COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education),* 2018 BCCA 305

Date: 20180725
Docket: CA44023

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
Respondents on Cross Appeal
(Plaintiffs)

And

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

Respondents
Appellants on Cross Appeal
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice MacKenzie

On appeal from: An order of the Supreme Court of British Columbia, dated September 26, 2016 (*Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2016 BCSC 1764, S103975).

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Place and Dates of Hearing: Vancouver, British Columbia
January 29, 30 & 31, 2018
February 1 & 2, 2018

Place and Date of Judgment: Vancouver, British Columbia
July 25, 2018

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Reasons for Judgment of the Court:

<u>Overview</u>

[1] This appeal arises from a dispute over whether the Province of British Columbia has adequately funded and supported French-language minority education consistent with its constitutional obligations.

[2] Section 23 of the *Charter of Rights and Freedoms*, grants citizens of Canada the right, in certain circumstances, to have their children educated in French or English out of public funds—even where that language community is the linguistic minority—so long as the number of children warrants such education. It essentially creates a sliding scale of entitlement to minority-language educational services based on the number of students: *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 366. It is a right that speaks to the unique nature of Canada as a bilingual society created through the coming together of French and English linguistic and cultural communities, and "sets Canada apart among nations": *Association des parents de l'école Rose-des-vents v. British Columbia*, 2015 SCC 21 at para. 25 [*Rose-des-vents*]. It is also a positive right, somewhat distinct within the structure of the *Charter*, which places a duty on government to not just refrain from interfering in minority-language education, but to take positive steps to facilitate and provide such education. The Supreme Court of Canada has held that s. 23 essentially "mandates that governments do whatever is practical in the situation to preserve and promote minority language education": *Mahe* at 367.

[3] In most cases where this right has been invoked, the number of minority-language children has clearly warranted the highest level education and facilities. However, the case at bar raises, seemingly for the first time, the issue of what level of education must be provided when the number of students falls in the middle of the sliding scale—where at least some services, if not the highest level, are warranted.

[4] The plaintiffs in this case are the French-language school board Conseil scolaire francophone de la Colombie-Britannique (“CSF”), individual parents who are s. 23 rightsholders, and an association that represents Francophone parents, the Fédération des parents francophones de Colombie-Britannique (“FPFCB”). The plaintiffs claim that the Province has committed various systemic infringements of s. 23 through its process for funding education, which has resulted in underfunding of the French-language system, and inadequate facilities for French-language students in 17 different communities. The plaintiffs also claim that the *School Act*, R.S.B.C. 1996, c. 412, infringes the *Charter* by restricting admission to CSF schools to only s. 23 rightsholders or children of non-citizens who would otherwise be rightsholders.

[5] Given the scope of the claim, the trial was incredibly lengthy and complex. It lasted 238 days. The judge heard from more than 40 lay witnesses and 13 experts. The parties tendered more than 1,600 exhibits, and provided the judge with more than 1,000 pages of written argument. The reasons for judgment number 6,843 paragraphs. As the judge noted, her decision was likely the longest decision in the history of the Supreme Court of British Columbia, and possibly of any court in Canada.

[6] In the result, the judge made various declarations that certain of the Province’s administrative procedures for funding minority-language education unjustifiably infringed s. 23. To that end, the judge also directed that a separate capital envelope be created for the funding of CSF capital projects so that the CSF does not have to compete for funding with majority-language school districts. In addition, the judge ordered $6 million in *Charter* damages for the Province’s failure to adequately fund CSF transportation costs.

[7] However, the judge declined to order that the Province immediately fund the significant number of capital projects requested by the CSF or make declarations to that effect. The judge rejected that relief largely because she determined that rightsholders were not entitled to the requested facilities on the grounds of pedagogy and cost.

[8] In their final amended statement of claim, the plaintiffs estimated the costs for each project they said was necessary to ensure compliance with s. 23. The total cost for all those projects was estimated at upwards of $300 million, not including costs for site acquisition. To put that amount in perspective, the judge observed in her reasons that in 2013 the CSF had requested $350 million in capital funding, which was roughly equivalent to the total capital funding distributed to all districts that year province-wide (at para. 6477).

[9] The judge still made declarations regarding entitlement to facilities in several communities, and even found that there were unjustified breaches of s. 23 in some of them. However, the practical effect of those declarations did not require that the Province immediately fund the capital projects requested by the plaintiffs, and in some communities the judge concluded the plaintiffs would be entitled to substantively equivalent facilities to the majority only in the long term, i.e., ten years, once enrolment grew sufficiently.

[10] The judge also declined to declare that the impugned provisions of the *School Act* were of no force or effect, or that the Province's decisions not to fund early childhood education or certain CSF leases infringed s. 23.

[11] The plaintiffs now appeal the judge's order, saying she committed several legal errors in her analysis of whether s. 23 was infringed in the various ways alleged, whether any infringements were justified under s. 1, and the remedies she ordered for certain other discrete breaches she found.

[12] Notably, despite the length of the judgment, the plaintiffs challenge only one minor finding of fact on appeal.

[13] The Province also cross appeals the $6 million *Charter* damages award relating to inadequate transportation funding, but does not challenge the rest of the judge's order.

[14] The plaintiffs' fundamental complaint on appeal is that the judge erred in not finding rightsholders were entitled to the level of facilities that would justify the projects requested in their statement of claim. Concluding that the plaintiffs are entitled to such projects would clearly place significant costs on the Province, and was a conclusion the judge found to be impractical. The plaintiffs took the position before this Court that they did not on appeal seek orders directing that those requested projects be built. Instead, they sought only declarations as to entitlement in each community allowing any breaches of that entitlement to be remedied in a number of ways. Yet, crucially, there is nothing in the record before this Court to suggest that there are viable, less expensive alternatives to provide the level of facilities to which the plaintiffs claim they are entitled than the projects requested in the pleadings. The scale and costs of those requested facilities are therefore integral to the analysis of whether the plaintiffs are entitled by s. 23 to the level of facilities they so claim.

[15] The central question that must be answered then is whether the *Charter* requires the Province to immediately allocate upwards of $300 million to provide the educational facilities that have been requested by the plaintiffs, an amount equal to the annual funding for all educational capital projects province-wide.

[16] In our view, the answer to that question is "no". Such a result would be contrary to the consistent theme in the jurisprudence of the need for practicality when interpreting the duties imposed on the government by s. 23. We conclude that the judge did not commit any errors in her analysis of whether s. 23 was infringed or whether any infringements were justified under s. 1. Nor did the judge err in not awarding *Charter* damages to the plaintiffs for certain lease costs.

[17] However, we conclude that the judge did err with respect to the award of *Charter* damages against the Province for failing to adequately fund transportation costs. With respect, the judge incorrectly failed to apply the traditional immunity against damages for actions which involve the mere enactment of a law or policy that is only later declared unconstitutional.

[18] We would therefore dismiss the appeal, and allow the cross appeal, for the reasons that follow.

Facts

[19] There has been a Francophone presence in British Columbia since the earliest colonization by Europeans. That presence has waxed and waned over time. In the early 1800s, French was the most widely spoken non-Indigenous language in the province. Since then, through migration of non-Francophones and assimilation, the Francophone community has become a much smaller minority of the population.

[20] In the late 20th century, there was increased interest in French instruction, and B.C.'s first minority-language education programme, the Programme Cadre, was created in 1978. Around this time, a network of parents of Francophone children formed to address common issues with the Programme Cadre. This network would eventually become the FPFCB.

[21] After the introduction of the *Charter*, the precursor to the FPFCB brought a claim against the Province relating to breaches of s. 23. In response to that litigation, the Province created a Minority Language Task Force in 1990 to propose a better education delivery model.

[22] The Task Force process, and some further litigation, eventually resulted in the creation of the CSF, through which the Province implements its duties under s. 23.

[23] The CSF is one of 60 school boards in British Columbia, and the only French-language school board. The CSF has responsibility for delivering French-language primary and secondary education across the entire province, while the other 59 school boards are assigned responsibility for a specific geographical territory. The CSF's territorial jurisdiction therefore overlaps with other linguistic majority school boards, and the CSF operates schools in the same communities as majority-language boards and sometimes shares facilities with them.

[24] In 2014/2015, 5,382 students were enrolled in CSF schools in approximately 37 programs across the province. Since 1998, school enrolment in British Columbia has decreased significantly, but the CSF was and continues to be a growing school board. Between 2001 and the time of trial, the CSF's enrolment doubled, while almost every other school board declined, some by as much as 40%. However, this period also coincided with changes in government spending on educational capital projects, which the plaintiffs allege has led to the facilities becoming inadequate in a number of communities.

[25] In June 2010, the plaintiffs filed a notice of civil claim against the Province, alleging breaches of s. 23 caused by inadequate funding of minority-language education. The final amended notice of civil claim was filed in June 2015.

[26] The plaintiffs alleged a number of infringements of s. 23, including the following, which are relevant to the appeal and cross appeal:

1. Systemic infringements involving capital funding and how CSF projects are assessed and prioritized;
2. Specific capital funding infringements arising from allegedly inadequate facilities in 17 separate communities;
3. Various discrete funding infringements—including a failure to properly fund certain school facility leases, a lease for a new school board office, early childhood education, and transportation; and
4. An infringement caused by restrictions on admission to CSF schools in the *School Act*.

[27] The facts relevant to the issues on appeal and cross appeal are discussed below. We omit discussion of the facts of the community-specific claims except where necessary.

The role of school boards and the Province's Capital Planning Cycle

[28] Each school board, including the CSF, owns or leases the schools under its jurisdiction. In some communities, the CSF owns or leases stand-alone facilities and operates "homogenous" schools, which cater only to linguistic minority students. Some of these homogenous schools are "K-12 schools" that house both elementary and secondary students. In other communities, the CSF leases and shares space with a majority school board in so-called "heterogeneous" schools.

[29] School boards generally operate autonomously from the Provincial government, but the Province still funds the education sector. School boards and the Ministry of Education ("the Ministry") are jointly responsible for managing capital assets. School boards determine when new schools are needed, and when they are closed. Schools boards also maintain the school facilities under their jurisdiction. The Ministry specifically allocates capital funding to school boards to carry out these responsibilities through a "Capital Planning Cycle" involving a number of phases.

