a given region" (TJ at para 2121). However, she also noted that "[t]he local focus of the s. 23 analysis may disguise the fact that the CSF, while having substandard facilities at the local level, in fact operates a system that is the same as or better than the systems operated by other school districts across the Province" (TJ at para 1098).

In contrast, the trial judge's appreciation of costs under s. 1 was more expansive. She considered the salutary and deleterious effects of infringing measures at "both the local and systemic levels" (TJ at para 1098), including, for instance, the significant operating surpluses the CSF enjoyed (see e.g. TJ at para 1526).

[236] See *Toronto Star Newspapers Ltd. v Canada,* 2010 SCC 21 at para 20.

[237] TJ at para 1065.

[238] TJ at para 1064.

[239] BCCA at para 218.

[240] See AF at para 94.

3. The Province did not "dodge" its burden under the minimal impairment step of *Oakes*

112. The appellants argue that the courts below considered cost savings at the third step of the proportionality stage of the *Oakes* test, rather than at the minimal impairment step, and therefore allowed the Province to "dodge" (*esquiver*) its burden to demonstrate that the infringing measures impaired the s. 23 right as little as possible.[241] Not only is this argument premised on a misreading of the decisions below, but it ignores this Court's direction that the *Oakes* analysis must be applied contextually. For these reasons, the appellants' argument must fail.

(a) The courts below considered costs under the minimal impairment step

113. The appellants' submission that the courts below *only* considered costs at the third step of the proportionality stage of the *Oakes* test[242] is not borne out on the face of those decisions.

114. The trial judge considered the "fair and rational allocation of limited public funds" (and therefore "costs") at all three steps of the proportionality stage of the *Oakes* test. For example, in considering whether the s. 23 breach in Penticton was minimally impairing, the trial judge acknowledged that, in weighing the CSF's project requests against those of other districts, the "Minister [of Education] was dealing with limited public funds, and was allocating them between districts to achieve the public good of education." She considered that: even though the Province did not build a new school, it funded the lease for a homogeneous CSF school in that community; the CSF chose not to apply its AFG funding toward tenant improvements at the leased school; and, with the CSF's consent, the Minister approved funding for new, homogeneous facilities for the CSF in Comox and Campbell River. The trial judge concluded, based on these facts, that the Province's approach was "minimally impairing" until 2005.[243]

115. The passage from the Court of Appeal decision upon which the appellants rely must be read in the context of the argument that Court was addressing.[244] The Court of Appeal did not say that the trial judge did not consider costs *at all* at the minimal impairment stage. The Court was simply observing that the trial judge considered "cost savings"—in the specific sense of the cost

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[241] AF at paras 95-98.
[242] AF at para 95.
[243] TJ at paras 3220-3221. From 2005-2011, the Province froze capital funding for projects that add new space for students ("expansion projects"). The trial judge found that this measure was not minimally impairing: see TJ at paras 5958-5964, 6036-6037; BCCA at paras 31, 35.
[244] See AF at para 95, citing BCCA at para 222.

difference between the government's chosen measures and the new, homogeneous schools the CSF sought—under the third, proportionality step.[245]

(b) Minimal impairment in this context considers whether the infringing measure falls within a range of reasonable options

116. The traditional concern of the "minimal impairment" step of the *Oakes* test is state action that is *overbroad* in relation to its objective. This concern does not translate easily into the context of a positive right like s. 23, where breaches arise from state action that is *inadequate*. In other words, the "minimal impairment" question in the context of s. 23 is not whether government went too far, but whether it went far enough.

117. The appropriate approach to minimal impairment in the unique context of s. 23 is to determine whether the infringing measure falls within a range of reasonable alternatives that would achieve government's pressing and substantial objective.[246] This reflects the fact that s. 23 does not prescribe the "specific modalities" required in every given community,[247] which means that "there may be no obviously correct or obviously wrong solution."[248]

118. The courts below effectively applied this approach. The Province adduced evidence to show that it "had a reasonable basis for concluding that it has complied with the requirement of minimal impairment."[249] In some cases, the Province met its burden at this stage;[250] yet in three communities and with respect to the enrolment projections breach, it did not.[251] Had the trial judge permitted the Province to dodge its burden, as the appellants contend, she could not have found that in some cases the Province actually failed to meet it.

(c) The courts below correctly weighed the infringing measures against the pedagogical needs the CSF identified

119. The appellants say that the courts below applied the wrong approach to the third step of

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[245] See BCCA at paras 220-222.
[246] See e.g. *RJR-MacDonald* at para 160; *N.A.P.E.* at para 83; *Centrale des Syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 46.
[247] See *Mahe* at 376.
[248] *N.A.P.E.* at para 83.
[249] *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22 at 44 [*Tétreault-Gadoury*]. See also *McKinney v University of Guelph*, [1990] 3 SCR 229 at 285-286, 288-289.
[250] See e.g. TJ at paras 1774-1775 (transportation funding); 3725 (Vancouver (West)).
[251] See TJ at paras 2824 (Sechelt, from 2005 to 2011), 3222 (Penticton, from 2005 to 2011), 5126 (Abbotsford); 6653-6657 (enrolment projections).

the proportionality analysis. They posit that, in considering the salutary and deleterious effects of the infringing measures against the cost of the new, homogeneous schools the CSF sought in each community, the courts below essentially reversed the burden of proof.[252]

120. This argument overlooks the CSF's obligation—as an aspect of its right to management and control under s. 23 of the *Charter*—to identify what services it feels are pedagogically appropriate (in terms of language and culture) in communities where numbers warrant.[253] The CSF insisted, both in its 2013/2014 Project Identification Report submissions to the Ministry[254] and in its pleading,[255] that in each community the *only* solution was a new, homogeneous school.

