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)

AND:

ATTORNEY GENERAL OF NOVA SCOTIA,
ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF PRINCE EDWARD ISLAND,
ATTORNEY GENERAL OF SASKATCHEWAN,
ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR,
ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES,
COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA,
QUEBEC COMMUNITY GROUPS NETWORK,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
ASSOCIATION DES JURISTES D'EXPRESSION FRANÇAISE DU NOUVEAU-BRUNSWICK INC. ET L'ASSOCIATION DES ENSEIGNANTES ET ENSEIGNANTS FRANCOPHONES DU NOUVEAU-BRUNSWICK INC.,
FÉDÉRATION NATIONALE DES CONSEILS SCOLAIRES FRANCOPHONES,
ASSOCIATION DES PARENTS DE L'ÉCOLE ROSE-DES-VENTS ET ASSOCIATION DES PARENTS DE L'ÉCOLE DES COLIBRIS,
CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE,
SOCIÉTÉ DE L'ACADIE DU NOUVEAU-BRUNSWICK ET LA FÉDÉRATION DES CONSEILS D'ÉDUCATION DU NOUVEAU-BRUNSWICK,
ASSEMBLY OF MANITOBA CHIEFS,
COMMISSION NATIONALE DES PARENTS FRANCOPHONES,
CONSEIL SCOLAIRE FRANCOPHONE PROVINCIAL DE TERRE-NEUVE-ET-LABRADOR, and
CANADIAN FRANCOPHONIE RESEARCH CHAIR IN LANGUAGE RIGHTS

INTERVENERS

FACTUM OF THE INTERVENER

THE ATTORNEY GENERAL FOR SASKATCHEWAN

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

Counsel for the Intervener,
Attorney General of Saskatchewan

ALAN F. JACOBSON
KYLE McCREARY
Attorney General for Saskatchewan
820-1874 Scarth Street
8th floor
Regina, SASK S4P 3V7
Phone: (306) 787-3680
Fax: (306) 787-9111
Email: alan.jacobson@gov.sk.ca

Agent for the Intervener,
Attorney General of Saskatchewan

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Respondents,
Her Majesty the Queen in Right of the
Province of British Columbia and
the Minister of Education of British Columbia

KARRIE A. WOLFE,
KATHERINE WEBBER, and
EVA L. ROSS
Ministry of Attorney General
Legal Services Branch
1001 Douglas Street, 6th floor
Victoria BC V8W 9J7
Phone: (250) 356-6185
Fax: (250) 356-9154
Email: karrie.wolfe@gov.bc.ca
Email: katie.webber@gov.bc.ca
Email: eva.l.ross@gov.bc.ca

Agent for the Respondents,
Her Majesty the Queen in Right of the
Province of British Columbia and
the Minister of Education of British Columbia

MATTHEW ESTABROOKS
Gowling WLG (Canada) LLP
Barristers and Solicitors
60 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Phone: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Counsel for the Appellants,
Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Annette Azar-Diehl, Stéphane Perron and Marie-Nicole Dubois

ROBERT W. GRANT, Q.C.,
MARK C. POWER,
FRANCOIS J. LAROCQUE,
JENNIFER A. KLINCK and
DAVID P. TAYLOR
Power Law
401 West Georgia Street, Suite 1660
Vancouver BC V6B 5A1
Phone and Fax: (604) 260-4462
Email: smscott@juristespower.ca

Agent for the Appellants,
Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Annette Azar-Diehl, Stéphane Perron and Marie-Nicole Dubois

DARIUS BOSSÉ
Power Law
130 Alberta Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: dbossé@juristespower.ca

Counsel for the Intervener,
Attorney General of Nova Scotia

EDWARD A. GORES, Q.C.
Attorney General of Nova Scotia
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6
Phone: (902) 424-4024
Fax: (902) 424-1730
Email: edward.gores@novascotia.ca

Agent for the Intervener,
Attorney General of Nova Scotia

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener,
Attorney General of New Brunswick

ISABEL LAVOIE DAIGLE
Ministère de la Justice et Cabinet du procureur général
675, rue King, bureau 2018
Fredericton, NB E3B SHI
Phone: (506) 238-1652
Email: isabel.lavoiedaigle@gnb.ca

Agent for the Intervener,
Attorney General of New Brunswick

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener,
Attorney General of Prince Edward Island