[30] First, the Ministry sends instructions to school boards establishing the process for requesting capital project funding.

[31] Next, the school boards indicate their needs to the Ministry. Projects that propose acquiring new sites, constructing new schools, or otherwise addressing growing enrolment needs, are called "Expansion Projects." Projects that request renovations or the replacement of schools at the end of their economic lives are known as "Building Condition Projects." School boards also rank proposed capital projects in their submissions to the Ministry. This requirement to rank proposed capital projects is one of the policies the plaintiffs challenge on appeal.

[32] The Ministry then performs an internal assessment of each project and provides feedback to school boards on priority rankings. A final ranking of high-priority projects across the education sector by order of relative need is conducted by the Ministry and submitted to the Treasury Board for approval.

[33] Based on the rankings from the Ministry, the Treasury Board provides the Ministry with a "Capital Envelope" or a set of specific spending targets with associated priorities to focus on. For example, the Ministry may be directed to approve a certain number of Expansion Projects up to a certain dollar value.

[34] Finally, the Ministry informs school boards regarding which projects have been supported, and then works with school boards to develop more detailed plans to carry out the projects.

[35] However, from 2005 until fall 2011, there were no capital project approvals for Expansion or Building Condition Projects.

Building Condition Projects and the Building Condition Driver

[36] When the Treasury Board provides the Ministry with the Capital Envelope for funding capital projects, the Ministry is also advised of the Province's priorities for funding. Those priorities or "Capital Drivers" are developed by Cabinet and reflect the Province's general strategic priorities for how the Ministry should approve projects.

[37] For many years the key Capital Drivers were the "Building Condition Driver" and "Enrolment Driver". As a result, the Province tended to prioritize in order: health and safety Building Condition Projects, Expansion Projects, and Building Condition Projects to address buildings at the end of their economic lives.

[38] When determining relative need for Building Condition Projects, the Ministry relies on the Facility Condition Index ("FCI") metric. The Ministry has contracted a company to conduct assessments of school facilities to determine the life cycle of various building components and the costs for remediating deficiencies. The FCI is a ratio of the cost of addressing the deficiencies to the replacement cost of the building. A building nearing the end of its economic life would have an FCI score close to 1, while a new building would have an FCI score of 0.

[39] The Ministry considers buildings with an FCI score of 0.6 or greater to be high priority, and, unless a project meets that threshold, it is unlikely the Ministry will consider it further. No CSF schools currently have an FCI score of 0.6 or greater.

[40] FCI assessments do not specifically take into account whether a space meets the educational needs of the school, such as considering the adequacy of the size of a gymnasium or classrooms, or the presence of amenities such as a music room. The plaintiffs also take issue with this lack of a "functionality" component to the assessment of Building Condition Projects.

The Annual Facilities Grant

[41] Separate from capital funding approved through the Capital Planning Cycle, the Ministry provides school boards with an Annual Facilities Grant ("AFG") to cover the costs of maintaining school facilities. Eligible expenditures using the AFG include items such as roof replacements,

asbestos abatement, or electrical system upgrades. However, AFG funds are not to be used for Expansion Projects, building or site acquisitions, or acquisition of equipment or furnishings. For example, AFG funds could not be used to build a gymnasium.

[42] AFG amounts are determined principally on the basis of enrolment and allowed space per student, though some additional factors modify the amount. In particular, the “AFG Rural Factor” recognizes that some rural schools that have excess capacity and which have maintenance costs above funding levels provided on the basis of enrolment, cannot be closed or consolidated as easily as those in urban areas to reduce costs. As a result, the Ministry increases the AFG for school boards that operate rural schools, and provides a credit for 50% of the students that can be accommodated in that excess space.

[43] Prior to 2012/13, the AFG Rural Factor was not applied to the CSF. In the summer of 2009, the Ministry recognized that the CSF was incurring an AFG shortfall as a result of taking over rural school facilities, but the Ministry did not reallocate funds to the CSF due to the recession that was placing pressure on the budget. To apply the AFG Rural Factor at that time would have required the Ministry to reallocate money away from majority school boards. As a result, the CSF was deprived of approximately an additional $1 million between 2009/10, when the CSF began to utilize homogenous rural school facilities, and 2012/13. The plaintiffs obviously took exception to this shortfall and it is in issue on appeal.

Transportation

[44] The question of whether the Province has adequately funded CSF transportation costs was also a significant issue at trial, and is the subject of the Province’s cross appeal.

[45] The vast majority of CSF students live closer to a majority school than a CSF school. The CSF has also chosen to structure its education in order to have larger catchment areas, justifying greater homogenous facilities, that inevitably leads to longer travel times than for students attending majority schools.

[46] The Ministry funds transportation costs for the CSF through an annual allocation called the “Operating Block”. Prior to 2002, the Operating Block amount was determined based on a Resource-Cost Funding Model, where the Ministry funded specific aspects of school programs. In 2002, the Ministry moved toward an Enrolment-Based Funding Model where school boards received a basic allocation based on enrolment numbers, with various supplements to recognize the unique circumstances of certain types of school boards. Under the Enrolment-Based Funding Model, school boards could then use funds provided in the Operating Block for transportation services at their discretion.

[47] One of the supplements to the Operating Block under the Enrolment-Based Funding Model was for Transportation and Housing, which was a holdover from the Resource-Cost Funding Model. This supplement was frozen at 2001/02 levels until 2009/10, with a minor increase in 2010/11, but frozen

again for 2011/12. During this freeze, the CSF's annual funding from this supplement was $3,400,440 based on audited transportation costs for 1999/00. The small increase in 2010/11 brought the total to $3,488,298.

[48] During the time the Transportation and Housing Supplement was frozen, the CSF's enrolment grew and the CSF's actual transportation costs exceeded the funds provided by the supplement. The Ministry was aware as early as 2004 that the CSF was incurring transportation costs in excess of the supplement.

[49] At the same time, this increase in enrolment led to an increase in the Operating Block, and in 2006, the Ministry implemented a 15% Francophone Supplement to address the additional operating costs associated with the CSF's programming. As a result, the CSF had an overall annual operating budget surplus from 2001/02 to 2013/2014. Despite this increase in funding, and overall operating budget surplus, the CSF accumulated a transportation budget deficit of between $6 million and $14 million.

[50] In 2012, the Ministry abolished the Transportation and Housing Supplement and compensated school boards for those costs using the Student Location Factor and Supplemental Student Location Factor, which are based on population density. The Ministry adapted the formula for calculating those factors to reflect the CSF's highly dispersed population and the new system properly indemnifies the CSF for its transportation costs.

The board office lease

[51] As discussed above, the CSF operates several leased facilities, including its board office space, and some of the issues on appeal relate to how the Province has treated those leases. Sometime between 2010 and 2013, the Ministry imposed a requirement on the CSF that it seek pre-approval of all leases. This requirement arose to enable the Ministry to appropriately budget and out of concern that the CSF's lease costs had increased.

[52] In 2014/15, the Ministry froze the CSF's lease funding as a result of what the Ministry considered to be the failure of the CSF to abide by the pre-approval requirement.

[53] From 2010 to 2013, the CSF submitted a capital request to the Ministry for a new school board office. This request was not approved as the Ministry had a policy not to provide capital funding for school board offices given the capital needs of actual instructional facilities. Despite this policy on capital funding, the Ministry still funded the CSF's lease of board office space prior to 2014.

[54] Since the board office project was not approved, the CSF began to investigate leasing new facilities in order to consolidate district-level staff, and replace office space for district-level staff that was being removed due to another capital project. The CSF informed the Ministry about proposed options for a new board office space, but the options all involved considerably increased costs and space over the current lease. The CSF and Ministry engaged in multiple discussions prior to 2014

regarding the request, and the Ministry repeatedly asked for a business plan justifying the increased space. In particular, the Ministry expressed concerns that other CSF properties were not being considered.

[55] Without first gaining the approval of the Ministry, the CSF entered into a lease agreement for a new board office space with a footprint of 2,271 m^2. Prior to 2014, the CSF leased board office space totalling 747 m^2. The new board office space was also larger in terms of area per full-time equivalent students than most comparator school board offices.

[56] The Ministry informed the CSF that because the space exceeded standards, was for a much higher cost, and because the lease was entered into without prior approval, that no additional funding for the school board office lease above 2013/2014 levels would be provided. To fund the lease, the CSF cut approximately 27 classroom aide positions.

The Victoria leases

[57] In 2009, École Victor-Brodeur, a homogenous CSF school in Victoria, reached capacity. In 2012, to alleviate overcrowding, the CSF leased parts of Lampson Elementary ("the Lampson Annex"). In the fall of 2014, the CSF expressed interest in leasing Sundance Elementary ("the Sundance Annex") and the remaining space available in Lampson Elementary. As with the board office lease, lease funding was subject to Ministry pre-approval.

[58] The CSF submitted an official request on 6 October 2014 seeking funding for these leases. In November 2014, the CSF entered into leases for the two Annexes, on the condition that the Ministry fund the lease.

[59] The Ministry eventually refused to fund the leases. The CSF still paid a deposit to lease the schools and intended to pay the lease using operating funds.

[60] The lease of the Sundance Annex costs the CSF $100,000 per year. The Ministry still funds the portion of the Lampson Annex lease that was funded previously, but the additional cost to the CSF from the new 2014 lease is $24,000 per year.

Early childhood education

[61] The CSF operates a number of early learning programs within its schools ranging from daycares and preschools to Franc-Départ programs that allow children to participate in play-based activities. Generally, minority-language daycare and preschool services require parents to enrol their children and pay a fee. However, the Ministry does fund the Franc-Départ programs which are the French-language equivalent of Ministry-sponsored majority-language Strong Start early childhood learning programs.

[62] Experts indicate that early exposure to French-language education is important to developing language proficiency. As well, many children who attend CSF early learning programs go on to attend

kindergarten in the same school.

[63] The Ministry has adopted policies to encourage various early learning programs across the education sector, including a policy to increase the envelope of new school projects to allow for the building of community spaces for such programs. Many majority schools already operate early learning programs in surplus spaces. However, the failure to more expansively fund early French-language childhood education is at issue on appeal.

