File No. 38332

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN

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

APPELLANTS
(Appellants/Plaintiffs)

– and –

THE MINISTER OF EDUCATION OF BRITISH COLUMBIA

RESPONDENTS
(Respondents/Defendants)

– and –

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PART I: OVERVIEW OF POSITION AND FACTS

1. Alberta takes no position on the facts.

2. Alberta intervenes with respect to the applicability of s. 23 of the *Constitution Act, 1982*,[1] in relation to the provincial obligation to provide funding for educational services, and in particular, the obligation to provide capital funding for minority language school facilities.

PART II: OVERVIEW OF POSITION

3. It is uncontentious that the appropriate level of educational services for the provision of minority language education rights guaranteed by s. 23 of the *Charter* is determined on a sliding scale to reflect the level of services warranted by the number of entitled children in a given area.[2] The determination of the warranted services requires a quantitative analysis. Proportionality is a quantitative notion – how much and what kind of educational service is warranted for the number of minority language students. If the correct amount of the services determined quantitatively are provided, those services should enable a substantively equivalent education.[3]

4. The holistic qualitative analysis is premised on the existence of differences: different pedagogical needs supported by different educational services and facilities intended to provide for a substantively equivalent outcome. The focus of the analysis should not be on the identification and elimination of differences. Differences are expected, and may legitimately and properly be stark. It is an error to conclude that the identification of differences leads inexorably to the conclusion that there has been a failure

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[1] *Canadian Charter of Right and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]

[2] *Mahe v Alberta*, [1990] 1 SCR 342, [*Mahe*].

[3] *Assoc des parents de l'école Rose-des-vents v British Columbia (Minister of Education)*, 2015 SCC 21, [2015] 2 SCR 139, at para. 3 [*Rose-des-vents*]: "This Court's past jurisprudence has recognized that, because of the remedial nature of s. 23 rights, equality may mean something different than formal equality. **It requires substantive equality**." [Emphasis added]

See also *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14, at para. 20: "**Section 23** has been described as an exception to ss. 15 and 27 of the Canadian Charter; it is rather an example of **the means to achieve substantive equality in the specific context of minority language communities**." [Emphasis added]

to provide the requisite level of services and facilities. A meaningful qualitative assessment must be made with the understanding that the individual's rights and the provincial obligation under s. 23 of the *Charter* are informed by the placement of the rights on the sliding scale.

5. The quantitative analysis conducted to situate rights on the sliding scale is intimately and inextricably linked to the qualitative analysis conducted to assess substantive equivalence, and both the quantitative analysis and the qualitative analysis are deficient if conducted without an awareness of the results of the alternative type of analysis.

6. An assessment of substantive equivalence is misplaced if it is used to conduct the quantitative analysis that determines where on the sliding scale the s. 23 rights fall. Pedagogical needs, costs, and practicalities inform the quantitative assessment. Those considerations are misplaced in a qualitative analysis, but properly form part of the quantitative analysis undertaken with the understanding that there is a need to ensure an appropriate qualitative outcome: substantively equivalent education where the numbers warrant. Correspondingly, the qualitative analysis conducted to assess substantive equivalence cannot be properly conducted without an awareness of the level of entitlement as determined on the sliding scale.

7. In short, both types of assessments are typically required, and each type of assessment cannot be properly completed without considering the results of the other type of assessment.

8. The courts below used a proportionality standard to make a quantitative assessment of the required level of service that the government must support at various places along the sliding scale. The use of a proportionality standard does not hinder the conduct of an appropriate qualitative assessment undertaken to ensure that both the quantity and the quality of the services provided satisfy the requirements of s. 23 of the *Charter* in the relevant circumstances.

9. An examination of substantive equivalence in the context of s. 23 is not intended to provide a second quantitative assessment to determine the appropriate educational services, or type of school facilities to be provided. Such an assessment is intended to ensure that the constitutionally mandated level of services and facilities determined on the sliding scale are qualitatively equivalent to that enjoyed by the majority. Consequently, the determination of substantive equivalence uncoupled from the requisite level of educational services the facilities are intended to support is ineffectual, inappropriate, and incorrect in law when used to determine whether rights guaranteed by s. 23 of the *Charter* have been breached.

PART III: STATEMENT OF ARGUMENT

10. In the unique circumstances of the *Rose-des-vents* case, a Court had determined, and a government had conceded, that parents in the Vancouver community were entitled to rights at the upper end of the sliding scale.[4] The quantitative analysis conducted to establish where on the sliding scale the rights of parents fell was not an issue. This Court appropriately turned to the qualitative analysis needed to assess whether the services and facilities provided were in fact substantively equivalent.