121. The courts below properly considered, at the final step of the *Oakes* analysis in each community, the salutary effect of cost savings achieved by the Province's approach to providing minority-language education, as compared to the projects the CSF identified.[256] In other words, the courts below considered whether the effects of the infringing measures on the s. 23 right (which includes the right to management and control) were proportionate to the pressing and substantial objective. This is precisely what *Oakes* obliged them to do.

4. The courts below did not err in finding certain s. 23 breaches to be justified

(a) Victoria

122. The appellants challenge the finding that the breach in Victoria was justified,[257] largely repeating their arguments from the Court of Appeal.[258] Those arguments should be rejected for the same reasons provided by that court.

123. In Victoria, the CSF proposed to divide the existing catchment area and build new East and West schools.[259] The trial judge found that by September 2015,[260] the addition of two leased spaces had resolved the immediate overcrowding, but transportation issues remained, and, as a

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[252] AF at paras 96-97.
[253] *Arsenault* at paras 43, 49, 55; *Mahe* at 372-373. See also TJ at paras 431-434, 446, 6500, 6503-6504.
[254] See Exs listed at FN 76, above.
[255] See FN 76, above. See also AF at para 150 (and paras cited therein).
[256] See e.g. TJ at para 2826 (Sechelt); BCCA at paras 220-223.
[257] AF at paras 103-107, 122, 150(h).
[258] BCCA at paras 231-234.
[259] 6th FANOCC at paras 203-206, 291(c)-(d); TJ at paras 3996, 3999-4002; BCCA at para 225.
[260] Ex 1038; TJ at paras 3997 (the reference to September 2014 is in error), 4017, 4089.

result of the CSF's planning, the number of students would eventually exceed capacity.[261]

124. The trial judge found that the Province's limited funding for expansion projects since 2010, when the CSF began requesting projects in East and West Victoria, materially contributed to the anticipated lack of space in Victoria, and therefore to the s. 23 breach.[262] Contrary to the appellants' assertion otherwise,[263] the trial judge only held that long travel times in Victoria may have a "slight deterrent effect" for *some* parents.[264] That effect was offset by the regional school's exceptional facilities: the trial judge found the global educational experience equivalent to that at comparator schools.[265]

125. The trial judge held, on the basis of evidence, reason, and logic,[266] that the Province's decision not to fund expansion projects for any school district in the province during a period of overall enrolment decline (2005-2011), and to fund very few thereafter, was rationally connected to the objective of the fair and rational allocation of limited public funds.[267] The trial judge did not err in so concluding. In asserting that the freeze on expansion project funding ought not to have applied to the CSF because its enrolment was increasing, the appellants overlook the existence of other districts that were also growing at the time.[268]

126. At the minimal impairment step, the Province was not required to demonstrate it would

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[261] TJ at paras 4121, 4124-4125, 4234-4236, 4246-4247, 4259, 4263. TR, S. Allison, 28 Jan 2015 at pp 15(L42)-17(L13); BCCA at paras 226-227, 233; Ex 1106 at pp 28-31.
[262] TJ at paras 3996-4265 (esp 4239, 4247, 4249, 4251), 5976-5981; BCCA at para 228. See also Chart of CSF Capital Plan Requests (1998 to 2010/2011), and Exs therein, handed up 29 Dec 2015 (TR, Province's closing, 29 Dec 2015 at pp 19(L23)-20(L14), 30(L39)-31(L14)).
[263] AF at para 103.
[264] TJ at paras 4048, 4125, 4256, 4264.
[265] TJ at paras 4048, 4107, 4124-4125, 4256, 4259, 4264; BCCA at paras 227, 234.
[266] *Carter* at para 99.
[267] TJ at paras 4248-4249; BCCA at paras 228, 231-232.
[268] AF at para 104. The CSF was not the only growing district at the time: see TJ at paras 77-79, 1241, 5965-5971; Ex 1400A pp 115-117. The appellants' reliance (AF at para 2) on a 40% enrolment decline is misplaced. The extent of the trial judge's finding was that there was a range of decline from 20-40% in many districts (TJ at para 1241). Further, as noted above, the mere fact that some demands on the public purse do not engage *Charter* rights does not mean that the Province can ignore them: see *N.A.P.E.* at paras 93-94.

have been "impossible" to achieve its objective in another manner, as the appellants suggest.[269] For the reasons set out above, it was sufficient for the Province to show it had a reasonable basis for concluding the minimal impairment requirement had been met.[270] The steps the Ministry took to alleviate space issues in Victoria while expansion project funding was limited are relevant to that inquiry. The trial judge correctly found that, by funding the construction of a new regional school in 2007 (including significant cost overages) and negotiating and funding an additional leased space, the Province met its objective while "still ensuring that Victoria rightsholders' needs were being met."[271]

127. Nor did the courts below err in assessing the salutary and deleterious effects.[272] For the reasons set out above, the courts below properly considered costs.[273] Further, since the trial judge found as a fact that the degree of parental deterrence was less than the appellants had asserted,[274] the courts below did not unduly minimize the deleterious effects.