The CSF's admissions policy

[64] Also at issue in this appeal, is whether limitations on admission to CSF schools infringe s. 23.

[65] The provision states as follows:

> **<u>Minority Language Educational Rights</u>**
>
> **Language of instruction**
>
> 23. (1) Citizens of Canada
>
> > (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> >
> > (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province. (93)
>
> **Continuity of language instruction**
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> **Application where numbers warrant**
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
>
> > (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
> >
> > (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[66] This section creates three separate types of rightsholders who have a claim against the Province to provide their children with French-language education. Section 23(1)(a) provides the right to those citizens whose first language learned and still understood is French. Section 23(1)(b) provides it to those citizens who received their primary school instruction in Canada in French. Finally, s. 23(2) gives the right to those citizens who have a child who has received a French-language education.

[67] The *School Act*, which sets out who is eligible to attend a CSF school, limits admission to only the children of parents who are in one of the s. 23 rightsholder categories discussed above, or if they are the child of an immigrant who would be a s. 23 rightsholder if they were a Canadian citizen.

[68] In April 2013, the CSF adopted an Expanded Admissions Policy that would allow non-rightsholders over and above immigrant children to attend CSF schools. The CSF decided it would admit, at its discretion, children with one parent who understood and spoke French fluently ("the Francophile Clause") or children with a grandparent who spoke French as a first language or who received French-language education ("the Descendant Clause"). Potential students admitted under this policy were first approved by an admissions committee who considered a student's application in accordance with a number of criteria.

[69] On 22 May 2015, the Francophile Clause and the Descendant Clause of the Expanded Admissions Policy were suspended in order to bring the policy in line with the *School Act*. However, in the 25 months the policy was in effect, 83 students were admitted pursuant to the Francophile Clause, and 73 were admitted pursuant to the Descendant Clause.

[70] The Expanded Admissions Policy was criticized by some parents as impacting space requirements and potentially diluting the language community in schools. However, almost all other minority-language school boards across the country have adopted policies that allow for admission of non-rightsholders that do not fall within the immigrant or ancestry categories.

Decision Under Appeal

[71] The judge summarized her key holdings at paras. 3-26 of her reasons. Those parts of her judgment relevant to the issues on appeal are discussed below.

Section 23

[72] After setting out some background facts, the judge reviewed the interpretative principles applicable to s. 23 and held that because the provision is remedial and contextual it must be sensitive to the unique situation of the minority in each province, and inevitably involves some balancing of interests.

[73] The judge went on to discuss the rates of assimilation for Francophones in British Columbia, and agreed with the conclusion of one of the experts that "Francophone schools, might, at most, delay the inevitable assimilation that will occur" (at para. 341). In reviewing the evidence on the impact of minority-language schools, she held that such schools were "not a panacea" and "[w]hile minority language schools can make the life of a Francophone community more vibrant, they cannot magically increase birthrates and immigration. Minority language schools may slow the tide of assimilation, but they will only prolong the inevitable" (at para. 371).

[74] However, the judge held that whether those views on assimilation are correct is irrelevant. Section 23 provides constitutional guarantees and "[s]chools must be built and have a duty to attempt

to fight assimilation, even if they only exist to serve those students until they grow older, start their own homes and assimilate" (at para. 343).

[75] The judge held that the purpose of s. 23 is to preserve and promote Canada's two official languages, and their cultures, so they may flourish where that language group is a minority.

[76] When determining entitlement to facilities under s. 23, the judge held that a court must first estimate the number of children likely to attend a programme, then place that number of children on the sliding scale established by *Mahe*, taking into account the appropriate services and the cost of contemplated services. The judge also held that the analysis of where the numbers fall on the sliding scale has a temporal aspect, since when a programme begins it may have only a few students, but it may warrant more facilities and services as enrolment grows.

[77] The judge held that where the numbers fall on the high end of the scale, which is to say when enrolment approaches that of comparable majority schools in the same area, then rightsholders are entitled to full educational facilities, distinct from, and equivalent to, those found in majority schools. When determining whether the minority-language education facilities are equivalent, the judge, citing *Rose-des-vents*, held that the proper test is "[w]ould reasonable rights-holder parents be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school?"

[78] Where the numbers fall in the middle of the scale, the judge held that rightsholders are entitled to facilities and programs that are proportionate, though not equivalent, to those offered at local majority schools. In the judge's view, it would be impractical to expect that a school of 100 students would have equivalent facilities and programs to majority-language schools with double or triple the enrolment. The judge concluded that the analysis of whether the CSF's facilities are proportionate must still take into account that the minority will need special consideration, and must also consider whether a reasonable rightsholder parent would find the minority school to be meaningfully disproportionate to the global educational experience at local majority schools.

[79] The judge also concluded that costs were not relevant to the equivalence analysis when numbers fall at the high end of the scale, but may still be relevant for determining whether facilities are proportionate, and to the justification analysis under s. 1.

Section 1

[80] The judge generally addressed whether various breaches related to the specific community claims were justified under s. 1 when actually discussing those specific claims. However, she first reviewed the various principles that governed her s. 1 analysis.

[81] The judge held that context is relevant to the s. 1 analysis, and in this case includes "the Province's economic and budgetary objectives" (at para. 976).

[82] The judge also addressed the role of costs in the s. 1 analysis and held that while costs will not on their own be a sufficiently pressing objective to justify a rights infringement—outside of a period of financial emergency—they may be relevant to the analysis, and she later addressed cost savings as a salutary benefit in the proportionality analysis of the community-specific claims.

[83] The judge held that the purpose of the funding system was a fair and rational allocation of limited public funds, though that was sometimes more a general objective that informed the more specific objective of the various funding policies challenged. She also noted that the plaintiffs conceded this was the purpose of the scheme (at para. 1064).

[84] The judge also held that salutary and deleterious effects should be considered at both the local and systemic level. She concluded a purely local focus may disguise the fact that the CSF operates a system equal to or better than the majority-language system across the province, even if some facilities in some communities may be substandard.

Remedies

[85] The judge held that the unique circumstances of the case justified providing remedies pursuant to both ss. 24(1) and 52(1). In particular, because entitlement to minority-language education under s. 23 depends in part on whether someone has attended minority-language education previously, then the failure by the government to act expeditiously to correct current rights breaches may prevent future individuals from becoming rightsholders.

[86] The judge observed that the plaintiffs may not have standing to seek s. 24(1) remedies given the section refers to "[a]nyone whose rights or freedoms ... have been infringed or denied" and the CSF and FPFCB were not individuals. However, since the Province did not argue this point, the judge assumed without deciding that the plaintiffs had standing (at para. 1131).

[87] With respect to *Charter* damages, the judge reviewed the principles from *Vancouver (City) v. Ward*, 2010 SCC 27, and *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, and noted that countervailing factors may preclude a damages award. In particular, she noted the rule from *Mackin* that damages should not be awarded for breaches where the government took action pursuant to laws that were subsequently declared unconstitutional, unless there was evidence of bad faith, so as not to chill policy-making. The judge then found that there was no evidence of bad faith on the part of the Province and that the Province worked steadily to provide the CSF sufficient facilities following previous litigation related to minority-language education (at para. 1193).

Application and key holdings

[88] After reviewing those principles, the judge applied them to the issues raised in the claim and made various holdings that are relevant on appeal.

Actions that did not infringe s. 23

[89] The judge held that s. 166.25(9) of the *School Act* which prevented the CSF from admitting students under the Francophile and Descendant Clauses did not infringe s. 23 of the *Charter*. She considered herself bound by the decision in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone School Board*], which held that a minority school board does not have the unilateral ability to admit non-rightsholders unless admission of the non-rightsholders is necessary to ensure the existence of the school going forward. As the totality of the evidence indicated there was no threat to the continued viability of CSF programs absent the admission of non-rightsholders, the judge dismissed this part of the claim and declared s. 166.25(9) constitutionally valid.

[90] Nor did the judge find that the Province infringed s. 23 by not funding space for CSF early childhood education programs. The Province implements an education system where primary education begins in kindergarten, and does not generally fund services for early childhood education despite permitting school boards to use surplus space for that purpose. As a result, the judge concluded that the definition of primary instruction does not include preschool or daycare services. The only exceptions are for Strong Start early learning programs, which are part of the Province's K-12 education system and should be funded, and capital funding to include space in new schools to accommodate early childhood programs, which is also provided to majority-language school boards.

[91] The judge also concluded that the Ministry's failure to fund the new CSF board office lease did not infringe s. 23. The judge determined the Ministry's policy requiring pre-approval of CSF leases is consistent with the Ministry's residual discretion to manage the education system, and that the CSF failed to comply with those policies by unilaterally entering into a lease of an extravagant school board office. The judge ordered that until the CSF complies with the requirements, and justifies its new space and additional lease funding, the Ministry is not required to fund the CSF's lease of the new board office.

[92] Finally, the judge held the Province's requirement that the CSF prioritize capital projects as part of the Capital Planning Cycle does not infringe s. 23. The judge found that the prioritization requirement does not usurp the CSF's right to management and control, but instead furthers it. By requiring the CSF to prioritize projects, the Ministry actually cedes control over those decisions to the CSF. While the plaintiffs argued that the CSF should not have to wait for any of its capital projects, the judge concluded s. 23 only requires the Ministry to do whatever is practical to achieve minority-language education, and it is simply not practical to have the CSF build schools in every area of the Province all at once.

Actions that infringed s. 23, but were justified under s. 1

[93] The judge held that the Province infringed s. 23 by failing to apply the AFG Rural Factor to the CSF from 2008/09 to 2010/11, but that infringement was justified. She found that the salutary effects of not applying the AFG Rural Factor were that "the Ministry did not have to deal with the political consequences of taking from the majority", and that it protected majority boards from additional AFG

losses when majority boards were already facing AFG cuts (at para. 1525). The judge concluded these salutary effects outweighed the deleterious effect which was merely an increased financial burden on the CSF that was difficult to quantify in any event as the CSF did not point to any projects it was unable to complete due to insufficient funds. The CSF's need for the AFG Rural Factor was only just beginning to materialize when it was frozen and the CSF had considerable operating surpluses at that time. In the alternative, the judge noted that, if the breach was not justified, the appropriate remedy would have been a damages award.