11. Though this Court in the *Rose-des-vents* case asked: "how should a court assess the substantive equivalence of a minority language school facility as compared to majority language school facilities, for the purpose of determining whether the minority language facility complies with s. 23 of the Charter,"[5] this Court did not indicate that it was necessary to assess the substantive equivalence of school facilities in all cases.

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[4] *Rose-des-vents*, at para. 34: "The first step in any s. 23 analysis is to determine the entitlement of the parents, who are the holders of the right. This requires assessing what level of service the number of rights holders in a given community warrants**. In the present case, a court has previously determined, and the parties accept, that numbers warrant the highest level of French-language educational instruction and facilities,** which necessarily includes an element of management and control for the rights holders. This being established, the issue in this case is how to determine whether the Parents have, in fact, been provided the substantive equivalence to which they are entitled." [Emphasis added]

[5] *Rose-des-vents*, at para. 22.

12. It may be appropriate in some circumstances, as in *Rose-des-vents*, to compare the equivalence of school facilities. However, as a general proposition, assessment of substantive equivalence under s. 23 of the *Charter* is premised on the existence, recognition, and acceptance of differences. Determining whether minority language education is substantively equivalent requires assessing whether, despite differences, the educational outcomes are equivalent. This requires a qualitative assessment,[6] not a quantitative assessment, of minority language education and facilities that captures all the relevant features of primary and secondary education services at issue in a particular case.

13. In *Rose-des-vents*, this Court was concerned with the quality of the educational experience at the upper end of the sliding scale.[7] In that case, this Court stated:

> […] what is paramount is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students.[8]

14. The Court's analysis was focused on rights at the upper end of the sliding scale not on rights at other points along the scale. To apply this Court's comments in *Rose-des-vents* without taking into consideration the different contexts in which the question of equivalence may arise, is to misapply the principles enunciated by this Court in *Rose-des-vents*, and to fail to adopt a contextual and holistic approach to the assessment of substantive equivalence, as required by the case law.

15. In *Rose-des-vents*, given the level of educational services required to satisfy the provincial obligation under s. 23 of the *Charter*, a comparison of the majority and minority language schools in the same community was appropriate because that comparison shed light on whether the educational services provided to the minority in the school catchment

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[6] *Rose-des-vents*, at para. 1 : "This appeal reflects a new generation of issues for minority language education rights**. When is the quality of a minority language school education equivalent** to that of the majority language schools? What factors go into determining equivalence?" [Emphasis added].

[7] *Rose-des-vents*: at para. 29 : "At the upper limit of the sliding scale, numbers will warrant the provision of the highest level of services to the minority language community. In such cases, rights holders are entitled to full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group […]"

[8] *Rose-des-vents*, at para. 33. See also para. 48.

area were substantively equivalent to those provided to the majority in the surrounding area. In short, the comparison of school facilities was not uncoupled from the amount of the entitlement in the analysis for a substantively equivalent education.

16. Given the holistic and contextual nature of the assessment of substantive equivalence, it is inappropriate to rely on a simple comparison of the size and features of neighbouring facilities in many if not most cases; or as Justice Slatter says, to overemphasize the comparison,[9] except when the numbers warrant the provision of educational services at the high end of the sliding scale.

17. The sliding scale and the limits on the provincial obligation flowing from what the numbers warrant, make it clear that the provincial obligation is not to ensure the equality of the minority language educational facility when compared to neighbouring majority language school facilities in all circumstances. Rather, the obligation is to ensure that appropriate size and type of facilities of similar or equivalent quality to that enjoyed by the majority are provided to support the requisite level of educational services as determined on the sliding scale.[10]

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[9] *Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife,* 2015 NWTCA 2 (CanLII), [*Yellowknife*] at para. 72: "**If there was any reviewable error made with respect to comparator schools, it was not in the selection of those other Yellowknife schools, but rather in overemphasizing the importance and helpfulness of the comparisons** (see infra, para. 133). In this case the sliding scale test had to be applied without over-emphasizing the "comparatives", although they were still a part of the body of evidence." [Emphasis added]

Yellowknife, at para. 135: "By overemphasizing the facilities available at the selected comparator schools, the trial judge stepped past the sliding scale test set out in Mahe, and the requirement that the numbers "warrant" the extra facilities being demanded." At para. 72: "If there was any reviewable error made with respect to comparator schools, it was not in the selection of those other Yellowknife schools, but rather in overemphasizing the importance and helpfulness of the comparisons (see infra, para. 133). In this case the sliding scale test had to be applied without over-emphasizing the "comparatives", although they were still a part of the body of evidence."