RUTH M. DEMONE
Département de la Justice et de la sécurité publique
Services juridiques, Immeuble Shaw, 4e étage (sud)
95, rue Rochford, C.P. 2000
Charlottetown, P.E.I. C1A 7N8
Phone: (902) 368-5486
Fax: (902) 368-4563
Email: rmdemone@gov.pe.ca

Agent for the Intervener,
Attorney General of Prince Edward Island

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener,
Attorney General of Alberta

RANDY STEELE
Attorney General of Alberta
11th Floor, Oxford Tower
10025 - 102A Avenue
Edmonton, AB T5J 2Z2
Phone: (780) 422-6619
Fax: (780) 425-0307
Email: randy.steele@gov.ab.ca

Agent for the Intervener,
Attorney General of Alberta

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener,
Attorney General of Newfoundland and Labrador

BARBARA BARROWMAN
Attorney General of Newfoundland and Labrador
4th Floor, East Block
Confederation Bldg., P.O. Box 8700
St. John's, NFLD A1B 4J6
Phone: (709) 729-0448
Fax: (709) 729-2129
E-mail: barbarabarrowman@gov.nl.ca

Agent for the Intervener,
Attorney General of Newfoundland and Labrador

ROBERT E. HOUSTON, Q.C.
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 783-8817
Fax: (613) 788-3500
E-mail: robert.houston@gowlingwlg.com

Counsel for the Intervener,
Attorney General of the Northwest Territories

BRADLEY PATZER
Attorney General of the Northwest Territories
Legal Division, Department of Justice
4903 – 49th Street, P.O. Box 1320
Yellowknife, NWT X1A 2L9
Phone: (867) 767-9257
Fax: (867) 873-0234
Email: brad_patzer@gov.nt.ca

Agent for the Intervener,
Attorney General of the Northwest Territories

GUY RÉGIMBALD
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-0197
Fax: (613) 788-3559
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener,
Commissioner of Official Languages Canada

CHRISTINE RUEST NORRENA
ISABELLE BOUSQUET
Directorate of Legal Affairs
Office of Commissioner of Official Languages
of Canada
30 Victoria Street, 6th Floor
Gatineau, QC K1A 0T8
Phone: (819) 420-4867
Fax: (819) 420-4837

Counsel for the Intervener,
Quebec Community Groups Network

MARION SANDILANDS
Conway Baxter Wilson LLP/s.r.l
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Phone: (613) 780-2021
Fax: (613) 688-0271
Email: msandilands@conway.pro

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

KENT ROACH
CHERYL MILNE
University of Toronto
78 Queen's Park Crescent
Toronto, ON M5S 2C3
Phone: (416) 978-0092
Fax: (416) 978-8894
Email: kent.roach@utoronto.ca
cheryl.milne@utoronto.ca

Agent for the Intervener,
David Asper Centre for Constitutional Rights

MATTHEW J. HALPIN
Norton Rose Fulbright Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4
Phone: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Counsel for the Interveners,
Association des juristes d'expression française du Nouveau-Brunswick inc. et
Association des enseignantes et enseignants francophones du Nouveau-Brunswick inc.

ÉRIC LABELLE EASTAUGH
University of Moncton
Campus of Moncton
Pavillion Léopold-Tallion
18, Antonine-Maillet Avenue
Moncton, NB E1A 3E9
Phone: (506) 863-2136
Fax: (506) 858-4534
Email: erik.labelle.eastaugh@umoncton.ca

Agent for the Interveners,
Association des juristes d'expression française du Nouveau-Brunswick inc. et
Association des enseignantes et enseignants francophones du Nouveau-Brunswick inc.

ALYSSA TOMKINS
Caza Saikaley LLP
220 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5Z9
Phone: (613) 565-2292
Fax: (613) 565-2087
Email: atomkins@plaideurs.ca

Counsel for the Intervener,
Fédération nationale des conseils scolaires francophones

ROGER J. F. LEPAGE
PETER T. BERGBUSCH
JONATHAN MARTIN
Miller Thomson LLP
2103 – 11th Avenue, Suite 600
Regina, SK S4P 3Z8
Phone: (306) 347-8330
Fax: (306) 347-8350

Agent for the Intervener,
Fédération nationale des conseils scolaires francophones

MAXINE VINCELETTE
Power Law
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: mvincelette@juristespower.ca

Counsel for the Interveners,
Association des parents de l'École Rose-des-Vents et
Association des parents de l'école des Colibris