(b) Pemberton

128. The courts below found that rightsholders in Pemberton were entitled to, but were not receiving, French-language instruction with proportionate access to core facilities.[275] The infringing measure was the Province's policy of funding leases for shared heterogeneous space rather than funding expansion projects where (as in Pemberton) enrolment was low.[276]

129. The appellants say the courts below erred in four respects in concluding the infringing measure in Pemberton was justified under s. 1. These arguments cannot succeed.

130. First, the appellants submit that the Province did not show it chose the least impairing means of achieving its objective in Pemberton because the Minister of Education (**"Minister"**) could have helped improve the CSF's access to facilities in Pemberton.[277] This argument misrepresents the trial judge's findings of fact. The trial judge only found that the CSF was "left to the whims of majority boards" in other communities where it had asked for help negotiating

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[269] AF at para 105. See *Hutterian Brethren* at paras 37, 53-55; *RJR-Macdonald* at para 160.
[270] *Tétreault-Gadoury* at 44.
[271] TJ at paras 4146, 4166-4174, 4237-4238, 4251; BCCA at paras 228, 233; Ex 270.
[272] AF at paras 106-107.
[273] TJ at paras 4253-4255; BCCA at paras 229-230, 234.
[274] TJ at paras 4048, 4125, 4256, 4264.
[275] TJ at paras 2344, 2424; BCCA at para 236.
[276] TJ at paras 2425, 2428-2429; BCCA at para 236.
[277] AF at para 109, citing TJ at para 5763.

leases. This finding did not apply in Pemberton, because the CSF never asked the Province for assistance negotiating with the majority-language school board.[278]

131. Second, the appellants assert that the courts below erred at the minimal impairment step by considering factors that lack any connection to the breach in Pemberton, which they characterize as inadequate access to core facilities in a heterogeneous environment.[279]

132. The appellants' second argument must fail for two reasons. First, the appellants mischaracterize the nature of the breach: since there is no entitlement to homogeneous facilities in Pemberton,[280] the mere fact that education is provided in a heterogeneous environment is not a breach of s. 23.[281] Second, the factors the lower courts considered—including Ministry funding for leases and portables, and the lack of other schools or amenities in Pemberton to accommodate the CSF[282]—were directly relevant to the question of whether the infringing measure (that is, the policy of funding leases rather than building a new school) minimally impaired the right, while still fairly and rationally allocating limited public funds.

133. Third, the appellants submit the courts below erred by considering the salutary effects of not building a new school in Pemberton, instead of the effects of the breach (that is, inferior access to core facilities).[283] This argument must be rejected: as elsewhere, the CSF told the Province that building a new homogeneous school was the only solution in Pemberton.[284] The Province's refusal of this request, in favour of funding leases, formed part of the infringing measure. For this reason, it was appropriate to consider the effects of not building a new school.

134. Finally, the courts below properly considered costs, including the wider context of delivering education out of limited funds throughout the province,[285] in concluding that the s. 23 breach in Pemberton was justified.

(c) Application of the Building Condition Driver to Mission

135. The appellants challenge the justification analysis in relation to the application of the

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[278] TJ at para 2426.
[279] AF at para 109.
[280] TJ at para 2343.
[281] That the CSF leases facilities is not presumptively contrary to s. 23: TJ at para 5947.
[282] TJ at paras 2406, 2410-2413, 2420, 2424, 2432; BCCA at para 237; Ex 1481.
[283] AF at para 110.
[284] See Exs 735, 780; TJ at paras 2394-2396. See also 6th FANOCC at paras 179, 181, 281(c)-(d).
[285] See e.g. TJ at paras 2434-2436.

Building Condition Driver in Mission. The Building Condition Driver is a Ministry funding policy that prioritizes capital project requests based on the remaining economic life of a school.[286] Because the appellants had only adduced evidence about the small size of the Mission school's gymnasium,[287] the trial judge found that there was insufficient evidence to decide whether the *global* educational experience gave rise to a breach of s. 23. She assumed, without deciding, that it did, but found that any s. 23 breach would be justified under s. 1.[288]

136. The Court of Appeal properly held that the failure of the appellants to prove a breach of s. 23 in Mission was determinative of their appeal on that point.[289] In *RDV*, this Court confirmed that the "fact that a given school is deficient in one area does not mean that it lacks equivalence in an overall sense."[290] The appellants bore the burden of proof at the s. 23 stage; their submission that they did not should be rejected.[291]

137. In any event, the courts below were correct to find the infringing measure minimally impairing. There was no evidence of a readily available alternative to measure building functionality.[292] And, for the reasons set out above, the courts below were obliged to consider the positive steps the Province took in Mission.[293]

138. Nor did the courts below err at the final proportionality step of the analysis. For the reasons set out above, the courts below properly considered costs, including those engaged by the broader context of the public education system.[294] The recognition of the natural life cycle of an educational facility did not unduly minimize the deleterious effects of an inferior physical