[10] *Yellowknife*, at para. 144: "**Section 23 does not mandate providing minority language facilities just because the majority language schools have such facilities**. Any demanded facility must still meet the test in s. 23(3)(b) that "numbers warrant" providing separate minority language facilities "out of public funds". As previously discussed (supra, paras. 118-29) sharing of facilities in another school might not be the perfect solution, but on the sliding scale analysis it may be the only remedy that the constitution mandates." [Emphasis added]

18. Alberta says the comparison of neighbouring majority and minority language schools is useful only when the comparison is capable of shedding light on whether a particular school facility appropriately supports the level of minority language educational services to which the minority is entitled, as determined on the sliding scale.

A. Appropriate level of educational services: numbers warrant – sliding scale

19. The Supreme Court of Canada in *Mahe* established that the right to minority language education in a given situation falls on a sliding scale. The Court stated:

> Another way of expressing the above interpretation of s. 23 is to say that s. 23 should be viewed as encompassing a "sliding scale" of requirement, with subs. (3)(b) indicating the upper level of this range and the term "instruction" in subs. (3)(a) indicating the lower level. **The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved**.[11] [Emphasis added]

20. The Supreme Court of Canada in *Mahe* indicated that pedagogical needs and costs were the primary considerations when determining what the numbers warranted.

> The numbers warrant provision requires, in general, that two factors be taken into account in determining what s. 23 demands: (1) the services appropriate, in pedagogical terms, for the number of students involved; and (2) the cost of the contemplated services. The first, pedagogical requirements, recognizes that a threshold number of students is required before certain programmes or facilities can operate effectively. There is no point, for example, in having a school for only ten students in an urban centre. The students would be deprived of the numerous benefits which can only be achieved through studying and interacting with larger numbers of students. The welfare of the students, and thus indirectly the purposes of s. 23, demands that programmes and facilities which are inappropriate for the number of students involved should not be required.[12] [Emphasis added]

21. The Court went on to state:

> Cost, the second factor, is not usually explicitly taken into account in determining whether or not an individual is to be accorded a right under the Charter. In the case of s. 23, however, such a consideration is mandated. Section 23 does not, like some other provisions, create an absolute right. Rather, **it grants a right which must be subject to financial constraints,**

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[11] *Mahe*, at 366.
[12] *Mahe*, at 384, 385.

> **for 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.**[13] [Emphasis added]

22. This Court in *Mahe* recognized that the impracticality of treating a small group the same as a large group meant that the level of service mandated by s. 23 would vary.

23. The Court in *Mahe* qualifies pedagogical services with the words "appropriate for the number of students involved". This provides explicit recognition that all pedagogical services including separate facilities to support the pedagogical needs may not always be appropriate. The subsequent reference to the cost of the contemplated services clearly indicates that cost is a factor to be taken into account in addition to appropriateness.

24. The Court in *Mahe* went on to state:

> The welfare of the students, and thus indirectly the purposes of s. 23, demands that programmes and facilities which are inappropriate for the numbers of students involved should not be required.[14] [Emphasis added]

25. Appropriateness for the numbers of students is the standard identified by this Court in *Mahe*. Proportionality as a rough guide for appropriateness is consistent with the purpose of s. 23, particularly when proportionality is used to place the minority language education requirements on the sliding scale, subject to other relevant considerations, to ensure that the appropriate level of services is being provided.

B. The Sliding Scale is Inherently Proportionate

26. Proportionality is a quantitative notion. Similarly, the sliding scale adopted by this Court in *Mahe* reflects a quantitative notion. The Court in *Mahe* could have devised a proportionality test qualified in much the same way as the sliding scale adopted in *Mahe*, without any significant or noticeable loss to the rights guaranteed by s. 23 of the *Charter*. That is, the Court could have said the right under s. 23 of the *Charter* based on what the numbers warrant means that rights-holders are entitled to proportionate educational services based on the number of students realistically expected to use the service, with

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[13] *Mahe*, at 385.
[14] *Mahe*, at 385.

some additional funding or services if necessary, to ensure the provision of a substantively equivalent educational outcome, provided the proportion is not impractical or too costly. The qualifying language might have had to vary a little to capture the same legal notions, but in general, the notion of a proportion of potential educational services determined by the number of entitled children of rights holders and the notion of educational services determined on a sliding scale based on the number of children of rights holders, if different, are only marginally different.