NICOLAS M. ROULEAU
SYLVAIN ROULEAU
Nicolas M. Roleau, Professional Society
41 Burnside Drive
Toronto, ON M6G 2M9
Phone: (416) 885-1361
Fax: 1 (188) 850-1306
Email: rouleaun@gmail.com

Agent for the Interveners,
Association des parents de l'École Rose-des-Vents et
Association des parents de l'école des Colibris

MAXINE VINCELETTE
Power Law
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: mvincelette@juristespower.ca

Counsel for the Intervener,
Canadian Association for Progress in Justice

AUDREY BOCTOR
JOHANNA MORTEAUX
IMK LLP/s.e.n.c.r.l.
1400 – 3500 Blvd. de Maisonneauve W.
Montreal, QC H3Z 3C1
Phone: (514) 934-7737
Fax: (514) 935-2999
Email: aboctor@imk.ca

RYAN D. W. DALZIEL
Norton Rose Fulbright Canada LLP
1800 – 510 West Georgia Street
Vancouver, BC V6B 0M3
Phone: (604) 641-4881
Fax: (604) 646-2671
Email: ryan.dalziel@nortonrosefulbright.com

Agent for the Intervener,
Canadian Association for Progress in Justice

MATTHEW J. HALPIN
Norton Rose Fulbright Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4
Phone: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Counsel for the Interveners,
Société de l'Acadie du Nouveau-Brunswick et Fédération des conseils d'éducation du Nouveau-Brunswick

DOMINIC CARON
Pink Larkin
1133 Regent Street, Office 210
Fredericton, NB E3B 3Z2
Phone: (506) 458-1989
Fax: (506) 458-1127
Email: dcaron@pinklarkin.com

Agent for the Interveners,
Société de l'Acadie du Nouveau-Brunswick et Fédération des conseils d'éducation du Nouveau-Brunswick

DARIUS BOSSÉ
Power Law
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: dbossé@juristespower.ca

Counsel for the Intervener,
The Assembly of Manitoba Chiefs

BYRON WILLIAMS
JOËLLE PASTORA SALA
Public Interest Law
200 – 393 Portage Avenue
Winnipeg, MB R3B 3H6
Phone: (204) 985-8540
Fax: (204) 985-8544
Email: bywil@pilc.mb.ca
jopas@pilc.mb.ca

CHRISTIAN MONNIN
Hill Sokalski Walsh LLP
2670 – 360 Main Street
Winnipeg, MB R3C 3Z3
Phone: (204) 943-6740
Fax: (204) 943-3934
Email: cmonnin@hillcounsel.com

Agent for the Intervener,
The Assembly of Manitoba Chiefs

MAXINE VINCELLETE
Power Law
1103 – 130 Albert Street
Ottawa, ON K1P 5G4
Phone: (604) 239-0984
Fax: (604) 239-0984
Email: mvincelette@juristespower.ca

Counsel for the Intervener,
La Commission nationale des parents francophones

VINCENT LAROCHELLE
Larochelle Law
4133 4th Avenue, Suite 201
Whitehorse, YK Y1A 1H8
Phone: (867) 333-3608
Email: vincent@larochellelaw.ca

Agent for the Intervener,
La Commission nationale des parents francophones

MAXINE VINCELETTE
Power Law
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: mvincelette@juristespower.ca

Counsel for the Intervener,
Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador

ANDREW CARRICATO
Lidstone & Company
128 West Pender Street, Suite 1300
Vancouver, BC V6B 1R8
Phone: (604) 899-2269
Fax: (604) 899-2281
Email: carricato@lidstone.ca

Counsel for the Intervener,
Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador

DARIUS BOSSÉ
Power Law
130 Albert Street, Suite 1103
Ottawa ON K1P 5G4
Phone and Fax: (613) 706-1091
Email: dbossé@juristespower.ca

Counsel for the Intervener,
The Canadian Francophonie Research Chair in Language Rights

FRANÇOIS LAROCQUE
Phone: (613) 894-4783
Email: francoislarocque@uottawa.ca

TABLE OF CONTENTS

PART I: OVERVIEW OF POSITION AND FACTS

1. The Attorney General for Saskatchewan ("Saskatchewan") intervenes in this appeal in order to address the second question posed by the Appellants in their Notice dated, May 13, 2019, in which the Appellants challenge the constitutional validity of the British Columbia Ministry of Education's requirement that the Conseil scolaire francophone de la Colombie-Britannique (CSF CB) prioritize proposed capital projects needed to meet the demands of section 23 of the *Canadian Charter of Rights and Freedoms.*[1]

2. It is Saskatchewan's position that such a requirement does not represent a violation of section 23. Saskatchewan submits that such a requirement is consistent with the need for a practical development and achievement of the rights contained in section 23. Just as the scope of the right for a single community depends upon the size and nature of demand on a sliding scale, so too, when examining several demands at once, a practical approach is warranted to determine relative urgencies for a province over-all. Here again, a sliding scale approach is appropriate to appreciate the relative importance of each individual demand on the province.