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[286] AF at paras 112-117; TJ at paras 4990, 6096-6102; BCCA at paras 38-40.
[287] TJ at paras 4932-4954, 4962; BCCA at para 245.
[288] TJ at paras 4962-4963, 4991-5003, 5007, 6107; BCCA at paras 245-246, 252.
[289] BCCA at paras 251-254.
[290] *RDV* at para 38; TJ at paras 833, 837; BCCA at para 126.
[291] AF at para 114.
[292] The evidence was that issues with building functionality are common in the public school system, especially in older schools, and in the Ministry's view, a tool to measure building functionality would add only "marginal value": see Ex 1400C at pp 1178-1182. There are two versions of Ex 1400C in the parties' records. This reference is to the Respondents' Record.
[293] AF at para 115; BCCA at paras 248 (citing TJ at para 4995), 251-253.
[294] TJ at paras 4997-4999.

education experience.[295]

(d) Annual Facilities Grant (Rural Factor)

139. The appellants allege that, in finding the s. 23 breach related to AFG funding (an annual allocation for building maintenance) to be justified, the courts below erred at each step of the second stage of the s. 1 analysis.[296]

140. The AFG Rural Factor, introduced in 2003/2004, increased the allocation for rural schools that operate below capacity.[297] The Ministry recognized the CSF had an AFG shortfall in the summer of 2009, but did not apply the Rural Factor to the CSF until 2012/2013.[298]

141. The appellants' submission that the courts below erred at the rational connection stage reflects an improper focus on whether the *effect* of the infringing measure (that the CSF had less AFG funding) is rationally connected to the objective of the fair and rational allocation of public funds.[299] The courts below properly held that the infringing measure (the policy of not applying the AFG Rural Factor to the CSF) was rationally connected to the objective.[300]

142. The courts below did not relieve the Province of its burden to demonstrate there was no less prejudicial way to allocate AFG funding.[301] The Province showed it had a reasonable basis for concluding its actions were minimally impairing. The CSF continued to receive 60% of the AFG to which it would have been entitled (at a time when all school boards were suffering from a reduction in funding). Moreover, the CSF had a surplus of unspent AFG during the period of the breach, in part because it was only beginning to transition to owned facilities and did not spend its AFG on its leased spaces.[302]

143. Last, at the final balancing step, the trial judge had difficulty quantifying *any* deleterious effects in light of the CSF's operating surpluses, the lack of evidence that the CSF had to forego maintenance projects, and the fact that the CSF would not have been permitted to carry over

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[295] AF at para 117; TJ at para 4995. Assimilation is addressed below at paras 145-150.
[296] AF at paras 118-121. Re: AFG generally, see TJ at paras 1454-1456; BCCA at paras 41-42.
[297] TJ at paras 1439, 1447-1452, 1493; BCCA at para 255.
[298] TJ at paras 1474, 1494-1503, 1508-1511; BCCA at paras 256-257; Ex 911.
[299] AF at para 119. *RJR-Macdonald* at paras 144, 153.
[300] TJ at paras 1519, 1521; BCCA at para 259.
[301] AF at para 120.
[302] *Tétreault-Gadoury* at 44; TJ at paras 1472, 1479, 1522-1523; BCCA at para 260.

unused AFG to future years.[303] While the salutary effects were "not strong", the courts below did not err in finding that those effects outweighed any deleterious ones.[304]

144. There is, therefore, no basis for an order of *Charter* damages.[305] In any event, for the reasons identified below in Part D, *Charter* damages are not an appropriate remedy where a government policy, made in good faith, is subsequently found unconstitutional.

5. The courts below properly weighed assimilation as a deleterious factor

145. The appellants challenge the trial judge's treatment of the effects of assimilation in the context of s. 1.[306] Yet their submission that the courts below denied "the very basis" of s. 23 at once ignores the trial judge's actual findings of fact and the relevance of those findings to the s. 1 analysis.[307] It must be rejected for those reasons.

146. Both parties adduced expert evidence about linguistic assimilation. The experts agreed that more than 70% of francophones in British Columbia eventually assimilate.[308] Accepting that evidence, the trial judge made findings of fact that assimilation is strong in British Columbia and that minority-language schools will only have a limited effect in delaying it.[309] Those findings of fact are unchallenged. The Court of Appeal did not err in upholding them.

147. Neither the trial judge nor the Court of Appeal relied on those findings to deny the rationale for s. 23 or the government's duty to provide minority-language education out of public funds. To the contrary: the trial judge accepted the purpose of s. 23 and expressly held that whether s. 23 is effective in combatting assimilation is "irrelevant".[310] She recognized that government's obligation to fund minority-language education and to build schools exists regardless.[311] In light of these findings, the Court of Appeal correctly rejected the appellants'

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[303] TJ at paras 1337, 1446, 1474-1480, 1526; BCCA at para 264.
[304] AF at para 121. See TJ at paras 1474, 1508, 1525-1527; BCCA at paras 93, 261-264.
[305] AF at paras 123, 151.
[306] AF at paras 82, 84-88.
[307] AF at para 85.
[308] Exs 1506 at para 20, 20 at para 84 (see also paras 85-86), 1394 at paras 137 and Table 1 (see also paras 115-119, 182-183); TJ at para 339; BCCA at paras 209-210.
[309] See e.g. TJ at paras 257-372 (esp 339, 341-342), 604-605 (general); 4257-4258 (Victoria); 5132-5133 (Abbotsford). See also BCCA at paras 209- 210, 215; Exs 20 at para 115, 1394 at paras 134, 179, 186-187 and Table 2.
[310] TJ at para 343 (see also *ibid* at paras 118-123, 128, 132, 367, 371-372, 421); BCCA at paras 74-75.
[311] TJ at paras 371-372 (see also *ibid* at paras 121, 343, 413, 5765, 5948).