27. It follows that if there is a problem in this case it is not with the use of the notion of proportionality generally. Moreover, the use of the notion of proportionality is no more prone to distorting the qualitative assessment of substantive equivalence than is consideration of the sliding scale, an essential consideration if a proper determination of rights under s. 23 of the *Charter* is to be undertaken. In short, concern over the use of the notion of proportionality is misplaced.

C. Substantive Equality and the interplay of Qualitative and Quantitative Assessments

28. Assessing substantive equivalence requires a qualitative analysis.[15] This is distinguished from the quantitative analysis conducted to determine where on the sliding scale the required level of educational services fall.

29. This Court has endorsed the notion that s. 23 mandates the provision of substantively equivalent education where the numbers warrant. In *Arsenault-Cameron*, this Court stated:

> Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, **in order to provide them with a**

[15] *Rose-des-vents*, at para. 1: "This appeal reflects a new generation of issues for minority language education rights. **When is the quality of a minority language school education equivalent** to that of the majority language schools? What factors go into determining equivalence?" [Emphasis added], and at para. 30 : "Once it is determined that the number of children mandates the highest level of services, **s. 23 requires that the quality of services be substantively equivalent to that offered to the majority language students**." [Emphasis added]

> **standard of education equivalent to that of the official language majority**.[16] [Emphasis added]

30. The assessment of substantive equality is informed by the level of educational services mandated by what the numbers warrant. That is, the kinds of required educational services and the nature of the required pedagogical program warranted by the number of students realistically expected to receive the minority language education must be known before an assessment of substantive equivalence can be undertaken.

31. The interplay of the qualitative and quantitative assessments distinguishes this case from the *Rose-des-vents* case. In *Rose-des-vents* it had been determined that the level of required services fell at the high end of the sliding scale, and in that context the qualitative assessment based on substantive equivalence was undertaken.[17] In effect, qualitative shortcomings that required the expenditure of additional funds to ensure substantive equivalence had already been considered, at least notionally, in setting the quantitative limit at the high end of the sliding scale.

32. In the present matter, both the position on the sliding scale and substantive equivalence are at issue. Therefore, pedagogical needs, costs, and practicalities are all relevant considerations in making a determination.

33. This Court stated in *Rose-des-vents*:

> In my view, costs and practicalities are relevant to the determination of the level of services a group of rights holders is entitled to on the sliding scale. The Province's position misconceives the nature of the equivalence analysis, and conflates entitlement and equivalence. **The entitlement is to equivalent educational services. The equivalence analysis is thus a factual inquiry, not an entitlement-related decision. The "numbers warrant" analysis will have already considered costs and practicalities in determining the scope of the s. 23 rights to be afforded to the minority language group.** It would undermine that analysis to consider costs and practicalities again, after the appropriate level of educational services has already been determined. Such an approach is neither logical nor principled. Thus, it is not appropriate for provincial or territorial governments to invoke issues of practicality or cost as part of the inquiry

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[16] *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3, 2000 CarswellPEI 4, at para. 31.
[17] *Rose-des-vents*, at para. 34.

> into the factual equivalence of minority language and majority language schools.[18] [Emphasis added]

34. The logical inference is that at other points along the sliding scale, if the entitlement has not been challenged, deficiencies identified under the qualitative equivalency analysis would have to be addressed by the reallocation of existing resources within the existing budgetary framework. It follows that the equivalency analysis typically should not identify a need for more resources except possibly at the high end of the sliding scale. That said, the evolving nature of a minority language school population may require a reassessment of the minority's position on the sliding scale. The qualitative equivalency analysis, in addition to triggering reconsideration of the allocation and use of the current resources, may also then trigger a reassessment of the position on the sliding scale.

35. Because a substantively equivalent education is the desired outcome that the services mandated by s. 23 of the *Charter* are intended to provide, the notion of substantive equivalence informs the quantitative assessment conducted to situate the service on the sliding scale. Because of this relationship, the consideration of substantive equivalence may require a re-consideration of what is quantitatively warranted for the number of students. This would naturally include the potential for a re-examination of the costs and practicalities, depending on the nature of the shortcomings identified in the qualitative assessment of substantive equivalence.