3. Capital demands in the realm of education are generally identified and assessed in terms of renewal. Facilities depreciate gradually. In an imperfect world with limited resources, a determination of imperfect facilities is properly a question of relative scale. Where there exists a number of communities in a province with an inadequate level of facilities, it is expected that the responsibility of management and control should include a willingness to prioritize the needs. This is an obvious and reasonable way in which to balance *Charter* rights, management and control, and public spending.

---

[1] *Canadian Charter of Rights and Freedoms*, s 23, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4. The right to management and control bestowed upon the CSF CB to exercise on behalf of rights-holders is as much a responsibility as a right. A school board is not merely a pressure organization. Prioritization is an essential part of any governing body with a budget to balance. This is an undeniable reality both for the province and for the school division. It is to be expected that the parties must order priorities together.

5. A corollary to this responsibility is the critical importance for a board's spending behaviour to be considered as part of the context of a constitutional demand for a remedy. The exercise by a board of management and control might include spending decisions that may be said to not meet priorities in proper order. It cannot be the case in such circumstances that needs with greater legitimacy are simply attributed to lack of provincial funding.

6. In this connection, it is healthy to expect accountability from a board, elected by rights-holders to prudently administer educational services. The democratic oversight of the rights-holders over the board ought to continue to be the normal discipline to ensure management and control is exercised responsibly and effectively and particularly in connection with setting priorities.

7. Such circumstances ought also to be taken into account when considering the proper relationship between section 1[2] and section 23. To the extent that there can be said to be mixed causes of section 23 breaches, then it does not fall to the government alone to justify a breach. The sliding scale in the section 23 analysis applied to prioritizing the resolution of constitutional deficiencies is often a better point of analysis to deal with such problems practically.

---

[2] *Ibid*, s 1.

8. Finally, Saskatchewan supports the analysis of the British Columbia Court of Appeal on the question of *Charter* damages. "Good governance" concerns as described in *Mackin*[3] ought to be a strong countervailing consideration in the application of damages, both in the face of legislation, but also in the policy context, and particularly so in the budgetary process.

PART II: POSITION ON THE CONSTITUTIONAL QUESTION

9. Saskatchewan offers argument on the second question posed for this Honourable Court:

> Est-ce l'exigence du ministère de l'Education de la Colombie-Britannique que le Conseil priorise ses projets d'immobilisation visant à pallier des manquements à l'article 23 de la *Charte* entrave ou nie les droits garantis par l'article 23 de la *Charte* de manière non justifiée en vertu de l'article premier de la *Charte ?*

10. It is Saskatchewan's position that the question should be answered in the negative for the following reasons:

a) Prioritization is a necessary component to the management and development of multiple facilities and should be recognized as such both for schools that can be said to be below acceptable standards and those above.
b) Prioritization is a necessary component of the requirement of cooperation. With complementary constitutional duties, provincial governments and school board governments must work together to prevent and solve constitutional inadequacies.
c) Prioritization is a reasonable component of management and control on the high end of the sliding scale. In this connection, management and control conferred to the board on behalf of the rights-holders is a responsibility as much as it is a right.

---

[3] *Mackin v New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13 [*Mackin*].

d) Inasmuch as practical solutions and reasonable expectations are necessary in meeting a large number of concerns, it would be irresponsible of a board to not be actively involved in assessing how such needs should be met in the best possible order.

PART III: ARGUMENT

A. *Mahe* Principles Applied Meaningfully to Multiple Claims

11. This Honourable Court is called on for the first time to assess the question of how a province and a school board must manage a multitude of constitutional claims that demand attention at the same time. In any ordinary context, of course, the element of time is used to allocate limited resources to multiple demands. This is what is meant by "prioritization".

12. The Appellant CSF CB takes the position that it would be unjust to recognize that certain capital inadequacies are greater than others, and that therefore whenever it can be said that the standard for a facility does not meet the appropriate constitutional standard, there must be an immediate remedy, regardless of the context of demands in the rest of the province, whether for other minority language schools or for schools broadly.