suggestion that the trial judge considered s. 23 to be "futile".[312]

148. The appellants also misconstrue the relevance of the trial judge's findings of fact to the s. 1 analysis. At trial, both parties agreed that the effects of any s. 23 breach on assimilation are relevant under s. 1.[313] The appellants only disagree with the weight the trial judge placed on that factor: they say that she ought to have accorded more weight to the deleterious effects the infringing measures had on rates of assimilation. The appellants focus, in particular, on the individual impacts of assimilation.[314]

149. Yet the trial judge made an unchallenged finding of fact that minority-language schools would not have a significant impact on the high rate of assimilation in British Columbia. It was this finding that led her to conclude that *heightened* assimilation was not a strong deleterious effect.[315] Absent a palpable and overriding error, that conclusion is entitled to deference.[316]

150. The trial judge's conclusion also reflects the appellants' failure to adduce evidence of either a generation of "lost rightsholders" or significant numbers of parents who were deterred from sending their children to minority-language schools.[317] Nor did the trial judge find any delay by the Province in implementing s. 23 rights that could give rise to heightened assimilation.[318] The Court of Appeal was therefore right to reject the appellants' claim of heightened assimilation on the basis that it was an argument "in the abstract".[319]

D. *Charter* damages

1. The Court of Appeal correctly held that "countervailing factors" negate the availability of *Charter* damages for the transportation funding breach

151. In *Ward*, this Court outlined a four-step approach to assessing a claim for damages under s. 24(1) of the *Charter*: i) proof of a *Charter* breach; ii) functional justification; iii) countervailing factors that negate damages; and iv) quantum.[320] This appeal concerns the third step: the

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[312] BCCA at para 212.
[313] TJ at paras 257-372, 1101, 2147.
[314] AF at paras 86-88.
[315] TJ at paras 2147-2148; BCCA at para 215.
[316] *Bedford* at paras 48-56.
[317] TJ at para 1183; BCCA at para 195.
[318] TJ at paras 233-236, 1144, 1180; BCCA at para 195.
[319] BCCA at para 214.
[320] *Vancouver (City) v Ward*, 2010 SCC 27 at para 4 [*Ward*].

countervailing factors of "good governance" and "alternative remedy"[321] render *Charter* damages unavailable with respect to the s. 23 breach for inadequate transportation funding.

152. In overturning the trial judge's award of *Charter* damages, the Court of Appeal correctly recognized that, on the facts of this case, the Province benefits from the immunity set out in *Mackin*[322] and the alternative remedy of a declaration of invalidity could "have provided practical guidance for future policy-making."[323] Those holdings should be upheld.

2. Findings below

153. Every year, the Province provides each public school board in British Columbia with a grant to pay for the cost of operating educational programs. The Province prescribes the operating funding allocation system in an annual policy known as the "Operating Grants Manual"[324] which is made pursuant to s. 106.3 of the *School Act*.[325]

154. In 2002/2003, the Province adopted an enrolment-based (rather than cost-based) operating funding model.[326] The new model retained one element from the old one for a period of time: the "Supplement for Transportation and Housing" (**"Transportation Supplement"**). The Operating Grants Manual froze the amount of the Transportation Supplement, for all school districts, from 2002/2003 to 2011/2012 (subject to a small increase in 2010/2011).[327]

155. In September 2004, the CSF notified the Province that the freeze impacted its ability to fund its transportation system.[328] Contrary to the suggestion at paragraph 124 of the appellants' factum, the trial judge did not find that the Province knew in 2002 that the freeze on transportation funding would result in underfunding of the CSF's transportation needs.[329] Upon being advised of the CSF's concern, the Province acted:[330] the Province immediately began

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[321] *Ward* at para 33.
[322] BCCA at paras 298-299, referring to *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 [*Mackin*].
[323] BCCA at para 304.
[324] Ex 1201, as modified by Ex 1414. See also TJ at paras 1269-1270.
[325] See also Ex 1414 at para 9.
[326] TJ at paras 1273, 1275-1291, 1587.
[327] TJ at paras 1619-1621; Ex 1201, as modified by Ex 1414.
[328] TJ at para 1593; Ex 368.
[329] TJ at para 1702.
[330] TJ at paras 1593, 1702. The Province had already established the Operating Grants Manual for the 2004/2005 school year six months earlier, on 12 March 2004: see Ex 1201.

negotiations with the CSF for an operating funding supplement and, in the fall of 2006, implemented a supplement for the CSF equal to 15% of its total operating grant each year, with retroactive application to 2005/2006 (**"Francophone Supplement"**).[331] The trial judge did not find that there was "inaction" on the part of the Province, as the appellants suggest.[332] The Francophone Supplement was designed to address the unique funding needs of the CSF, including its higher transportation costs.[333] The trial judge held that, in responding to the CSF's transportation funding concerns, "the Minister *only acted in good faith*."[334] The CSF did not tell the Province that the Francophone Supplement was inadequate.[335]

156. In 2012/2013, the Province replaced the Transportation Supplement with two new funding factors.[336] The trial judge found that, since this change, the CSF is being fully indemnified for its transportation system, "and is likely generating a surplus."[337]

157. The trial judge nevertheless held that the policy that froze the Transportation Supplement caused a shortfall in transportation funding for the CSF during the freeze, in breach of s. 23 of the *Charter*.[338] Despite finding that the objectives of the policy were pressing and substantial (a point the appellants conceded),[339] the trial judge concluded that the breach was not justified[340] and awarded the appellants $6 million in *Charter* damages.