36. In effect, each type of assessment informs the other type of assessment. The assessment of substantive equivalence is informed by the relevant level of entitlement on the sliding scale, and the level of entitlement is informed by the need to provide substantively equivalent education in a particular circumstance.

37. If the qualitative assessment of substantive equivalence indicates an existing or potential deficiency, the means to correct the deficiency need to be explored. If it is clear that additional facilities and services are not warranted by the numbers, other options, such as the reallocation of existing resources, need to be explored to ensure the appropriate qualitative outcome: a substantively equivalent educational experience.

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[18] *Rose-des-vents*, at para. 46.

However, if the means to address the deficiency include an increase in the level of services or facilities, a quantitative reassessment may be required to see whether the numbers warrant and, therefore, mandate additional services or facilities. This requires a reconsideration of the pedagogical needs, and the costs and the practicalities of providing the services to a particular number of students in a particular community, not as part of the assessment of substantive equivalence, but as a reassessment of the entitlement along the sliding scale.

38. It is true that costs and practicalities are not to be considered when assessing substantive equivalence. However, if an assessment of substantive equivalence suggests that the government needs to allocate additional resources, a reassessment of the minority's position on the sliding scale would be required. This would require a further reconsideration of costs and practicalities of providing the appropriate level and kind of services needed for the substantively equivalent education that is warranted by the new number of students.

39. Analytically, this results in a process that calls for quantitative assessment, followed by qualitative assessment, which may lead to a quantitative reassessment and a subsequent qualitative reassessment. This cycle repeats and the assessments are refined until the appropriate level of services is identified. Because s. 23 of the *Charter* requires the provision of substantively equivalent education regardless of where on the sliding scale the minority language rights fall, the quantitative and qualitative tests are intimately and intricately linked and ultimately function as different, corresponding, but alternating parts of the same test: in effect, opposite sides of the same coin. This does not improperly import a consideration of costs and practicalities into the assessment of substantive equivalence. Rather, it functions as a feed-back loop that enables the proper completion of the necessary assessments to establish the proper level of entitlement.

40. As a legal test this may appear cumbersome, but it reflects the reality faced by civil servants who are aware of and subject to the normal provincial budgetary pressures and constraints and who must keep in mind the constitutional obligations arising under s. 23

of the *Charter* when they are charged with considering and recommending approval of minority language funding requests. A daunting task.

41. With respect to school facilities, the assessment of substantive equivalence contemplated in the case law is not intended to provide an assessment of school facilities uncoupled from the requisite level of educational services mandated by s. 23 of the *Charter*. Rather, assessing a substantively equivalent education requires a contextual and holistic assessment based on the appropriate level of educational services and facilities that must be provided. It is entirely consistent with the case law, to provide different facilities for the minority's different circumstances while ensuring that the education received is substantively equivalent.

42. However, it should be noted that a government may permit and may provide funding for minority language education in circumstances where the numbers do not warrant the provision of minority language education, and may even permit and provide funding for minority language education in homogenous facilities when not required to do so by s. 23 of the *Charter*.[19] Nevertheless, the assessment of substantive equivalence must follow the determination of the appropriate level of educational services mandated by s. 23 of the *Charter*, independent of the current level of service being provided.

43. Nor can a minority language board expand the nature of the province's constitutional obligation by making choices that exceed the pedagogical and cost constraints inherent in the sliding scale.[20]

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[19] *Yellowknife*, at para. 108: "[…] The appellants do not challenge the existence of the high school program, but it makes a difference whether the program is constitutionally mandated, or merely provided as a matter of public policy. If it is the latter, there is no opportunity for the courts to order further and better facilities under s. 23. As was said in *Mahe* at p. 365, **governments can always provide more than the minimum minority language education called for by the Charter, and should be encouraged to do so. It would be counterproductive to hold that if a government follows that invitation, it then will be compelled to provide yet further facilities.**" [Emphasis added]

[20] *Yellowknife*, at para. 108: "[…] The appellants do not challenge the existence of the high school program, but **it makes a difference whether the program is constitutionally mandated, or merely provided as a matter of public policy. If it is the latter, there is no opportunity for the courts to order further and better facilities under s. 23.** As was said in *Mahe* at p. 365, governments can always provide more than the minimum minority language education called for by the Charter, and should be encouraged to do so. It would be

D. Substantive Equality and the Reasonable Rights Holding Parent

44. The use of a reasonable parent's perspective was endorsed by this Court in *Rose-des-vents.* If recourse is to be had to the reasonable rights holding parent for the assessment of equivalency at all points along the sliding scale, the test must be an objective one, and the reasonable parent must be a fully informed parent, one who is aware of the quantitative nature of the entitlement.