[94] The judge also concluded that the use of FCI scores to prioritize Building Condition Projects could potentially infringe s. 23 because such scores do not take into account functionality and therefore fail to respond to situations where buildings do not meet the standard of local majority schools. However, in her view, any infringement was justified. The judge found that the purpose of the FCI scores was intended to further the fair and rational allocation of public funds which was pressing and substantial. FCI scores were rationally connected to that objective as it allowed the Ministry to objectively assess capital approvals. The judge concluded the measure was also minimally impairing as the Ministry provides the CSF with other funds that can be used to improve building functionality, and the Ministry has advocated to the Treasury Board for other types of replacement projects, such as seismic upgrades, that effectively result in improvements to building functionality. In addition, as the buildings age their FCI scores will increase, so they will eventually receive funding to address functionality concerns. The judge determined that the salutary effects of using FCI score to target limited funds, which has resulted in the CSF itself receiving significantly greater per-capita funding than majority school boards, outweighed the deleterious effects of small numbers of children having inadequate facilities such as gymnasiums, and any extra impact on assimilation that might result, which adequate schools may be unable to prevent anyway.

Actions that infringed s. 23 and were not justified under s. 1

[95] However, the judge did find the Province breached s. 23 by failing to adequately fund the CSF's transportation system, and the breach was not justified. In deciding damages were an appropriate remedy, the judge held that because the Province had caused a financial loss to the CSF, an award of damages was clearly the most appropriate remedy to put the CSF in the position it would have been in if not for the breach. While the Minister acted only in good faith, in this case there was little risk that the government would be chilled from carrying out its legislative and policy-making functions so the principle from *Mackin* did not apply. The judge therefore awarded the CSF $6 million in damages, equivalent to the lowest estimate of its transportation budget deficit.

[96] The judge also found that the Ministry's decision to freeze funding for CSF leases at 2013/2014 levels infringed s. 23 because it prevented the CSF from adding new programs where numbers warrant. Because the freeze was a blanket funding cap, it was not minimally impairing and not justified by s. 1. The judge then made a declaration that the freeze on lease funding was to be of no force or effect as it related to CSF. Nevertheless, the judge declined to award *Charter* damages to compensate

the CSF for the increased lease costs of the Sundance Annex and the balance of the Lampson Annex as they did not seek pre-approval of those leases, in violation of valid Ministry policies.

Community specific holdings

[97] As above, we omit detailed discussion of the judge's reasons with respect to the community-specific claims.

[98] As a summary, the judge found there was no infringement of s. 23 in Nelson, Richmond, Southeast Vancouver, Nanaimo, Kelowna, Chilliwack, and Whistler (elementary).

[99] The judge found there was an infringement of s. 23 in Pemberton, Victoria, and Mission, but the infringement was justified.

[100] The judge also found there was an infringement in Squamish, Northeast Vancouver, Whistler (secondary), and Burnaby, but due to actions taken by the CSF, the Province was not responsible.

[101] Finally, the judge held there was an infringement in Sechelt, Penticton, Abbotsford, and Vancouver West, but the infringement was not justified and the Province was responsible.

[102] The judge therefore made declarations respecting entitlement to facilities in Squamish, Sechelt, Penticton, Vancouver West, Northeast Vancouver, Abbotsford, and Burnaby. However, even in those communities where the judge did find unjustifiable infringements and declared that rightsholders were entitled to certain facilities, the plaintiffs say the judge erred in not concluding that rightsholders were entitled to a higher level of facilities.

Parts of order not under appeal

[103] Given the scale of the litigation and the number of issues in dispute, it may be difficult to comprehend the full nature of the judge's decision by only looking at those parts of the order which are now being challenged. Therefore, we summarize those parts of the order which are not subject to appeal to provide context regarding the breadth of conduct which was found to infringe the *Charter* and the various remedies already granted. The judge also summarized these declarations and orders at paras. 6834-6837 of her reasons.

[104] In addition to various declarations regarding the community claims, and the systemic issues under appeal, the judge also declared or ordered that:

1. The Province's policy of freezing CSF lease funding unjustifiably infringed s. 23 and was of no force or effect;
2. The Province's policy of requiring the CSF to negotiate leases without Ministry assistance unjustifiably infringed s. 23;
3. The Province's policy of not funding Expansion Projects and evaluating CSF requests against those of majority school boards with greater capital resources unjustifiably

infringed s. 23;

4. The Province's policy requiring the CSF to identify and negotiate for site acquisitions without Ministry assistance unjustifiably infringed s. 23;
5. The Province's failure to collect information regarding the potential demand for French-language education unjustifiably infringed s. 23;
6. The Province must exercise its powers to create a long-term, rolling Capital Envelope to provide CSF with secure funding to address the CSF's capital needs; and
7. The Province must craft a policy or enact legislation to ensure the Ministry's active participation in the resolution of issues concerning the CSF's need for space and disputes that arise between the CSF and majority school boards.

Analysis

[105] The plaintiffs allege a number of errors in the judge's reasons which affect all stages of her analysis, and we group the issues in this appeal based on whether they address the judge's analysis with respect to (1) infringement of s. 23, (2) justification under s. 1, or (3) remedies. We also consider the issues raised by the Province's cross appeal of the *Charter* damages award within the discussion of remedies.

[106] The issues can thus be stated as follows:

Infringement of s. 23

1. Did the judge err by relying too heavily on local comparator schools to determine entitlement?
2. Did the judge err by concluding that rightsholders were entitled only to proportionate facilities where the number of students was in the middle of the sliding scale?
3. Did the judge err in assessing entitlement to K-12 schools by treating elementary and secondary students separately?
4. Did the judge err by applying a "temporal aspect" to certain declarations of entitlement?
5. Did the judge err by concluding that the requirement that the CSF prioritize capital requests to the Province did not infringe s. 23?
6. Did the judge err by concluding that the Province's failure to fund the CSF board office lease did not infringe s. 23?
7. Did the judge err by concluding that s. 166.25(9) of the *School Act* did not infringe s. 23?
8. Did the judge err by concluding that the Province's failure to fund early childhood education did not infringe s. 23?

Justification under s. 1

9. Did the judge err by discounting the deleterious effect of increased assimilation from inadequate instruction and facilities?

10. Did the judge err by considering cost savings as a salutary benefit of the Province's decisions?

11. Did the judge err by concluding the infringement in Victoria was justified?

12. Did the judge err by concluding the infringement in Pemberton was justified?

13. Did the judge err by concluding the infringement in Mission with respect to the Building Condition Driver was justified?

14. Did the judge err by concluding the infringement from the failure to apply the AFG Rural Factor to the CSF was justified?

Remedies

15. Did the judge err by not awarding *Charter* damages for the failure to fund facilities leases in Victoria?

16. Did the judge err by concluding that the Province's failure to adequately fund transportation costs should be compensated with *Charter* damages?

Alleged errors in the analysis of the infringement of s. 23

Section 23: General principles

[107] To address the issues raised in this appeal, it is helpful to first review the general principles guiding the analysis of claims under s. 23.

[108] For ease of reference, s. 23 reads again as follows:

> **Minority Language Educational Rights**
>
> **Language of instruction**
>
> 23. (1) Citizens of Canada
>
> > (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> >
> > (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> **Continuity of language instruction**
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> **Application where numbers warrant**
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[109] In *Mahe*, the Court held that the general purpose of s. 23 “is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in the provinces where it is not spoken by the majority of the population” (at 362). The Court also placed a significant emphasis on the cultural component of the right (at 362):

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[110] The specific purpose of s. 23(2)—which guarantees that a parent of a child who has received minority-language education has the right to have all their children receive minority-language education—is to promote family unity and national mobility: *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14 at para. 30. In *Solski*, at para. 30, the Court quoted from a speech given during a debate in the House of Commons by the Honourable Jean Chretien, then Minister of Justice, as evidence of this purpose:

> Mr. Speaker, this government holds the view that such rights must be protected in the constitution because they are fundamental to what Canada is all about. When minority language education rights are taken away, the right to take up a job in any part of Canada is seriously impaired. English-speaking Canadians, if they move to Quebec, want to have the right to send their children to school in their own language...
>
> Similarly French-speaking Canadians do not want to move to other parts of Canada unless they can send their children to school in their own language. The only way to achieve this is to guarantee such rights in the constitution. In effect, without a guarantee of minority language education rights, there can be no full mobility rights.

[111] Section 23 is also a remedial provision, meant to remedy the conditions of the linguistic minority, and its very existence implies that the previous regimes for providing minority-language education prior to the introduction of the *Charter* were inadequate: *Mahe* at 363; *Solski* at para. 21. The provision “was designed to correct, on a national scale, the historically progressive erosion of official language groups and to give effect to the equal partnership of the two official language groups in the context of education”: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 at para. 26. As the Court wrote in *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para. 25, the section “was thus conceived as a tool for achieving equality between Canada’s two official language groups.”

[112] The protections granted by s. 23 are also vulnerable to delay or inaction on the part of the government as the provision of facilities is only required where the numbers warrant. As the Court wrote in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 29:

> For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly.

[113] Section 23 protects individual rights, even though the section furthers the interests of a language community and implementation requires the existence of certain numbers of qualified children: *Reference re Public Schools Act (Man.) s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839 at 862 [*Reference re Public Schools Act*]; *Solski* at para. 23. The entitlement of s. 23 rightsholders “is not subject to the will of the minority group to which they belong, be it that of a majority of that group, but only to the ‘numbers warrant’ condition”: *Reference re Public Schools Act* at 862.

[114] In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549 at 578, Justice Beetz described language rights as being “based on political compromise.” However, in *Mahe*, the Court observed that the fact that language rights may have arisen from a political compromise should not prevent courts from “breathing life” into s. 23, though courts should be careful when interpreting them (at 365):

> Beetz J.’s warning that courts should be careful in interpreting language rights is a sound one. Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not “breathe life” into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[115] Similarly, in *Arsenault-Cameron* the Court held that the fact that language rights resulted from political compromise does not affect their scope (at para. 27).