13. The implication of this approach suggests that facilities are suddenly toggled from adequate to inadequate on a section 23 evaluation for purposes of renewal or initiation. This is an unrealistic and impractical approach, and one that does not promote helpful planning by the parties.

14. It is also an approach that unfairly ignores the relative reality of challenges for various minority language communities throughout the province. It is not helpful to ignore that one community may be facing a particularly egregious deficiency (*e.g.* no facility at all for a

large community) while another community is facing a borderline deficiency (*e.g.* aging facility that is serving, but beyond the standards of the day for that facility) and while yet another community is similarly suffering at a borderline level, but where no actual section 23 violation has been determined.

15. The approach suggested by the appellants in such a situation would demand that the first two facilities in the example above be addressed immediately and the third not at all.

16. Saskatchewan suggests instead that the practical approach described in *Mahe*[4] should be extended to the context of multiple and competing minority language school claims. This is the responsible way in which to promote the purposes of section 23 to be pursued on a long-term planning basis.

17. Such a practical approach better recognizes the fact that a school facility very gradually depreciates and therefore it is expected that a standard of acceptability is not only to be determined with respect to local comparators, but also is factored by time. An approach that allows for prioritization allows for better planning.

18. The same could be said for demands for new facilities in communities where none yet exist. Typically, a demand will grow gradually (often because of the growth of the minority language community within a broader community) and becomes more and more demonstrably justified. It is not helpful to assess this as though it were a sudden event. The growth of the demand is likely to gradually require responses that change appropriately across the sliding scale identified in *Mahe*.[5]

---

[4] *Mahe v Alberta*, [1990] 1 SCR 342 [*Mahe*].
[5] *Ibid.*

19. Under such an approach, it is not impossible that in some circumstances, multiple inadequacies could be so great, that a remedy could be required, even for multiple communities at the same time. Such a practical approach would factor in the measure of egregious need as well as the broader context of needs throughout the province. An understanding of relative urgencies will assist, not hinder, a minority language school board in long-term planning.

20. The practical approach not only promotes sensible planning, but fits properly the unique nature of section 23. No other provision of the *Charter* resembles section 23 in terms of directly requiring significant expenditures on the part of the provinces. In *Mahe*, Chief Justice Dickson, at page 365, recognized that s. 23 was unique, that careful interpretation was demanded and that this could require novel approaches to meet its purposes.[6]

21. The solution for approaching the unique, expense-driven nature of section 23 in *Mahe* was the sliding scale.[7] The same approach should apply to the broader context of multiple claims.

22. Just as in the case of a single community, the demands on the public purse depend on the strength of the demand in that community, so in the case of several demands, the priority of each of them ought to be factored in order to solve the demands in an orderly way that balances the challenges of promoting minority culture in a way that sustainably balances with the broader budgetary pressures, and particularly those that touch on education.

23. The scale, in this manner, should apply to allow for addressing remedial needs realistically. It can factor in the constitutional priority required by section 23 and be

---

[6] *Ibid.*
[7] *Ibid.*

informed by local proportionate comparisons, while at the same time factor in the budgetary realities of the province. The two pressures are solved with the element of time.

B. Management and Control of Multiple Claims

24. As is the case in British Columbia, Saskatchewan has a single minority language school board (the Conseil scolaire fransaskois) that serves the entire province. Saskatchewan therefore is presented with similar issues facing the province of British Columbia that present a contrast to the context facing this Court in *Mahe*,[8] where the needs of a single community (Edmonton) were being considered.

25. Unlike, for example, the Province of Alberta, where multiple minority language boards serve the interests of rights holders for particular, smaller geographical areas (and where therefore, the responsible board does not have competing interests from disparate parts of the province), the Appellant CSF CB, like Saskatchewan's minority language school board is answerable to all communities in the province where numbers warrant one level of minority language school services or another.

26. This means necessarily that, as the governing body charged by rights holders to administer management and control on behalf of all minority language communities in the province, it is necessary that the board efficiently balance all competing interests of such communities. This, obviously in many respects of its mandate, will require prioritization in relation to the various regions served.

27. A minority language school board, exercising management and control on behalf of the rights-holders is also, like other school boards, a governing body designated by the provincial government to deliver services to students and families. In the case of

[8] *Ibid.*

Saskatchewan, this is spelled out in legislation. It has a responsibility to both its particular constituency and to the provincial government to manage, control and prioritize.