45. The reasonable parent's focus should be on the quality of the minority language education provided, as circumscribed by the placement on the sliding scale, with a keen eye to the cultural and linguistic aspects of education, which fall uniquely within the purview of the minority language parents. Though the reasonable parent need not understand the budgetary constraints faced by governments, or the practicalities or impracticalities of providing a particular level of service, the fully informed reasonable parent must evaluate the service with a clear awareness of the level of service to which the children in the particular minority language community are entitled. The reasonable parent will ask whether the educational services and facilities available to the minority language children are qualitatively equivalent, not quantitatively equivalent and will focus on the quality of the services and the facilities, not on the quantity or the size of the facilities.

46. Use of the reasonable parent to assess equivalency, untethered from the nature of the entitlement as determined on the sliding scale, is counter to the analysis required under *Mahe* and *Rose-des-vents*. If the reasonable parent's assessment is untethered from the level of entitlement, the assessment would become a measure of a hypothetical parent's desire rather than an objective qualitative assessment of required services and facilities that it is intended to be. If the reasonable parent's assessment is used as the ultimate test to determine compliance with s. 23 of the *Charter*, it would effectively supplant the cost and practicality analysis used to situate the level of the required services on the sliding scale.

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counterproductive to hold that if a government follows that invitation, it then will be compelled to provide yet further facilities." [Emphasis added]

47. A finding that the educational services are not substantively equivalent should only be made with reference to the precise level of education services and facilities required by what the numbers warrant. The use of a proportionality standard properly applied to consider the pedagogical needs and the costs and practicalities of providing the requisite services can be the point of reference the reasonable parent uses to conduct the objective assessment of substantive equivalence.

48. Assessing whether a reasonable parent would find the educational opportunities available in a neighbouring majority language school more attractive when the majority language school serves a much larger student population and is able to provide economically a broader range of educational choices is inappropriate. It risks wrongly equating a failure to entice with a failure to satisfy s. 23 of the *Charter*. In short, there is a big legal difference between not choosing a minority language school because the constitutionally warranted level of services is not sufficiently attractive and not choosing that school because the warranted level of services is deficient in some way.

49. Though this Court in *Rose-des-vents* indicated that equivalent facilities counteracted assimilation,[21] the comment must be understood in the context of that case and the concern with substantive equivalence at the high end of the sliding scale. As ageneral proposition, the provision of any appropriate level of constitutionally mandated minority education serves that same purpose.

50. Consequently, if the reasonable parent standard is to be applied, it must be applied through the eyes of a fully informed reasonable parent aware of the scope of the minority language educational entitlement as determined on the sliding scale. Such a reasonable parent would ask whether the facilities are able to support the provision of the constitutionally mandated level of minority language educational services that is qualitatively equivalent.

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[21] *Rose-des-vents*, at para. 29 : “The s. 23 right to equivalent educational facilities for minority language rights holders where numbers warrant provides a means to counteract the assimilation that occurs when the children of rights holders attend majority language schools.”

E. Proportionality and the Reasonable Parent in this Case

51. In the trial judge's reasons in this case, it is apparent that the discussion of proportionality was intended to reflect the need to identify the appropriate level of educational services and facilities on the sliding scale, as required by *Mahe.* In this regard, the trial judge stated:

> Further, in my view, it is not practical to assume that every instructional facility that the CSF operates must be equivalent to that of the majority in the community where it operates. CSF programmes in the middle of the range should certainly have sufficient facilities to offer a core programme and meet students' needs. However, **it is simply not practical or cost-effective to expect that a school of 100 students will have equivalent facilities and instructional programmes to nearby majority-language schools that are double or triple its size.**[22] [Emphasis added]

52. The Trial judge went on to state:

> Rather, I take the view that along the sliding scale, it is practical for the CSF's facilities and programmes to be proportionate to the facilities and programmes offered at majority schools in the same area. The CSF must have spaces to offer a core programme. It may also be relevant to consider whether the CSF has sufficient space per capita to offer those programmes, while exercising caution not to stray into a formal equivalence analysis. Of course, the analysis must also take into account whether there are other factors related to the facility — its age, level of repair, location, class sizes, and control by the CSF, for example — that, regardless of the per capita allotment of space, make the facility less than proportionate to what the majority has.[23] [Emphasis added]

53. It is evident from the nature of the trial judge's comments that the notion of proportionality was used to situate the requisite level of educational services along the sliding scale.