[116] However, in *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at para. 2, the Supreme Court of Canada again recognized that s. 23 was a “carefully crafted compromise” which should not be read out of the Constitution. And in *Caron v. Alberta*, 2015 SCC 56 at paras. 36-38, in the context of a language rights claim, the Court wrote that the remedial, purposive approach should “not undermine the primacy of the written text of the Constitution” and cautioned that “[t]he Court must generously interpret constitutional linguistic rights, not create them”.

[117] The Court in *Mahe* also went on to note that s. 23 provides a comprehensive code, and while it may incorporate notions of equality it should be interpreted separately from ss. 15 or 27 of the *Charter* as it creates special rights for a select group of individuals (at 369):

> While I agree that it is often useful to consider the relationship between different sections of the *Charter*, in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada’s official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27

> in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".
>
> [Emphasis added.]

[118] Therefore, the Court in *Mahe* described s. 23 as creating a general right to minority-language instruction which functions as a constitutional minimum, with the qualification that instruction will be provided where the numbers warrant, and includes the right to facilities (at 365):

> The proper way of interpreting s. 23, in my opinion, is to view the section as providing a general right to minority language instruction. Paragraphs (*a*) and (*b*) of subs. (3) qualify this general right: para. (*a*) adds that the right to instruction is only guaranteed where the "number of children" warrants, while para. (*b*) further qualifies the general right to instruction by adding that where numbers warrant it includes a right to "minority language educational facilities". In my view, subs. 3(*b*) is included in order to indicate the upper range of possible institutional requirements which may be mandated by s. 23 (the government may, of course, provide more than the minimum required by s. 23).

[119] Under a purposive approach, the meaning of s. 23 can be described more broadly as simply mandating the government to "do whatever is practical in the situation to preserve and promote minority-language education": *Mahe* at 367. The Court has also described the provision as guaranteeing "whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved": *Mahe* at 366.

[120] The jurisprudence has established that there are three steps in any s. 23 infringement analysis. First, a claimant must establish the number of students "who can eventually be expected to take advantage of a given programme or facility": *Reference re Public Schools Act* at 850. While it may be impossible to exactly determine this figure, it falls between known demand for the service and the total number of students who could potentially take advantage of the minority-language education programme: *Mahe* at 384; *Arsenault-Cameron* at para. 32. In *Arsenault-Cameron*, the Court endorsed the trial judge's approach that looked at potential demand projected out ten years (at para. 33). When calculating the numbers of students, courts should not be restricted to existing school boundaries given that s. 23 states that the right to instruction applies "wherever in the province" the "numbers warrant": *Mahe* at 386.

[121] The second step in the s. 23 analysis is to place the number of students on a sliding scale to determine entitlement to services. *Mahe* established that where a group of students will be placed on the sliding scale is determined by two factors: pedagogy and cost, with pedagogical considerations being the more important factor (at 384). The Court in *Mahe* described the factors and the contextual nature of the analysis as follows (at 384-386):

> 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.
>
> 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, 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. I note, however, that in most cases pedagogical requirements will prevent the imposition of unrealistic financial demands upon the state. Moreover, the remedial nature of s. 23 suggests that pedagogical considerations will have more weight than financial requirements in determining whether numbers warrant.
>
> In my view, the phrase “where numbers warrant” does not provide an explicit standard which courts can use to determine the appropriate instruction and facilities (in light of the aforementioned considerations) in every given situation. The standard will have to be worked out over time by examining the particular facts of each situation which comes before the courts, but, in general, the inquiry must be guided by the purpose of s. 23. In particular, the fact that s. 23 is a remedial section is significant, indicating that the section does not aim at merely guaranteeing the status quo.
>
> Thus, a number of complex and subtle factors must be taken into account beyond simply counting the number of students. For example, what is appropriate may differ between rural and urban areas.

[122] When applying the factors of pedagogy and cost, courts must be cautious not to do so with reference to how they might apply to the majority-language group, and the pedagogical requirements of the majority “cannot be used to trump cultural and linguistic concerns appropriate for the minority language students”: *Arsenault-Cameron* at paras. 31, 38; *Rose-des-vents* at para. 31.

[123] At the low end of that sliding scale, “s. 23 may not require that anything be done in situations where there are a small number of minority language students”: *Mahe* at 367. At the upper end of that sliding scale, s. 23 requires that the minority have management and control over the minority-language education system, possibly including an independent school board, and that “the quality of education provided to the minority should in principle be on a basis of equality with the majority”: *Mahe* at 378. However, the Court in *Mahe* cautioned that the level of management and control should be appropriate to the student population (at 374):

> In some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23. However, where the number of students enrolled in minority schools is relatively small, the ability of an independent board to fulfill this purpose may be reduced and other approaches may be appropriate whereby the minority is able to identify with the school but has the benefit of participating in a larger organization through representation and a certain exclusive authority within the majority school board. Under these circumstances, such an arrangement avoids the isolation of an independent school district from the physical resources which the majority school district enjoys and facilitates the sharing of resources with the majority board, something which can be crucial for smaller minority schools. By virtue of having a larger student population, it can be expected that the majority board would have greater access to new educational developments and resources. Where the number of s. 23 students is not sufficiently large, a complete isolation of the minority schools would tend to frustrate the purpose of s. 23 because, in the long run, it would contribute to a decline in the status of the minority language group and its educational facilities. Graduates of the minority schools would be less well-prepared (thus hindering career opportunities for the minority) and potential students would be disinclined to enter minority language schools.

[124] The Court in *Mahe* went on to find that the number of minority-language students in Edmonton at the time did not justify an independent school board, though they did warrant some level of management and control (at 388-389). Therefore, the Court also discussed a middle ground option of guaranteed minority-language representation on the majority-language school board that was proportional to the number of minority-language students (at 377):

> In my view, the measure of management and control required by s. 23 of the *Charter* may, depending on the numbers of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:
>
> > (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
> >
> > (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;
> >
> > (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
> >
> > > (a) expenditures of funds provided for such instruction and facilities;
> > >
> > > (b) appointment and direction of those responsible for the administration of such instruction and facilities;
> > >
> > > (c) establishment of programs of instruction;
> > >
> > > (d) recruitment and assignment of teachers and other personnel; and
> > >
> > > (e) making of agreements for education and services for minority language pupils.
>
> [Emphasis added.]

[125] The third and final step in the s. 23 analysis is to determine whether the rightsholders are receiving the quality of service to which they are entitled. Where the number of students falls at the high end of the sliding scale, and their entitlement is to substantively equivalent facilities, a court must ask "[w]ould reasonable rights-holder parents be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school?": *Rose-des-vents* at para. 35. This analysis should also focus on local comparator schools as they represent realistic alternatives for rightsholder parents: *Rose-des-vents* at paras. 36-37.

[126] The Court in *Rose-des-vents* also confirmed that the comparative exercise required by the substantive equivalence analysis is contextual and holistic:

> [38] As the Province has argued, no school is likely to be considered by all parents to be equal or better than its neighbours in every respect. The comparative exercise must be alive to the varied factors that reasonable parents use to assess equivalence. The fact that a given school is deficient in one area does not mean that it lacks equivalence in an overall sense. In particular, both quality of instruction and facilities can represent important elements of comparison. Indeed, in *Mahe*, Dickson C.J. rejected an approach that would treat instruction and facilities as "separate rights" under s. 23 of the *Charter*, rights to be associated with different numerical thresholds. He preferred instead to consider instruction and facilities together when determining the scope of the s. 23 right (p. 366). Such an approach is consistent with the purpose of s. 23. It stands to reason that the same considerations apply when comparing equivalence between minority and majority language schools. The quality of instruction and the quality of facilities may both be strong indicators of equivalence, and are properly considered together.

> [39] Thus, the comparative exercise is contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times, to name a few factors. Such an approach is similar to the way parents make decisions regarding their children's education. Of course, the extent to which any given factor will represent a live issue in assessing equivalence will be dictated by the circumstances of each case. The relevant factors are considered together in assessing whether the overall educational experience is inferior in a way that could discourage rights holders from enrolling their children in a minority language school.
>
> [40] As a result, the fact that a minority language school is older than nearby majority language schools is not, when viewed in isolation, enough to ground a finding of lack of equivalence. Schools can last for a long time, and older schools may have facilities that are inferior to those of newer schools. The fact that a minority language school is in the older range would not normally drive a reasonable rights-holder parent to withdraw her child from the school, particularly where other aspects of the educational experience are strong. Fundamentally, the age of a school and the quality of its physical facilities are but two factors among many. There are several other compelling considerations that form part of a reasonable parent's comparison: the quality of the teachers, the curriculum, and the cultural opportunities offered by a minority language school are all relevant. The expectation is not, and cannot reasonably be, to have the "very best" of every aspect of the educational experience. As noted above, the comparative exercise is holistic.
>
> [41] Ultimately, the focus of the assessment is the substantive equivalence of the educational experience. If, on balance, the experience is equivalent, the requirements of s. 23 will be met.

[127] Although costs and practicalities are relevant at the entitlement stage of the s. 23 analysis, they are not relevant when determining whether the facilities provided are substantively equivalent: *Rose-des-vents* at para. 46.

Alleged overreliance on local comparator schools and the proportionality standard

[128] The plaintiffs' first ground of appeal is that the judge erred in her entitlement analysis by focusing too heavily on the circumstances of the majority-language school boards and requiring that French-language schools have similar enrolment to local English-language schools in order to be entitled to homogenous facilities. They submit that the judge's approach would prevent many rightsholders from establishing an entitlement to a homogenous school, and bar most rightsholders from reaching the upper end of the sliding scale, because any proposed French-language school is almost certain to be smaller than a comparator English-language school. They also say this local focused approach is not supported by the s. 23 jurisprudence.

[129] As an example, the plaintiffs point to the judge's inconsistent approach to the claim in Mission where 65 students were sufficient to warrant a homogenous school (at para. 4928) and Whistler where 85 students were not sufficient (at para. 2207). The plaintiffs submit that this approach undermines substantive equality, and that on a proper view of the sliding scale analysis the schools requested in Whistler, Pemberton and Chilliwack were pedagogically appropriate, and justified based on cost. There was no evidence for the judge to find that it was pedagogically inappropriate to have a small school due to the benefits of French-language students interacting with large populations in majority-language schools. The judge also erred in considering costs only of the plaintiffs' proposed relief in each community as opposed to other available options to remedy the breach which the judge identified.