28. It is submitted that the CSF CB, inasmuch as it *asserts* management and control on behalf of rights-holders, must be expected to *exercise* management and control as a responsibility that is corollarous to its right.

29. The British Columbia Court of Appeal correctly emphasized this point in its decision below, at paragraphs 177 and 178.[9]

30. It is not too much to expect, seen through this light, that as it may best understand the relative pressures experienced by various communities, it should assist the province, over a long-term planning basis, with identifying the ordering of projects to meet the demands to best advantage.

31. Again, management and control must entail responsibility. A minority language school board is much more than a pressure organization with a mere mandate of advocacy and lobbying. It is a form of local government[10] and has a primary role in prudently and creatively stretching limited dollars and in finding solutions in concert with the provincial government.

32. This responsibility is exercised on behalf of rights-holders. And, just as a provincial government is responsible to its electors, so too is a minority language school board responsible to its electorate – the rights holders.

---

[9] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305.
[10] *The Local Government Election Act, 2015*, SS 2015 c. L-30.11.

33. Where there exist shortcomings vis-à-vis constitutional standards of education, it is ordinarily going to be the case that rights-holders will look to their elected board and how it has measured up to the standard of management and control.

34. This recognition accords with the subsidiarity principle. Not only is the level of local government closest to an issue usually the best placed to be authorized to handle such issues, but when a local level of government has exactly such a role (here the Board), the it should be expected to be primarily responsible to prevent and handle deficiencies as (or, preferably, before) they arise.

35. And, ordinarily, where such failures exist, it will be expected that the rights-holders will exercise their normal remedy with their school board vote. The point is that management and control often *is* both the problem and the solution. A board that failed to prioritize should be replaced as it is thereby failing to exercise good management. A board that failed to prioritize in consultation with the province would properly be seen to be failing at management.

36. An example of the kind of problem that can arise in this connection is where the ambition of a board to provide a service beyond what would be reasonable as dictated by the sliding scale elaborated in *Mahe*[11] can exhaust resources to the detriment of another community's section 23 rights.

37. This is not to say that the province is not similarly responsible and should not be liable when failing to fund. The province's primary responsibility, under the terms of section 23, is to fund. This leads to the other, similar relevant responsibility – that of spending carefully in view of the prioritization that is to be expected of any manager.

---

[11] *Mahe*, *supra* note 4.

C. The Relevance of Board Spending to Multiple Claims

38. The Court of Appeal decision below identifies an example of the relationship between constitutional inadequacies under section 23 and the exercise of management by the board. Beginning at paragraph 51, the Court describes the problem of unauthorized spending on the part of the board.[12] This necessarily adds to the pressure. Money spent on less critical priorities (in this case, leases deemed less than necessary) is money not spent on spreading around costs effectively on more critical priorities.

39. Saskatchewan makes this observation not with a view to pressing the facts in this case, but in the exercise of seeking this Court's guidance, to stress that the critical relevance of management and control relates not to "picking winners and losers" among communities that require renewal or initiation of facilities or services, but relates to a proper understanding of all sources of causation to constitutional deficiencies.

40. It should not be the case, for example, that a board could spend money on unnecessary priorities (knowing that a Court would not order them) and then allow core services to starve and then have the courts require the province to supplement funding that may have otherwise sufficed.

41. Similarly, it should not be the case that a Court would countenance a claim for larger facilities where existing facilities managed by a Board are being used for purposes too ancillary to core educational services.

42. The point here is the critical relevance of management and control, and particularly if it is exercised irresponsibly. Again, this Court is urged to underline the necessity of

[12] *Supra*, note 9.

considering management and control, not as merely a right of power, but as an ordinary primary element of seeking the cause of a breach of section 23.

43. This is particularly apt where there are suddenly and simultaneously several claims – again, the unique circumstance of this appeal. Such a regrettable confluence of multiple problems, is highly suggestive of issues with prioritization.

44. The question of prioritization necessarily linked with management and control. This equally is a function of the responsibility of the board. A board may be said to manage well, and yet to mis-prioritize laudable projects that result in a constitutional breach elsewhere. In *Saskatchewan v Conseil Scolaire Fransaskois,*[13] the Saskatchewan Court of Appeal found that there was no constitutional obligation for a minority language school board to subsidize out-of-province students. The policy to so subsidize had a deleterious effect on the overall per-pupil rate for Saskatchewan minority language students, a rate whose sufficiency was the subject of ongoing litigation.