158. The Court of Appeal overturned the *Charter* damages award because, on the trial judge's own findings of fact,[341] the Province was immune from damages pursuant to *Mackin*.

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[331] See TJ at paras 1311-1332; Ex 308.
[332] AF at paras 140, 144.
[333] TJ at paras 1602, 1677.
[334] TJ at para 1787 [emphasis added].
[335] TJ at paras 1330-1331; TR, G. Bonnefoy, 12 June 2014 at pp 13(LL6-13), 37(L18)-38(L24); BCCA at para 298.
[336] TJ at para 1647.
[337] TJ at para 1694. See also TJ at paras 1713, 1763.
[338] TJ at paras 1703-1704, 1762, 1765. The trial judge erroneously indicated at paragraph 1765 of the trial judgment that the freeze on the Supplement for Transportation and Housing was set out in the Capital Plan Instructions. In fact, it was in the Operating Grants Manual: see Ex 1201, as modified by Ex 1414; TJ at paras 1619, 1642-1647, 1767.
[339] TJ at paras 1768-1769.
[340] TJ at paras 1765-1781.
[341] BCCA at paras 298-299.

3. The *Mackin* immunity is squarely engaged

159. *Mackin* stands for the principle that "absent conduct that is clearly wrong, in bad faith or an abuse of power," government is immune from damages under s. 24(1) of the *Charter* for the mere enactment of a law or policy that is subsequently held to be unconstitutional.[342] *Ward* recognized that the *Mackin* principle is a "good governance" countervailing factor that renders *Charter* damages unavailable, unless the state conduct meets the minimum threshold of gravity set out in *Mackin*.[343]

160. More recently, in *Ernst*, this Court confirmed that "an individualized, case-by-case consideration" of the merits of a particular *Charter* damages claim is not necessary where, as here, "there is an effective alternative remedy or where damages would be contrary to the demands of good governance."[344]

161. Here, the trial judge made four findings of fact that unequivocally situate the transportation funding breach within the sphere of the *Mackin* immunity:[345] the objectives of the policy freezing the Transportation Supplement were pressing and substantial;[346] the Minister "only acted in good faith;"[347] the Province responded to the CSF's concerns about transportation funding by implementing the Francophone Supplement;[348] and the CSF never told the Province that the Francophone Supplement was inadequate.[349]

162. To the extent the appellants intimate that the immunity does not apply because the Province did not implement a policy in good faith, but rather knowingly perpetuated a *Charter* breach or failed to act altogether,[350] that argument cannot be reconciled with the actual findings of the trial judge. The Court of Appeal rightly rejected it.[351]

163. Nor is there any authority for the proposition that application of the *Mackin* immunity is contingent on an assessment of the potential impact of a damages award in any given case. In

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[342] *Mackin* at paras 78-79. See also *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347 at 358-360.
[343] *Ward* at para 39 (see also *ibid* at para 40); *Mackin* at para 78.
[344] *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 26 [*Ernst*] (see also *ibid* at para 29).
[345] BCCA at paras 298-299.
[346] TJ at paras 1768-1769.
[347] TJ at para 1787.
[348] TJ at paras 1593, 1602, 1677, 1702.
[349] TJ at paras 1330-1331; TR, G. Bonnefoy, 12 June 2014 at pp 13(LL6-13), 37(L18)-38(L24).
[350] AF at paras 124, 140, 144.
[351] BCCA at para 300.

suggesting otherwise, the appellants conflate the rationale of the immunity with the conditions that govern its application. The test is whether the government acted in bad faith or abused its power so as to vitiate the immunity, not whether the threat of damages might stymie the future exercise of legislative and policy-making powers.[352] The Court of Appeal correctly held that the trial judge "erred in overriding this immunity on the basis that she did not 'foresee' that damages would chill the policy-making role of the Legislature."[353] To conclude otherwise would undermine the very purpose of the immunity.[354]

4. The Court of Appeal did not expand the *Mackin* principle

164. The decision of the Court of Appeal reflects the application of existing precedent, not an expansion of the *Mackin* principle, for three reasons.

165. First, the application of the *Mackin* immunity is firmly grounded in *Ward*. In *Ward*, this Court observed that the remedial discretion of courts under s. 24(1) "is not unfettered" and that "[p]rior cases may offer guidance on what is appropriate and just in a particular situation."[355] The Court then confirmed that the *Mackin* immunity shields the state in the performance of its unavoidable public duties, including its "legislative and *policy-making* functions."[356]

166. Second, there is no material distinction between policy and statute law with respect to the application of the *Mackin* immunity. The operating funding system, which included the policy freezing the Transportation Supplement, is "prescribed by law" for the purposes of s. 1 of the *Charter*.[357] The policy fulfilled the same role as a statute: it prescribed binding rules of general application that were accessible and precise.[358] The government is democratically accountable for

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[352] BCCA at paras 287, 299. Neither this Court in *Mackin*, nor the Ontario Court of Appeal in *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA) [*Wynberg*], engaged in such an exercise.