[130] Relatedly, the plaintiffs also take issue with the judge's adoption of the proportionality standard when the number of children is above the threshold for instruction, but is below the upper end of the scale which would justify substantively equivalent facilities. The plaintiffs submit that, properly understood, the substantive equivalence analysis applies to determine whether parents are receiving their entitlement regardless of the number of children involved. They further submit that when determining equivalence using the standard of proportionality, the judge improperly took costs into account, and focused too heavily on comparator schools with similar enrolment despite the fact that French-language schools also compete with larger English-language schools. The plaintiffs argue that these legal errors impacted the judge's findings on infringement in Penticton, Squamish, Sechelt, Abbotsford, Burnaby and Nelson.

[131] The Province submits that the judge did not treat local comparator school enrolment as determinative of the entitlement analysis. It submits she merely used those enrolment numbers as a useful measure to inform her analysis of what was pedagogically appropriate, and it would be inconsistent with binding authority not to consider local circumstances. The Province says the plaintiffs rely too heavily on province-wide evidence of where schools may have been provided, despite lower enrolment, without taking into account the unique local circumstances of those schools, such as their isolation and inability to share space.

[132] The Province also submits that there was ample evidence on the record that smaller programs could not offer the full-range of courses, a fact which the plaintiffs themselves admitted. Nor, in the Province's submission, was it an error for the judge to assess entitlement based on the costs of the capital option proposed by the plaintiffs, as to do otherwise would be inconsistent with the plaintiffs' position that the judge should have deferred to the CSF's view of the pedagogical need for the facilities. The Province says in any event there was no evidence led on the costs of other alternatives.

[133] The Province submits that the plaintiffs' view that substantive equivalence is the standard applicable at all points on the sliding scale is unsupported by law as both *Mahe* and *Rose-des-vents* hold that the substantive equivalence standard applies only when the number of rightsholders is at the upper end of the scale. According to the Province, the judge appropriately modified the equivalence test using the proportionality standard at the middle range of the sliding scale, because that standard recognizes that there will necessarily be differences in the quality of educational facilities when comparing larger versus smaller numbers of students.

[134] In our opinion, the judge did not err in the way she relied upon enrolment numbers at local comparator schools.

[135] As an example of the judge's analysis, she found that 85 elementary-age students and 30 secondary-age students did not justify building a homogenous elementary/secondary school in Whistler (at para. 2207). The CSF estimated in 2014 that the Whistler school would cost more than $22.5 million, exclusive of acquisition costs (at para. 2159). The judge noted that the Province rarely builds schools to that capacity, and only did so where the school would serve an isolated and remote

community such that a new school was the only practical way of providing education. By contrast, the judge found that in Whistler there were other options for instruction, the smallest comparator school was 270 students, and a homogenous school would deprive the students of the opportunity to interact with large populations.

[136] By relying on local enrolment to come to the conclusion that a homogenous school was not justified the judge did not, as the plaintiffs assert, adopt a standard of formal equivalence. Nor did she allow the pedagogical requirements of the majority to, in the words of *Arsenault-Cameron*, "trump cultural and linguistic concerns appropriate for the minority language students" (at para. 38). She acknowledged that the CSF was owed deference in its pedagogical decisions. While the plaintiffs attack the judge's finding that minority-language students derived pedagogical value from interacting with larger student populations, this was something Chief Justice Dickson explicitly acknowledged in *Mahe* (at para. 385). And certainly local enrolment is general evidence of pedagogical needs, and the cost-effectiveness of providing a new school. Just because local enrolment should not be controlling, does not mean it is irrelevant. Notably, in *Arsenault-Cameron*, the Court actually relied on evidence of school enrolment in the Eastern school district of Prince Edward Island, which was the <u>local</u> district for the proposed minority-language school in that case (at para. 40).

[137] The only evidence the plaintiffs rely upon to prove the pedagogical justification for a homogenous school in the various communities they identify is the fact that in some other communities the Province has built smaller schools. The plaintiffs essentially urge this Court to conclude that if the Province has built a school anywhere in the Province where enrolment numbers were at or below the projected enrolment of minority-language students in a given community, then the Province must provide for a homogenous minority-language school in that community.

[138] Yet this reasoning ignores the unique circumstances in those remote and isolated communities where smaller schools have been built, and, just as importantly, the Court's direction in *Mahe* that appropriate facilities may be different in rural and urban areas, and that "there is no point, for example, in having a school for only ten students in an urban centre" (at 385). While in one sense a minority-language community may be remote and isolated from other minority-language communities, this is not the same as actual physically isolated communities where there are no practical options for providing education other than to build a new school. Students in those communities do not have the option of sharing space in other schools because none are nearby. In Whistler, the judge explicitly recognized that sharing space was an option.

[139] The judge did not commit a legal error by not relying solely upon the evidence that small schools had been built in more remote communities, or not deferring entirely to the decisions of the CSF. In the circumstances of this case, there was in fact reason for the judge to be skeptical of the CSF's assertions of pedagogical need. With respect to a school replacement project in Port Coquitlam, the judge found that the CSF's projections have resulted in the school being over built by 110 students, largely to accommodate students from Burnaby for which the CSF now requests a separate school (at para. 5238). The judge also found that the CSF took steps to make alternatives to

a newly constructed CSF school in Squamish, such as the transfer of a majority board school, unattractive in a "calculated attempt to lever the government into providing the CSF with a new school" (at para. 2631). The plaintiffs' own expert witness also acknowledged that the CSF secretary treasurer "significantly inflated and exaggerated" the witness's projection of rightsholders in conversations with the Ministry (at para. 1970).

[140] Here, the judge properly took a number of factors into account to determine whether a homogenous school should be built. While the plaintiffs now say that the judge failed to consider the costs of cheaper alternatives than the specific projects the CSF proposed, they do not point to any evidence of the viability of those alternatives or what they might cost.

[141] What the plaintiffs' submission amounts to is an attempt to ask this Court to reweigh the evidence and come to a different result, but as *Mahe* cautioned, the entitlement to instruction "will have to be worked out over time by examining the particular facts of each situation which comes before the courts" (at 385) and in such a fact-specific inquiry a trial judge's conclusion should not be lightly overturned. We see no reason to do so here.

[142] This is not to say that a distinct homogenous school will not be justified except where projected enrolment is equivalent to that at local comparator schools. The problem here was that the plaintiffs presented no evidence as to the pedagogical appropriateness of such small schools except the evidence from remote communities which was properly discounted by the judge for the reasons given. This is not a case where the judge required the plaintiffs to meet the standard of the majority to warrant a school. It is a case where the only evidence the plaintiffs relied upon was flawed, and in the absence of other evidence speaking to the pedagogical justification for such a small school, the judge was forced to look at local comparator enrolment. In fact, in Squamish, the judge held that a homogenous CSF school should be built, despite projected enrolment being almost half the average capacity of comparator schools, and being below the capacity of even the smallest comparator school. But saying a school is justified despite being smaller than local schools is different than saying a school is justified because it is at least as large as the smallest school anywhere in the province.

[143] The plaintiffs' position becomes more untenable when considering their related submission that the judge should not have taken local comparator school enrolment into account in determining entitlement to substantively equivalent facilities at the upper end of the sliding scale.

[144] When determining where on the sliding scale the numbers of students fall, it is necessary for a judge to consider whether pedagogy and cost concerns justify a given level of instruction. It is impossible to assess whether pedagogy and cost justify that level of instruction without first determining what that level of instruction entails. There can be no entitlement in the abstract.

[145] As the Court said in *Rose-des-vents*, determining whether instruction is substantively equivalent is a holistic exercise, and must take into account local comparators, with a view to whether a reasonable rightsholder parent would be deterred from sending their children to a minority-language

school because it is meaningfully inferior. Local comparator school enrolment was therefore a key factor for the judge to consider, because the level of programming, and the facilities available in a comparator school, depends upon that school's enrolment. Thus the judge did not commit an error in looking to whether the projected minority-language student population was at least somewhat similar to local comparator school enrolment to determine if pedagogy and cost concerns justified providing those students substantively equivalent programming and facilities to those local comparator schools.

[146] For example, in Squamish, despite finding enough students to justify a stand-alone school, the judge felt it was impractical to have a school of at most 170 elementary and secondary school students offer programs that were equivalent to those offered at all comparator schools when the average capacity of just the local elementary schools was 311. We agree.

[147] 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.

[148] The plaintiffs argue that the concept of substantive equivalence must apply at every point on the sliding scale. However, in our view, the Court in *Rose-des-vents* was clear that the standard of substantive equivalence applies only where the number of students fell at the upper end of the sliding scale, or where numbers warranted the highest level of French-language instruction, i.e., that it would be pedagogically and cost appropriate to offer substantively equivalent instruction.

[149] To conclude otherwise, in our view, would be an impractical duty to place on the government. To take the plaintiffs' position to its logical conclusion, the Province would be constitutionally obligated to provide distinct homogenous schools wherever the CSF determined it was appropriate, so long as the projected number of minority-language students was at least equal to the smallest stand-alone school in British Columbia. That distinct homogenous minority-language school would also have to provide substantively equivalent instruction to local comparator schools no matter their size, without regard to any economies of scale that might make the greater variety of programs and amenities in larger majority-language comparator schools actually viable. In essence, the plaintiffs argue that because the Province has built new schools in communities that have at least 50 students, s. 23 requires the Province to build a school wherever there are 50 minority-language students in British Columbia. That 50-student minority-language school must also be substantively equivalent to even a 1000-student neighbouring majority-language school, such that a reasonable rightsholder parent would not be deterred from sending her child to the minority-language school. This is simply not the practical interpretation of s. 23 urged by Dickson C.J.C. in *Mahe*.

