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 OF POSITION AND FACTS

1. This appeal arises out of a broad-based challenge by the Appellants to the validity of British Columbia's capital funding policies for minority language education in the province, and the adequacy of minority language programs and facilities in 17 communities in British Columbia.

2. The Attorney General of Newfoundland and Labrador (AGNL) intervenes to make submissions concerning the interpretation of s. 23 of the *Charter* where the relevant number of students falls in the middle of the "sliding scale", in particular, in situations involving relatively small numbers of minority language students, as well as concerning the potential relevance of cost considerations and practicalities in the justification of infringements of s. 23 under s. 1 of the *Charter*.

3. The AGNL supports the development and vitality of Francophone and Acadian communities in the province and recognizes the important role that s. 23 plays in furthering this goal. At the same time, consistent with the jurisprudence, pedagogical and cost considerations and practical realities must be taken into account in determining the scope and application of s. 23, particularly in situations involving relatively small numbers of minority language students located in geographically dispersed communities across a province or territory.

4. There is also an inherent temporal aspect to s. 23 since "the numbers" which are key to assessing what is required by s. 23 in a particular situation, are not fixed and may vary considerably over time. Section 23 should be interpreted and applied in a way that reflects and is responsive to this dynamic reality.

5. A requirement for minority language school boards to prioritize their capital funding requests is also consistent with s. 23, as it furthers the right of "s. 23 parents" or their representatives to the appropriate measure of management and control by ensuring that government is aware of the minority language community's greatest needs and priorities when government makes its capital planning and spending decisions.

6. Costs and practicalities may again become relevant where a party seeks to justify a s. 23 infringement under s. 1 of the *Charter*.

7. The AGNL relies on the statement of facts set out in the factum of the Respondents.

PART II – INTERVENER'S POSITION ON APPELLANT'S QUESTIONS

8. The Appellants state the issues on appeal 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?
   b. What is the test for assessing whether parents are receiving what they are entitled to receive?
   c. Can the Province require the Conseil Scolaire Francophone de la Colombie–Britannique 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?

9. The Appellants filed a Notice of Constitutional Question stating the following two questions:

   1) Dans le mesure où il s'applique aux projets d'immobilisation du Conseil, est-ce que le facteur fondé sur l'état des immeubles ("Building Condition Driver"), utilisé par le ministère de l'Éducation de la Colombie-Britannique afin d'évaluer les projets d'immobilisation, 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*?

   2) Est-ce que l'exigence du ministère de l'Éducation 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 guarantis par l'article 23 de la *Charte* de manière non justifiée en vertu de l'article premier de la *Charte*?

10. The AGNL intervenes to make submissions on the interpretation of s. 23, including with respect to the second constitutional question concerning the requirement to prioritize capital project requests, and on the potential relevance of costs and practicalities to the s.1 analysis in the context of s. 23. The AGNL takes no position on any of the specific "community claims" or remedial issues.

PART III – ARGUMENT

Section 23

Section 23, the middle of the sliding scale, and relatively small numbers

11. The purpose of s. 23 and relevant interpretive principles are set out at paragraphs 20 to 31 of the Respondents' factum. Section 23 creates a "sliding scale" of requirement, that is, it guarantees whatever type and level of rights and services are appropriate in order to provide minority language instruction for the particular number of students in the particular situation involved.[1]

12. There is no rigid formula for the application of s. 23; it must respond to the diversity of circumstances and give due consideration to the numbers involved as well as all of the important factors specific to a particular case.[2]

13. Ultimately, s. 23 "simply mandates governments to do **whatever is practical in the situation** to preserve and promote minority language education".[3] This theme of practicality runs throughout the s. 23 jurisprudence.[4]

14. The "numbers warrant" provision in s. 23 requires, in general that two factors be taken in to account: (1) the services appropriate in pedagogical terms for the number of students involved, and (2) the cost of the contemplated services.[5] Pedagogical considerations will generally have more weight than financial considerations.[6]