[353] BCCA at paras 298-299.

[354] *Ernst* at para 30; BCCA at para 294.

[355] *Ward* at para 19. See also *Ernst* at para 27; *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 91 [*Henry*].

[356] *Ward* at para 40 [emphasis added]; BCCA at para 291.

[357] TJ at paras 1002, 1055, 1768. The appellants conceded this point at trial. Binding government policies of general application are also considered "law" under s. 52(1) of the *Constitution Act, 1982*: see *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at paras 50-65, 84-89 [*GVTA*].

[358] Just as the law at issue in *Mackin* applied to all judges of the Provincial Court of New

the policy choices it makes. There is no principled basis to protect government from liability only when it enacts a law that is later found to be unconstitutional, but not when it implements a policy that serves the same normative function.[359]

167. Third, the circumstances that this Court considered in *Ward* and *Henry* are readily distinguishable. The *Mackin* immunity did not apply in *Ward* because the corrections officers, in conducting a *Charter*-infringing strip search, acted outside the scope of the applicable policy.[360] Similarly, *Henry* concerned the availability of *Charter* damages where a prosecutor failed to fulfil the non-discretionary constitutional duty to disclose evidence to the accused; it did not involve state conduct under a policy or law subsequently found to be unconstitutional.[361]

5. A declaration is an appropriate alternative remedy

168. In *Ward*, this Court recognized that *Charter* damages will generally be inappropriate where an alternative remedy, like a declaration, is available.[362] This countervailing factor further supports the decision of the Court of Appeal to overturn the *Charter* damages award.

169. Here, the trial judge recognized that a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* is typically the appropriate remedy where a policy breaches s. 23 of the *Charter*.[363] Yet she declined to grant declaratory relief[364] with respect to the policy freezing the

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Brunswick (*Mackin* at para 53), so too did the policy freezing the Transportation Supplement apply to all school boards in British Columbia: see TJ at para 1621.

[359] See *Wynberg* at paras 194-197.
[360] BCCA at para 290; *Ward* at para 41. See also *Ward v Vancouver (City)*, 2007 BCSC 3 at paras 83-86, 2009 BCCA 23 at paras 53, 59, 62.
[361] BCCA at para 302; *Henry* at paras 59, 61.
[362] *Ward* at para 34 (see also *ibid* at para 21).
[363] TJ at para 1785. See also *Doucet-Boudreau* at para 66; *RDV* at para 65; *GVTA* at para 89. Generally, courts have not found damages under s. 24(1) of the *Charter* to be an appropriate remedy for a s. 23 violation. For s. 23 cases in which *Charter* damages were sought, but not awarded, see: *Arsenault PEISC* at paras 113-115, rev'g (1998), 160 DLR (4th) 89 (SC Appeal Div), aff'g *Arsenault*; *Northwest Territories (Attorney General) v Association des Parents ayants droit de Yellowknife*, 2012 NWTSC 43 at paras 791-806, rev'g in part (on other grounds) *NWTCA*. The only case the Province is aware of in which damages were awarded as a *Charter* remedy is *Dauphinee v Conseil Scolaire Acadien Provincial*, 2007 NSSC 238. In that case, damages were awarded to compensate the plaintiff for an actual out-of-pocket loss.

Transportation Supplement on the basis that the policy "no longer exists".[365]

170. A declaration in these circumstances would have provided legal and practical guidance to the Province, which is charged with developing constitutionally compliant policy.[366] Indeed, the trial judge granted declaratory relief with respect to the Province's policy freezing funding for expansion projects, which was only in force between 2005 and 2011.[367]

171. This Court has observed that *Charter* damages may promote good governance "insofar as [they] deter *Charter* breaches."[368] Yet the trial judge's award of *Charter* damages in lieu of a declaration in this case had the opposite effect: to penalize the Province for proactively replacing the frozen Transportation Supplement with a constitutionally compliant funding scheme.[369] The Court of Appeal's decision to overturn that award should therefore be upheld.

PART IV – SUBMISSIONS AS TO COSTS

172. Costs awards are "quintessentially" discretionary. This Court has confirmed they are entitled to considerable deference. Given the privileged position of the trier of fact, a costs award may only be set aside if there is "an error in principle or if the costs award is plainly wrong."[370]

173. The trial in this case was exceptional in its length and factual complexity. A year before the trial ended, the appellants had already spent $12 million on legal fees.[371] Based on divided success, the trial judge ordered each party to bear their own costs. She dismissed the appellants' request for special costs on a public interest basis. The Court of Appeal upheld that award and, recognizing that both parties are public entities, ordered them to bear their own costs of the appeal.[372] The appellants have not met the high threshold necessary to overturn these awards.