45. Without commenting on the respective responsibilities related to inadequate facilities and services in British Columbia, Saskatchewan observes that it should never be assumed that facilities and services that fall below standard are necessarily caused by inadequate funding and therefore are the fault of the province. This Court is urged to direct that trial courts be alive to the full context of causation. This will have the healthy effect of reminding boards of their responsibility and of rights-holders to hold their boards electorally to account.

[13] *R v Conseil Scolaire Fransaskois,* 2013 SKCA 35.

D. The Relationship of Section 1 to Section 23 of the *Charter*

46. Saskatchewan submits that section 1 of the *Charter* often does not fit in comfortably with section 23 as it is intended to with other, more absolute provisions. Similar to certain other sections of the *Charter* (notably sections 7, 8 and 12), Saskatchewan submits that the right in question is already inherently subject to reasonable limits as carefully described in this court's section 23 jurisprudence, and in the text (*e.g.* "where numbers warrant"). The practical approach demanded and recognized in *Mahe*[14] is inherently guided by limits of reasonableness. For these reasons, questions of practicality, prioritization and the sliding scale fit best within a section 23 analysis, rather than informing a section 1 analysis.

47. Saskatchewan does not disagree with the analysis of the Court of Appeal below (at paragraphs 218 and 219)[15] concerning the potential relevance of government budgetary pressures as a potential pressing and substantial objective in a section 1 analysis, as posited in the *Rose-des-Vents* decision.[16] It may be the case that public costs are not relevant on an equivalence analysis, but it does not follow from this that questions of appropriate remedies that examine the broader context of board actions must be filtered through section 1. Saskatchewan does not disagree with the findings below applying section 1, but suggests that it is often preferable to allow section 23 to be interpreted to find practical solutions to multiple claims without resort to section 1.

48. In particular, the filter of sections 23 and 24 together should allow for sufficient reasonableness in dealing with questions of proper solutions where multiple claims of

---

[14] *Mahe*, *supra* note 4.

[15] *Supra* note 9.

[16] *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 SCR 139, 2015 SCC 21 (CanLII)

varying urgency call for varying suitable timelines, and particularly where the cause of constitutional inadequacies are complicated by poor board management. It is to be noted that section 24 will allow a court, when requiring solutions to be prioritized, to in this particular way, to grant "such remedy as the court considers appropriate and just in the circumstances."[17] The appropriate and just remedy in the circumstances may be to require co-operation in developing prioritized solutions.

49. If section 1 has a role in managing multiple claims, then it is submitted that this would not be so where mismanagement has a role in causation. In such cases, it would not be meaningful to apply a test of justification for a breach to the provincial government. It is in such circumstances that the aforementioned democratic remedy available to rights-holders, vis-à-vis their elected representatives comes to bear. In such circumstances, it is not because a breach is justified that the government is relieved of its duty, it is rather because there is a recognition that the failure is not (at least in part) one of funding.

50. Where there are mixed causes of constitutional breaches, section 24 allows a just remedy to be fashioned that is both reflective of the various sources of cause as well as the relative urgency of the breaches as they affect rights-holders. Section 24 also would allow the important tool of prioritization to allow realistic remedies that address multiple claims in proper order.

E. Charter Damages and Section 23 of the *Charter*

51. This case also raises the issue of when *Charter* damages should be awarded in relation to budgetary decisions. It is submitted that this Court should find that the *Mackin* good

[17] *Charter*, *supra* note 1, s 24.

governance consideration[18] applies to both legislative and policy decisions and that there should be a threshold of misconduct required to overcome the limited immunity for damages related to legislative and policy actions. This Court has set out in *Ward*[19] and subsequent cases the governing framework for the awarding of *Charter* damages. These submissions will focus on the issue of arguing good governance concerns as a countervailing factor in the *Ward* analysis.

52. It is accepted that *Charter* damages can apply in certain circumstances, but it is submitted that a Government Defendant should be entitled to argue good governance concerns should be a significant countervailing factor in relation to policy decisions, and especially budgetary decisions, in addition to legislative decisions. As was stated in *Ward*:

> The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:
>
> > The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79][20]

---

[18] *Mackin*, *supra* note 3.

[19] *Vancouver (City) v Ward*, 2010 SCC 27.

[20] *Ibid*.