15. This Court has held that there are outer limits to the sliding scale. In situations where there are a very small number of minority language students involved, s. 23 may not require that anything be done.[7] This threshold is crossed when there are a sufficient number of students in

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[1] *Mahe v. Alberta*, [1990] 1 SCR 342 ["*Mahe*"] at p. 366; *Reference re Public Schools Act (Manitoba)*, [1993] 1 SCR 839 ["*Manitoba Reference*"] at p. 850.
[2] *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3 ["*Arsenault-Cameron*"] at para. 57; *Manitoba Reference* at p. 851; *Mahe* at p. 385.
[3] *Mahe* at p. 367; *Arsenault-Cameron* at para. 26.
[4] *Mahe* at p. 367, 378, 384-385; *Arsenault-Cameron* at para. 26; *École Rose-des-Vents v. British Columbia (Education)*, [2015] 2 SCR 139 ["*Rose-des-Vents*"] at para. 30.
[5] *Mahe* at pp. 384-385.
[6] *Mahe* at p. 385.
[7] *Mahe* at p. 367.

a particular situation to justify a program of minority language instruction and / or a facility. It is then necessary to determine the nature and specifics of what s. 23 requires in terms of such a program and / or facility.[8]

16. Where there is a relatively large number of s. 23 students, the community will lie at or near the upper end of the sliding scale, warranting both a program of instruction in full educational facilities that are distinct from and equivalent to the majority and a measure of management and control.[9]

17. In between the lower and upper ends of the sliding scale is a continuum of potential points of entitlement having regard to numbers and specific contextual factors. This is the nature of the sliding scale and is consistent with the purpose of s. 23 in ensuring that the minority group receives the full amount of protection that its numbers warrant.[10]

18. In this middle range of the sliding scale and particularly where the number of s. 23 students is relatively small in comparison to the numbers at local majority language schools, careful assessment of pedagogical and cost considerations as well as a recognition of the guiding principle of practicality is crucial in determining entitlement.

19. Pedagogical requirements recognize that a threshold number of students is required before certain programs or facilities can operate effectively and that it is not in students' best interests to have programs or facilities that are inappropriate for the numbers involved.[11]

20. The s. 23 right is also subject to financial constraints since it is financially impractical to accord to every group of minority language students, no matter how small, the same services which a large group of s. 23 students are accorded.[12]

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[8] *Manitoba Reference* at pp. 855-856.
[9] *Mahe* at p. 378; *Rose-des-Vents* at para. 29.
[10] *Mahe* at p. 366.
[11] *Mahe* at pp. 384-385.
[12] *Mahe* at p. 385.

21. Given economies of scale, higher *per capita* costs for a minority language board or school are not unexpected;[13] however, there comes a point at which higher costs are simply too high to be reasonable or practical.

22. The approach of the lower courts in this case 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 number involved, is consistent with the principles that emerge from the jurisprudence of this Court and the underlying purpose of s. 23.

23. This approach seeks to ensure that the minority group gets the full amount of protection that its numbers warrant, while at the same time not overshooting that entitlement or imposing an unrealistic and impractical burden on governments.

24. Where numbers are quite small, both in absolute terms and in comparison to local majority language schools, it may not be appropriate or practical from a pedagogical or cost perspective to require that a minority language school be entitled to directly equivalent programming or facilities. For example, the range of specialized and non-core courses that it may be reasonable to offer in a secondary school of several hundred students may not be possible or practical to offer in a much smaller school, particularly if such courses require expensive facilities or equipment to deliver the instructional services. Similarly, cost considerations may render it impractical for a school of 30-40 students to have a gymnasium of comparable size and specifications as that of a nearby majority language school with hundreds of students. Such situations may call for explorations of creative and situation-specific responses, such as use of certain facilities of a nearby majority language school by the minority community during specified time periods. With careful attention to the manner in which facilities outside of the minority language school are accessed, concerns about dilution of the linguistically homogeneous experience can be adequately addressed.[14]