174. Nor do the appellants meet the second branch of the *Carter* test for special costs.[373] This

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[364] The appellants sought a declaration at trial: see 6th FANOCC at para 297(a).
[365] TJ at para 1785.
[366] BCCA at para 304. On the value of legal clarity provided by courts, see also *Ernst* at para 36.
[367] TJ at paras 5984, 6051.
[368] *Ward* at para 38.
[369] TJ at paras 1694, 1713, 1763. See also *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 115.
[370] *Hamilton v Open Windows Bakery Ltd.*, 2004 SCC 9 at para 27 [*Hamilton*]; *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 at para 126. *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42.
[371] TJ at paras 31-37, 1342, 1608; BCCA at para 5; BCCA Costs at para 7; *Hamilton* at para 27.
[372] TJ Costs at paras 2-4, 9, 79-84; BCCA Costs at paras 7-8.
[373] *Carter* at paras 140-141. The appellants do not expressly address this (AF at paras 145-148).

litigation was not beyond the CSF's means: the CSF maintained an operating surplus throughout.[374] Moreover, the appellants have a pecuniary interest in the outcome by virtue of their request for *Charter* damages.[375]

175. *Carter* only permits recovery of "reasonable and prudent" costs. The trial judge found the appellants' strategy of "accretion" made this case "far broader than it needed to be."[376] Even where a case raises public interest issues, the need to balance competing interests, like the use of public funds, may mean an elevated costs award is not justified.[377] Such is the case here.

176. *RDV* is distinguishable. That appeal only concerned the issue of equivalence in one community and the petitioners sought limited relief. In awarding special costs, this Court was restoring, and therefore deferring to, the decision of the chambers judge.[378]

PART V – ORDER SOUGHT

177. The respondents ask that the appeal be dismissed and the parties bear their own costs.

PART VI – SUBMISSIONS ON CONFIDENTIALITY

178. The respondents do not consider it necessary to refer to any of the materials subject to the sealing orders below to determine this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September, 2019.

Karrie Wolfe, Katherine Webber, and Eva Ross
Counsel for the respondents

[374] TJ at paras 1339-1344, 1608; TJ Costs at paras 83-84.
[375] *S.A. v Metro Vancouver Housing Corporation*, 2019 SCC 4 at para 70.
[376] TJ Costs at para 77; Russell J, "Memorandum to Counsel", 8 Sept 2015 at 2.
[377] *Caron* at para 113.
[378] *RDV* at paras 34, 63, 71, 83, 88-90.

PART VII – TABLE OF AUTHORITIES

Case	Para.
Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37	95, 126
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Legislation	Para.
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss. 1, 15(1), 23, 24, 52(1) [English]; 1, 15(1), 23, 24, 52(1) [French].	Throughout
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s. 93 [English] s. 93 [French]	22
School Act, RSBC 1996, c 412, generally and s. 106.3	9, 45, 153

APPENDIX A – *Canadian Charter of Rights and Freedoms*, ss. 1, 23 and 24

CANADIAN CHARTER OF RIGHTS AND FREEDOMS,
Part 1 of the *Constitution Act, 1982*, being
Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

GARANTIE DES DROITS ET LIBERTÉS

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

MINORITY LANGUAGE EDUCATIONAL RIGHTS

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic

DROITS À L'INSTRUCTION DANS LA LANGUE DE LA MINORITÉ

Langue d'instruction

23. (1) Les citoyens canadiens:

(a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

(b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou

minority population of the province,

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

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province:

(a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

(b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique finances sur les fonds publics.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

RECOURS

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

APPENDIX B – *School Act,* s. 106.3

SCHOOL ACT
RSBC 1996, CHAPTER 412,

[includes 2018 Bill 52, c 56 (BC Reg 30/2019) amendments (effective February 22, 2019)]

PART 8 – Finance

Part 8: Division 1 – Provincial Funding

Operating grants to boards

106.3 (1) The minister must determine the amount of the operating grant to each board from the Provincial funding based on the following:

(a) by multiplying

(i) a per student funding amount determined by the minister, and

(ii) the number of students, estimated by the board under subsection (2) and approved by the minister under subsection (3) or estimated by the minister under subsection (4), who may be enrolled in educational programs provided by that board;

(b) other formulas and amounts determined by the minister and announced to the boards by March 15 of each year.

(2) A board must submit to the minister on or before February 15 of each year an estimate of the number of students who may be enrolled in educational programs provided by the board in the next school year.

(3) The minister may approve or reject the estimate submitted under subsection (2).

(4) If the minister rejects the estimate submitted under subsection (2), the minister must estimate the number of students who may be enrolled in educational programs provided by that board in the next school year.

(5) For the purposes of determining the amount of the operating grant under subsection (1)(a), the minister may

(a) classify students under a classification system established by the minister,

(b) estimate the number of students in each class referred to in paragraph (a) who may be enrolled in educational programs provided by the board,

(c) establish a maximum number of students for a class referred to in paragraph (a) that the minister will include in the determination of the number of students for that class under subsection (1), and

(d) establish different per student funding amounts for the different classes of students referred to in paragraph (a).

(6) The minister may amend an operating grant to a board, for all or part of the fiscal year,

(a) if the number of students enrolled in educational programs provided by the board is different than the estimate approved under subsection (3) or the estimate under subsection (4) or (5),

(b) by amending the per student funding amount under subsection (1) (a) (i) or (5)(d), or

(c) if, in the opinion of the minister, the operating grant must be amended.

(7) Subsections (2) and (3) do not apply for the purposes of the 2002-2003 fiscal year.