[150] While the plaintiffs argue that substantive equivalence is capable of comparing seemingly different things, it would stretch the concept of substantive equivalence beyond recognition to say that a reasonable rightsholder parent would not be deterred from sending their child to a minority-language school in Squamish less than half the size of a local majority-language comparator, with correspondingly fewer programs and facilities—at least in the absence of evidence to the contrary.

Smaller class sizes and more individualized attention at smaller schools can only reasonably be expected to compensate so much. Moreover, at a certain point the plaintiffs' version of substantive equivalence simply comes to resemble the proportionality standard adopted by the judge, with which they take issue.

[151] In our view, the judge properly declined to declare that rightsholders were entitled to have their children educated in substantively equivalent facilities to local comparator schools where the projected enrolment of the minority-language school was not at least somewhat similar to those local comparator schools. It may be that what constitutes somewhat similar enrolment might vary in the circumstances, since there may be diminishing economies of scale to offering certain programs and facilities past a certain number of students. But there would need to be evidence of the pedagogical and cost appropriateness of offering substantively equivalent instruction in the much smaller minority school, namely, that the programs and amenities offered in the larger school could still be viable despite the technically smaller enrolment of the minority-language school, or that the benefits of a smaller school offset the loss of any programs. That evidence was not provided in this case.

[152] The judge was correct to instead apply a proportionality standard that was supported by authority. In *Mahe*, Dickson C.J.C. acknowledged that minority-language enrolment did not justify an independent school district in Edmonton. We would also observe that, in *Mahe*, several school districts in Alberta had been formed despite having smaller total enrolment than the proposed minority-language school district, in part because of the special circumstances in those districts. Nevertheless, the Court still held that the number of students in Edmonton did not justify creating a separate school district, even while acknowledging that s. 23 is itself a special circumstance: *Mahe* at 388. However, the Court went on to conclude that enrolment numbers did justify a number of minority-language representatives on the Edmonton school board that was proportional to the number of minority-language students in the district: *Mahe* at 377, 388-389.

[153] Unlike a substantive equivalence standard, at the middle of the sliding scale a proportionality standard acknowledges the practical reality that it would not be justified based on pedagogy and cost to try and recreate the global educational experience of a much larger school in a very small one, and as the judge observed, "a reasonable rightsholder parent would undoubtedly look at a small minority school and see meaningful differences from large majority schools" (at para. 852), differences which would be difficult, if not impossible, to overcome except at great cost.

[154] We also agree that pedagogy and cost are still relevant factors in the proportionality analysis as they will help determine the specific proportion of the services offered in comparator majority schools that must be provided. For example, the threshold at which it might be viable to offer a certain level of music instruction might be different than for the viability of specialty science or woodworking classrooms. Unlike with the test of substantive equivalence, it is not such a straightforward factual inquiry to say that a minority-language school is entitled to half or three-quarters the level of instruction and facilities offered in a correspondingly larger majority school. This is consistent with *Mahe*, where the Court emphasized that while equivalent per-capita funding for minority-language schools was the

minimum required by s. 23, special circumstances may warrant a greater allocation than for majority schools (at 378). Where it is not practical for the Province to provide substantively equivalent instruction and facilities, it will be up to the judge in each case to work out whether the Province is still at least doing whatever is practical to provide minority-language education, consistent with the purposes of s. 23.

K-12 schools

[155] The plaintiffs also argue that the judge erred in her analysis of the claims regarding K-12 schools in Nanaimo and Kelowna by determining entitlement to elementary and secondary spaces separately. The plaintiffs submit that the only way to properly assess pedagogical appropriateness and costs for K-12 facilities is holistically. The evidence indicated that the Province has also funded a K-12 school in Comox for 300 students, and the judge found that a similar number of students would attend a K-12 school in Kelowna and Nanaimo. The plaintiffs further submit that the effects of adding secondary grades to an existing elementary school project are minor and lead to only an incrementally greater cost than a purely elementary school facility.

[156] The Province submits that it would be inconsistent with *Mahe*, which requires that only services which are appropriate for the “particular” number of students be provided, to allow a small number of additional secondary students to piggyback onto an elementary project in order to reach the high end of the sliding scale. The pedagogical and cost considerations must take into account that secondary programs require specialized spaces, and the judge appropriately considered whether the government should be required to provide those facilities when the actual number of secondary students who will attend a K-12 school is small. While the plaintiffs point to other communities where K-12 schools have been approved, the Province submits that is not conclusive of the appropriateness of those facilities in Nanaimo and Kelowna and the judge’s determination of the appropriateness and cost effectiveness of these facilities is entitled to deference. In the view of the Province, the plaintiffs merely assert that the additional costs are minor, without pointing to evidence on the record for that argument.

[157] Again, we would conclude that the judge did not commit an error in her analysis of the plaintiffs’ claims related to K-12 schools. First, we do not interpret the judge’s reasons as coming to a conclusion that rightsholders were not entitled to a homogenous K-12 school in Kelowna or Nanaimo. The evidence indicated that the CSF was already operating a K-12 school in Kelowna, and could do so in Nanaimo if they chose to add portables. And the judge noted that where the CSF made a decision to operate a K-12 school, the Province “generally should not stand in the way” (at para. 4656). The plaintiffs’ true complaint is that the judge did not conclude that the homogenous K-12 school must be substantively equivalent to local comparator secondary schools. The judge instead held that rightsholders in those communities were only entitled to proportionate access to core secondary school facilities.

[158] The plaintiffs say that in coming to that conclusion the judge improperly segregated the secondary student numbers, and if they are taken together with the elementary school student

numbers, then pedagogy and cost would warrant substantively equivalent facilities to the local majority-language secondary schools. However, the judge properly considered the numbers of minority-language secondary school students separately because she focused on the pedagogical and cost appropriateness of offering programs and facilities that would only be used by secondary students, and where there would not be significant economies of scale from grouping them with elementary students.

[159] For example, with respect to the Kelowna claim, the comparator secondary and middle schools had enrolment ranging from 443 to 1804 students (at para. 4323). By contrast, the judge found that approximately 80 secondary school age students were expected to enrol at the CSF's Kelowna school. The judge found that the local majority secondary schools simply offered a much wider variety of specialty classrooms including spaces for "drama, metal working, mechanics, drafting and film" (at para. 4379). It was not as if the judge limited her analysis to whether 80 secondary students alone justified a homogenous school. If that were the case, the judge would have found such a school inappropriate (at para. 4325). Instead, she focused on whether the secondary student numbers warranted the secondary student specific programs and classrooms that would be required to achieve substantive equivalence with local comparator schools. The judge still came to the conclusion that trying to offer substantively equivalent secondary school instruction was not pedagogically or cost appropriate. In fact, the plaintiffs acknowledged that the CSF's Kelowna school "cannot reasonably offer all the same elective courses offered at majority schools" (at para. 4405). The plaintiffs assert before this Court that there would only be an incrementally greater cost to add these types of specialty classrooms as part of K-12 schools, but they do not point to any evidence of that fact.

[160] Again, what the plaintiffs actually take issue with is the judge's proportionality standard when enrolment numbers fall below the upper end of the sliding scale. Yet the circumstances in Kelowna clearly illustrate the value of the proportionality standard discussed above, and the impracticalities of trying to create the equivalent global educational experience of an 1800-student secondary school in a school with an enrolment of only 80 secondary age students – even if those 80 students are considered together with the elementary student numbers to render some services and facilities appropriate.

[161] For these reasons and those given above in the discussion of the proportionality standard, we would not conclude that the judge committed any errors in her analysis of the K-12 school claims.

The "temporal aspect" of s. 23

[162] The plaintiffs submit that the temporal approach used by the judge, which varies entitlement over time based on presumed growth, undercounts the number of children who would attend a new facility and deprives rightsholders of their entitlement. The plaintiffs argue the judge adopted this temporal aspect despite there being no precedent for such a requirement and without any evidence that (1) growth patterns will follow historical trajectories, (2) that parents would not move their children from other schools, or (3) that the CSF would not use its statutory authority to change catchment

areas. The plaintiffs submit that the temporal aspect also disregards the delays in facility constructions. The actual orders declare entitlement at ten years from the date of judgment, but if the CSF can only make a capital request based on that entitlement at the ten-year mark, the plaintiffs say that would mean in practice that rightsholders would not get a new facility for another three to five years.

[163] An example from the judge's order of a declaration incorporating the temporal component is reproduced below as an illustration:

> 11. The CSF has the jurisdiction pursuant to section 23 of the *Charter* to establish an elementary programme (for children age 5-12) in Northeast Vancouver with heterogeneous instructional space <u>for about 25 to 45 students in the short term</u> and homogeneous facilities with space <u>for up to 270 students in the long term</u> (or such other numbers as the parties agree to).
>
> [Emphasis added.]

[164] While "short term" and "long term" are not defined in the judge's order, her reasons indicate that she considered the short term as equivalent to within three years, and the long term as equivalent to within ten years (see paras. 4262, 5220-5221).

[165] The Province submits that a temporal component is inherent to the sliding scale analysis. If the entitlement analysis did not vary over time it would be unresponsive to circumstances and may disadvantage either the government or rightsholders. The Province points out that there was no evidence regarding how many children would leave an existing CSF school to relocate to a new one, and the judge reasonably inferred that some would not. They argue there was also evidence before the judge speaking to incremental growth in CSF programs and she was reasonably able to determine growth in the short and long term. The Province also submits that since the plaintiffs do not challenge the judge's actual findings regarding numbers, they must be taken to argue that s. 23 requires immediate construction of facilities that may not be fully utilized for years. As to the complaint that construction delays would further delay implementation of the right, the Province submits that nothing stops the plaintiffs from submitting a capital request based on future enrolment projections at the five-year or seven-year mark for completion by year ten.

[166] We agree with the Province that because the right to minority-language education in s. 23 is conditional on a sufficient number of students to warrant a level of instruction or facilities, then as the numbers vary over time, so might the entitlement to services. It is true that in prior cases courts have not granted declarations that apply a temporal aspect to entitlement in the way the judge did, but the issue in those prior cases was only maximum eventual enrolment and entitlement. The Court in *Arsenault-Cameron* rejected a narrow focus on actual present demand for a minority-language school to determine the maximum entitlement going forward. Here, the judge was concerned about entitlement in the meantime while the programs in various communities are growing. The plaintiffs in fact take no issue with the judge's determination of ultimate entitlement, only with the temporal limit in the first few years. But how can it be said that rightsholders should be awarded a declaration that their

children are immediately entitled to the level of instruction that would be appropriate for a number of students that might not exist for up to a decade later?