54. Arguably, the comment of the trial judge to the effect that the proportionality analysis and the substantive equality analysis are not *ad idem*, simply reflects an effort to reconcile the comments on the required nature of school facilities that arise from the *Rose-des-vents* case with the notion of the sliding scale firmly established in the case law. It is clear, however, that the trial judge did not reject the need for an assessment of

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[22] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764, 2016 CarswellBC 2685, at para. 848. [Trial Decision]
[23] Trial Decision, at para. 849.

substantive equality. Nor did the trial judge use the notion of proportionality to avoid a proper qualitative assessment. Rather, the trial judge recognized the utility of the reasonable parent's perspective used to conduct the qualitative assessment when the trial judge stated:

> In all other ways, though, in my view it is appropriate for the proportionality analysis to assume the same perspective as the equivalence analysis: **it should adopt a substantive equivalence analysis, from the perspective of the reasonable rightsholder parent**, while making a local comparison of the global educational experience.[24]

55. The trial judge appears to have combined the notions of a quantitative and qualitative assessment under the rubric of proportionality, which, given the inextricable linkage of the two type of analysis, is not surprising. The trial judge's focus was on physical school facilities and the need to assess substantive equality in circumstances where the numbers only warranted facilities that were smaller than those available to the majority. It is evident that the introduction of the notion of proportionality was not intended to replace the notion of substantive equality, but rather to introduce a practical measure to reflect what the numbers warranted which would serve to inform the assessment of substantive equality. The trial judge stated:

> I acknowledge that the test for proportionality is not entirely *ad idem* with the concept of substantive equality. With the shift to analyzing proportionality, the question is no longer whether facilities are substantively equal. However, the substantive equality perspective is of great value when comparing minority facilities to the majority. Thus, the proportionality analysis must be approached with a view to recognizing that the minority will need special consideration and resources to achieve a standard that is proportionate to the facilities provided to the majority.[25]
>
> Similarly, the question of proportionality does not square perfectly with the question of whether a reasonable rightsholder would be deterred by meaningful differences between majority and minority schools. A reasonable rightsholder parent would undoubtedly look at a small minority school and see meaningful differences from large majority schools. Those differences might well deter the parent from choosing the minority school. Where the numbers are small, though, the fact that a parent will be deterred

[24] Trial Decision, at para. 850.
[25] Trial Decision at para. 851.

> would not make it practical in terms of pedagogy and cost to provide equivalent facilities to prevent those rightsholders from being deterred.[26]

56. The trial judge recognizes the inappropriateness of considering deterrence based on differences in majority and minority schools when the sliding scale does not require the provision of equivalent facilities. This is generally consistent with Justice Slatter's comments in the *Yellowknife* case, and is also consistent with the proper application of the reasonable parent test. Though the trial judge's comments do not neatly separate the assessment of the entitlement to a level of rights on the sliding scale from the assessment of whether the education actually received is substantively equivalent, it is clear that the trial judge is grappling with the qualitative assessment of the reasonable rights holder parent. As is appropriate when the level of service on the sliding scale is in issue, the trial judge goes back to assess costs and practicalities, not as part of a substantive equivalence assessment, but as part of the quantitative sliding scale entitlement assessment.

57. The trial judge goes on to note the value of the reasonable rights-holder parent:

> However**, the perspective of the reasonable rightsholder parent is a valuable one, too.** Taking that perspective ensures that the Court is focused on the global educational experience as it would appeal to the persons that will eventually take advantage of the service. As such, in my view, when examining the question of proportionality, **the question is whether a reasonable rightsholder would 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.[27] [Emphasis added]

58. The trial judge's use of the language "meaningfully disproportionate" clearly suggests an attempt to discern whether the facilities are able to support the requisite level of educational services, which is the essential question, since meaningfully disproportionate facilities would not enable the provision of the required level of educational services, as identified on the sliding scale.

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[26] Trial Decision, at para. 852.
[27] Trial Decision, at para. 853.