53. Similarly in *Henry*[21] the Court found that requiring threshold misconduct helps to address good governance concerns:

> [39] The second countervailing consideration — and the one at issue in this case — relates to concerns over good governance. *Ward* does not define the phrase "[g]ood governance concerns" (para. 38), but it serves as a compendious term for the policy factors that will justify restricting the state's exposure to civil liability. As the Chief Justice observed:
>
> > In some situations, . . . the state may establish that an award of Charter damages would Interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. [Emphasis added; para. 39.]
>
> ….
>
> [42] *Ward* provides an example of a prior case where a heightened per se liability threshold was justified by policy reasons. In *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405, this Court held that Charter damages were unavailable for state action taken pursuant to a law, considered valid at the time but later declared invalid, unless the state action was "clearly wrong, in bad faith or an abuse of power" (para. 78). In other words, state actors were afforded a limited immunity for actions taken in good faith under a law they believed to be valid. Citing Mackin, the Chief Justice in *Ward* noted that, "absent threshold misconduct", no cause of action for Charter damages will lie in these circumstances (para. 39).

54. The balance between the branches of Government would be undermined if budgetary policy and legislation were subject to potential damages under the Charter without an

---

[21] *Henry v British Columbia (Attorney General)*, 2015 SCC 24.

analysis of threshold misconduct. It would be undermined because without a requirement of a threshold, any budgetary decision that has a differential impact could potentially be open to litigation. While it is unlikely many such suits would be successful, it would undermine the balance by making the Court the potential arbiter of the distribution of scare resources or the re-allocation of scare resources if a Government or Legislature in good faith made a decision that subsequently ran afoul of the *Charter*.

55. The lack of availability of a section 52 remedy[22] should not be a basis for departing from the necessity of threshold misconduct. Budgetary legislative and policy decisions are likely to be time limited. Adopting the simple unavailability of section 52 because legislation or policy has been repealed or modified would essentially eliminate the *Mackin* principle for any time limited legislation or policy.

56. Any award of damages for a policy decision, especially a budgetary policy, should require threshold misconduct of bad faith. Relying on an existing interpretation of the law when the question at issue remains potentially unsettled should not meet that threshold.[23] A lower threshold invites parties to contest budgetary decisions and leave the Court the arbitrator of awarding damages where budget decisions have discriminatory impact but were taken in good faith.

57. Further, subjecting budgetary and policy decisions to *Charter* damages without threshold misconduct to overcome *Mackin* limited immunity would likely lead to issues of potential indeterminate liability. Government policy decisions can have broad impact and it could lead to a chilling effect if Governments have to ensure that policies taken in good faith and potentially pursuant to statutory authority could lead to damage claims from all

---

[22] *Charter*, *supra* note 1, s 52.

[23] *Saskatchewan Federation of Labour v Saskatchewan*, 2016 SKQB 365 (CanLII).

impacted persons. If the threshold is simply that a declaration of invalidity would not have practical effect on a previous years' budget.

58. Thus it is submitted that *Charter* damages should continue to have *Mackin* limited immunity for policy decisions as well as legislative ones and that that immunity should require a threshold of misconduct to overcome to prevent a chilling effect on good governance.

PART IV: COSTS

59. Saskatchewan does not seek costs and submits it should not be liable for costs.

PART V: REQUEST FOR ORDER

60. The Attorney General for Saskatchewan intends to present oral argument for five minutes as permission was ordered.

ALL OF WHICH is respectfully submitted.

DATED at Regina, Saskatchewan, this 11th day of September, 2019.

Alan Jacobson
Senior Crown Counsel

Kyle McCreary
Crown Counsel

PART VI: AUTHORITIES

CASES	**PARAGRAPH**
Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education), 2018 BCCA 305.	**29, 38, 47**
Henry v British Columbia (Attorney General), 2015 SCC 24.	**53**
Association des parents de l'école Rose-des-vents v. British Columbia (Education), [2015] 2 SCR 139, 2015 SCC 21 (CanLII)	**47**
Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick, 2002 SCC 13.	**8, 51**
Mahe v Alberta, [1990] 1 SCR 342.	**16, 18, 20, 21, 24, 36, 46**
R v Conseil Scolaire Fransaskois, 2013 SKCA 35.	**44**
Saskatchewan Federation of Labour v Saskatchewan, 2016 SKQB 365 (CanLII).	**56**
Vancouver (City) v Ward, 2010 SCC 27.	**51**
STATUTES, REGULATIONS	
Canadian Charter of Rights and Freedoms. FR : *Charte canadienne des droits et libertés*.	**1, 7, 48, 52**
The Local Government Election Act, 2015, SS 2015 c. L-30.11.	**31**