25. Such flexibility, adaptability, and creativity is not inconsistent with s. 23. To the contrary, taking into account the diversity of circumstances and seeking unique and effective solutions

[13] *Mahe* at p. 378, *Rose-des-Vents* at para. 33.
[14] *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 ["*NWTCA*"] at para. 118-129.

to "do whatever is practical in the situation to preserve and promote minority language education" is precisely governments' mandate under s. 23.[15]

The inherent temporal aspect of s. 23

26. This Court in *Mahe* held that the relevant figure for s. 23 purposes is:

> …the number of students who will eventually take advantage of the contemplated program or facility. It will normally be impossible to know this figure exactly, yet it can be roughly estimated by considering the parameters within which it must fall – the known demand for the service and the total number of persons who could potentially take advantage of the service.[16]

27. The number of students who could potentially take advantage of a minority language educational service <u>cannot</u> be estimated *in the abstract*, without any relationship to a timeframe. Moreover, to attempt to do so would be inconsistent with the sliding scale approach to s. 23.

28. A temporal component is inherent in the "where numbers warrant" and "sliding scale" analysis. The number of school-aged children of s. 23 rights-holding parents is not static and will evolve over time. So too will the number who are likely to take advantage of a contemplated program or facility. The sliding scale approach reflects the principle that the level of educational services to which a minority language community is entitled varies with the number of students involved. As numbers vary over time, so too may the entitlement to services.

29. In a particular factual situation, demographic projections and other evidence may help inform estimates of these numbers at different future points in time. As in this case, it may be possible to estimate these numbers with a greater or lesser degree of certainty depending upon how far into the future one is attempting to predict. As part of these projections, it may be reasonable to anticipate that enhanced programming and facilities will lead to increased numbers over time, but such projected increases should be reasonable and evidence-based.[17]

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[15] *Mahe* at p. 367; *Arsenault-Cameron* at para. 26; *Chubbs v. Newfoundland and Labrador*, 2004 NLSCTD 89 at para. 68.
[16] *Mahe* at p. 384.
[17] *Arsenault-Cameron* at para. 33, 59.

30. A temporal component is also consistent with the importance of pedagogical considerations in the placement of a community along the sliding scale. What may not be appropriate from a pedagogical perspective with a relatively small number of students may be justifiable and appropriate at some point in the future if the number of students is reasonably projected to increase sufficiently.

31. This case is not the first time that courts, including this Court, have recognized that there is a temporal dimension to s. 23. In *Arsenault-Cameron* the courts considered a projection covering a ten-year period and uncontested expert evidence to draw an inference as to the relevant number.[18] In *Mahe*, the Court based its decision on likely demand, but held that "[i]f actual experience reveals a larger than anticipated demand […] it may be necessary to reconsider".[19]

32. The approach of the lower courts in this case of considering both a short term (within three years) and long term (within ten years) view is both principled and pragmatic. It is principled in that it is consistent with the s. 23 jurisprudence and underlying purpose of the section. And it is pragmatic in that it helps inform planning and spending decisions over time. Section 23 entitlements in the shorter term can be addressed appropriately and in a manner that contemplates and allows for further expansion of programming and / or infrastructure if the trend of increasing numbers continues.

33. A temporal component that considers both shorter and longer timeframes also allows for the most effective deployment of limited resources to address s. 23 rights without overshooting entitlement in a particular situation at a particular point in time. Government is not compelled to construct or allocate facilities that greatly exceed likely demand for a period of several years.[20] Where government is faced with requests for increased programming and / or capital expenditures in multiple locations, estimating shorter term and longer term numbers may allow government to more effectively address a greater number of needs with limited resources.

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[18] *Arsenault-Cameron* at para. 33.
[19] *Mahe* at p. 389. See also *Rose-des-Vents* at para. 48, 53
[20] *NWTCA* at para. 107.