59. The Court of Appeal understood that the trial judge was applying the proportionality standard to determine the level of educational services warranted by the number of entitled minority language students, and speaking of the trial judge's use of a proportionality standard, stated:

> This is not to conflate the entitlement and equivalence stages as the plaintiffs suggest; a judge simply cannot determine entitlement without considering the actual services that entitlement would entail.[28] [Emphasis added]

60. The Court of Appeal recognized the inextricable linkage of the quantitative and qualitative assessments that need to be conducted to determine the entitlement.

> What the reasons of the courts below reveal is that the courts were grappling with determining the appropriate level of educational service on the sliding scale in communities where the numbers did not warrant the provision of services at the high end of the scale, and did not warrant providing facilities that were equivalent to those available to the majority with a significantly larger student body. In effect, the lower courts used the language of proportionality to express the need to identify the appropriate kind of school facility required to support the constitutionally mandated level of minority language education as part of their search to place the minority language education rights on the sliding scale.

61. Section 23 of the *Charter* gives rise to a substantively equivalent education where the numbers warrant, and pedagogical needs as well as costs and practicalities are used to determine the way in which the educational services will be delivered. Therefore, the assessment of pedagogical needs, costs, and practicalities must be undertaken with the understanding that the funded educational services will ultimately provide a substantively equivalent education. In short, the determination of the level of mandated services and facilities on the sliding scale requires both a quantitative and qualitative assessment.

F. Conclusion

62. The quantitative assessment and the qualitative assessment form opposite sides of the same coin. Assessing whether s. 23 rights have been violated requires both a quantitative assessment informed by the need to provide substantively equivalent

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[28] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305, 2018 CarswellBC 1956, at para. 147.

education determined on the sliding scale based on what the numbers warrant, and a qualitative assessment informed by what the numbers warrant as determined on the sliding scale.

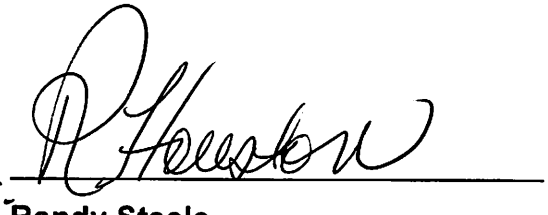
63. Though *Rose-des-vents* tells us that costs and practicalities are not to be considered in the qualitative assessment for substantive equivalence, costs and practicalities remain a constraint because the quantitative assessment undertaken to locate the appropriate level of services on the sliding scale, which informs the assessment of substantive equivalence, is subject to costs and practicalities.

64. The focus of the qualitative analysis must not drift unprofitably from its proper mooring in the quantitative sliding scale assessment long endorsed by this Court. If a comparison of school facilities is to be made, the comparison should be used to shed light on how best to support a mandated level of educational service as determined on the sliding scale, and not as the basis for a claim to obtain unwarranted but desirable options available in neighbouring majority language schools serving much larger student populations. Substantive equivalence is premised on an analysis that contemplates the valid and expected existence of legitimate, and constitutionally permitted differences between the services and facilities available to the minority and majority language students in a particular community.

PART IV: SUBMISSIONS CONCERNING COSTS

65. Alberta does not seek costs and asks that costs not be awarded against Alberta.

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



FOR: **Randy Steele**
Constitutional and Aboriginal Law Division
Alberta Justice and Solicitor General

Part VI: LIST OF AUTHORITIES

	Case	Paragraph
1.	*Arsenault-Cameron v Prince Edward Island*, [2000] 1 SCR 3, 2000 SCC 1 (CanLII)	29
2.	*Assoc des parents de l'école Rose-des-vents v British Columbia (Minister of Education)*, [2015] 2 SCR 139, 2015 SCC 21 (CanLII)	3, 10 – 15, 28, 31, 33, 44, 46, 49, 54, 63
3.	*Conseil scolaire francophone de la Columbie-Britannique v British Columbia*, 2016 BCSC 1764, 2016 CarswellBC 2685	51 – 58
4.	*Conseil scolaire francophone de la Columbie-Britannique v British Columbia*, 2018 BCCA 305, 2018 CarswellBC 1956	59, 60
5.	*Mahe v Alberta*, [1990] 1 SCR 342, 1990 CanLII 133 (SCC)	3, 19, 20, 22 – 26, 46, 51
6.	*Northwest Territories (Attorney General) v Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 (CanLII)	17, 42, 43, 56
7.	*Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 2005 SCC 14 (CanLII)	3
	Legislation	
	Canadian Charter of Rights and Freedoms, being Schedule B to the *Canada Act, 1982 (U.K.), 1982*, c. 11 s. 23	Throughout