The requirement to prioritize capital projects is consistent with s. 23

34. A requirement to prioritize capital project requests, including those proposed to address infringements of s. 23, does not infringe s. 23. To the contrary, it furthers the right to management and control under s. 23. Moreover, it simply reflects the reality that: (1) not all capital project requests are of equal priority, and some deficiencies may be of greater seriousness than others; and (2) for both cost and logistical reasons, not every project can necessarily be undertaken immediately or at the same time.

35. The right to management and control is enhanced when government is made aware of a minority language school board's ranking of priorities, thus enabling government to take those priorities into consideration when making capital planning and spending decisions.

36. Without such a requirement, government would be left to make its own assessments on the relative priority of capital project requests, which may not line up with the priorities of the minority. This would run counter to the principles underlying the right to management and control.

37. The minority language school board is best placed to assess the relative priority of projects from the perspective of its community (e.g. which projects might remedy what it considers to be the most serious breaches, or which might benefit the largest number of rights-holders).

38. Such a requirement also recognizes that with the right to management and control comes the accompanying responsibility and accountability for the exercise of that right. Minority language school boards should not be allowed to rely on that right, but refuse to participate in the difficult prioritization that is required when dealing with the reality of limited funds.

Section 1 - costs considerations

39. In addition to their relevance in determining where a minority language community falls on the sliding scale of rights guaranteed under s. 23, costs and practicalities may be relevant where government seeks to justify an infringement of s. 23 under s. 1 of the *Charter*.[21] In this context,

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[21] *Rose-des-Vents* at para. 49, 50.

there is “a perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse”.[22]

40. While budgetary considerations in and of themselves cannot generally be invoked as a free-standing pressing and substantial objective under s. 1 unless they rise to the level of a financial crisis,[23] cost considerations may nonetheless be an *aspect* of a s. 1 objective. As this Court held in *Newfoundland (Treasury Board) v. NAPE*:

> 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.[24]

41. An objective such as that put forward by the Respondents and accepted by the lower courts in this case, “the fair and rational allocation of limited public funds”, reflects more than purely financial considerations. As Sopinka J. noted in *Egan v. Canada*, “[I]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all.”[25]

42. Governments have a responsibility to ensure that limited public funds are allocated in a fair and rational manner, taking into consideration a range of pressing social priorities and values of a free and democratic society.[26] Consistent with these principles, cost considerations may be relevant under s. 1 in the context of infringements of s. 23.

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[22] *Rose-des-Vents* at para. 49.
[23] *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 SCR 381 [“*NAPE*”] at para. 64.
[24] *NAPE*, at para 69.
[25] *Egan v. Canada*, [1995] 2 SCR 513 at para. 104.
[26] *NAPE* at para. 75.

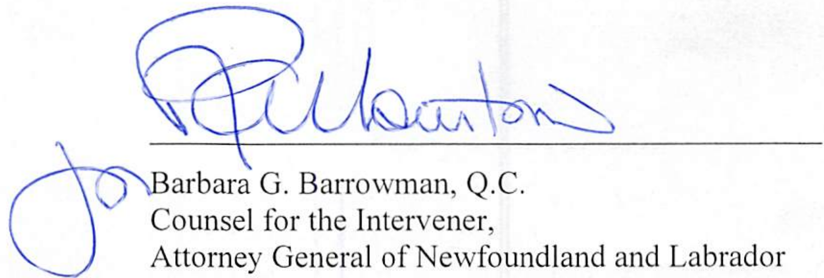
PART IV - COSTS

43. The AGNL does not ask for costs and requests that costs not be awarded against the AGNL.

PART V - ORAL ARGUMENT

44. The AGNL relies on these written submissions and does not intend to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2019.



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PART VI - TABLE OF AUTHORITIES

Case	**Para.**
Arsenault-Cameron v. Prince Edward Island, [2000] 1 SCR 3	12, 13, 25, 29, 31
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