[167] Before this Court, the plaintiffs themselves acknowledged the concern that an immediate declaration would possibly result in the Province being required to build a facility that would sit partially empty for many years. The plaintiffs took the position that this was something that could be taken into consideration with respect to remedies, but we fail to see how this adequately responds to the concern. It may be true that a declaration is less specific than ordering the Province, through an injunction, to actually build a school, since the parties might negotiate over the particular way in which the Province can provide the level of facilities and instruction to which the rightsholders are entitled. But a declaration does not ostensibly allow the parties to negotiate over whether the Province will comply with it for a period of time. It is assumed the Province will comply with declarations of this Court, which is why more coercive forms of relief are rarely ordered against the government. Therefore, with an immediate declaration of right, the plaintiffs could go to the Province and demand the level of instruction and facilities implied by that declaration and validly say the Province would be in breach of s. 23 immediately if they did not provide them. Yet if in fact the plaintiffs make that demand to the Province now, the numbers would not actually warrant that level of instruction.

[168] For example, in the Central Fraser Valley, the CSF seeks a new K-12 school estimated to cost $21 million, exclusive of acquisition costs, built to accommodate a total enrolment of at most 205 students. Yet the judge found that only 30-70 elementary and secondary students could be expected to enrol in the first few years (at paras. 5063-5066). Must the Province build this new school or transfer a school with capacity for 205 students immediately so that it can sit possibly more than two-thirds empty for up to ten years? Nothing in the authorities establishes that this is what s. 23 mandates. It would in fact be a highly impractical outcome.

[169] By contrast, the judge's approach adequately responds to the potential long term demand, consistent with the Court's direction in *Arsenault-Cameron*, while also addressing the concerns for overbuilding facilities in the short term. This is the more practical result that still ensures that at every point in time rightsholders are entitled to the level of instruction and facilities the number of students warrant—nothing more, but also nothing less.

[170] The plaintiffs say that if they were forced to wait several years until the numbers actually warranted the facilities they seek, then it is likely that the facilities would not be provided until much later due to construction delays, allowing the Province to breach their obligations during that construction time. However, nothing in the judge's order prevents the plaintiffs from going to the Province ahead of time and requesting that the Province begin planning and site acquisition for new facilities such that the new schools are ready to open and accommodate the projected enrolment ten years from now.

[171] The plaintiffs also seemingly take issue with the factual findings regarding student numbers in the short term, though they have attempted to cast their appeal as almost solely focused on legal

errors. However, we would not conclude that the judge made a palpable and overriding error in making those findings. Although the judge did not consider the ability of the CSF to change catchment areas and compel attendance at new CSF schools, it is not clear whether this issue was raised at trial and the plaintiffs do not point to any evidence regarding the CSF's intention to exercise that authority.

[172] It is notable that, for example, in Victoria East the judge found the initial demand for a new school would be less than the current enrolment from that catchment area at the existing CSF school (at paras. 4047, 4054). However, in making that finding the judge relied upon the evidence of the history of enrolment at a CSF school in Richmond which similarly divided a catchment area so as to provide a local option in a suburban community. The judge observed that the programme in Richmond grew gradually over time, and used that evidence to determine the enrolment demand in the near term in other communities.

[173] The judge made a similar finding with respect to the slow growth in enrolment when École Élémentaire Rose-des-vents opened in the context of the Vancouver East claim (at para. 3793). There may not have been specific evidence as to expected enrolment choices of parents in some communities, but it was certainly open on the record before the judge to come to the findings she did.

Prioritization of capital projects

[174] The plaintiffs submit that the judge erred by failing to find an infringement of s. 23 due to the Province's Capital Planning Cycle requirement that the CSF rank capital projects which are proposed to address breaches of s. 23. The plaintiffs argue that such a policy co-opts the CSF into justifying continued s. 23 breaches on the basis of cost, as the Province can rely upon the CSF's determinations that a project is less important to support a delay. They say the judge failed to recognize that the CSF has no control over which capital requests ultimately get approved, and that any projects not ranked highest priority tend not to be funded. The plaintiffs submit that the CSF should only be called on to prioritize the implementation of projects after funding has been approved, or where the projects are not proposed to address breaches.

[175] The Province submits that the plaintiffs' position would require the government to provide hundreds of millions of dollars of capital funding up front to the CSF which may sit unused as the CSF planning process encounters delays, representing lost opportunities for government to fund other projects or other spending priorities. The Province also argues that the plaintiffs' position would mean the government cannot cap funding or require the CSF to rank projects once a breach of s. 23 has been established or alleged. The Province also points out that any sequencing of projects by the CSF after capital funding was approved would occur without government oversight, which was an outcome rejected by the judge when she declined to order a trust remedy on the basis that it would circumvent legitimate administrative requirements.

[176] In our view, the judge did not commit an error in concluding that the requirement that the CSF prioritize capital projects in order to receive funding, even ones proposed to remedy breaches of s. 23, did not infringe the CSF's right to management and control. The judge found that the total value of the

CSF's requested projects in 2013 amounted to more than $350 million, equivalent to the total capital spending that year across all districts, and that the CSF lacked the institutional competence to manage that many projects. Before this Court the plaintiffs themselves concede that there are practical and administrative constraints on the CSF that prevent it from immediately remedying all the s. 23 breaches the judge identified. The reality is that there are legitimate constraints on the ability of the Province to remedy every breach instantly, and the CSF is well placed to determine which projects might be most needed, i.e., which projects might remedy the most severe breaches, or benefit the most rightsholders.

[177] It does not inhibit the CSF's right to management and control to require the CSF to tell the Province which projects are most important to the CSF. It can only further that right for the Province to know the CSF's priorities. If anything, it is necessary for the Province to know those priorities to ensure that the Province is giving sufficient deference to the needs of the minority. As the Court said in *Arsenault-Cameron*, the minority's determination of their priorities "lies at the core of the management and control conferred on the minority language holders and their legitimate representatives" (at para. 51).

[178] The Province is justified in requiring that the CSF prioritize projects intended to remedy breaches in order to receive funding so as to fairly and rationally allocate the limited funds. Prioritization properly recognizes the limited administrative capacity of the CSF. It is simply unreasonable for the CSF to acknowledge that not every breach can be remedied within one funding cycle, but at the same time sit silently and force the Province to guess which breaches should be remedied first, seemingly to avoid any negative political reaction that might come from rightsholders in those communities whose projects were not ranked highest in priority. While the CSF may not wish to accept the responsibility that comes with being granted the right of management and control, that is irrelevant.

The board office lease

[179] The plaintiffs argue it was an error for the judge to find the Province did not infringe s. 23 by freezing funding of the board office lease costs and to find the Province was not required to fund at least some of the CSF's board office lease costs in excess of the amount funded prior to 2014/2015. The judge found the French-language community was at the top of the sliding scale province-wide and s. 23 included the right to equivalent board office facilities. While the plaintiffs concede the Province does not need to fund the full cost, the CSF lost substantial board office space due to a capital project which must be replaced. The funding freeze does not take that into account. They say the Province should instead pay what is necessary to ensure substantive equivalence.

[180] The Province submits the plaintiffs misconstrue the reasons of the judge. She held the Province was not required to fund increased lease costs because the CSF did not provide a business case justifying the increased costs as required by a valid Ministry policy. There is no evidence the CSF has

complied with this policy. Therefore, the Province submits the proper avenue for seeking relief is to provide those materials to the Ministry, not to appeal the judge's order.

[181] We agree with the Province.

[182] Until 2014, the Ministry fully funded the lease of the CSF's board office. This practice was exceptional as the Ministry generally does not fund board office costs.

[183] In 2014, the CSF entered into a 10-year lease for a new board office. The lease costs for the new office were six times greater than before, and the judge described the facilities as "extravagant" (at para. 5477) and in excess of what rightsholders were entitled to under s. 23. The CSF not only signed the lease without obtaining Ministry approval, they did not advise the Ministry of the commitment despite being in discussions with the Ministry over lease costs. The Ministry had requested feasibility studies that looked at the costs of alternatives, but the CSF did not provide them. In light of this refusal to follow requirements, the Ministry declined to fund the additional lease costs.

[184] The judge found the Ministry's refusal to fund additional lease costs in these circumstances did not infringe s. 23 of the *Charter*.

[185] The plaintiffs' argument ignores the true basis for the judge's conclusion that s. 23 was not infringed by the Ministry's refusal to fund the increased lease costs, and her unchallenged factual findings. The key issue identified by the judge was that the CSF failed to provide the requested feasibility analysis to justify a six-fold increase in lease costs and failed to obtain the Ministry's approval before signing the new board office lease.

[186] Therefore, we see no error in the judge's conclusion regarding the CSF board lease. This ground of appeal is without merit. It is for the plaintiffs to advance their case through the Ministry by complying with its requirements.

Admissions policy

[187] At trial, the plaintiffs challenged s. 166.25(9) of the *School Act*, restricting the children entitled to be enrolled in a French-language education program. The plaintiffs say that the CSF should be entitled to allow enrolment of children of certain groups of parents who do not fall within the descriptions of rightsholders under s. 23.

[188] Section 166.24(1) of the *School Act* provides that an eligible child is entitled to enrol in a Francophone educational programme provided by the CSF. The term "eligible child" is defined in s. 1 of the *Act* to mean the child of a parent who has the right under s. 23 to have his or her children receive primary and secondary instruction in French. Section 166.24(3) also authorizes the CSF to enrol an immigrant child, defined under s. 1 to be the child of an immigrant parent who would have had the right under s. 23 to have his or her children receive primary and secondary instruction in French if the parent had been a Canadian citizen. Section 166.25(9) directs that the CSF must not provide a Francophone educational programme to any child other than those entitled to be enrolled

under s. 166.24 (and those older than school age who are permitted by the CSF to attend). At trial, the plaintiffs sought a declaration that s. 166.25(9) was of no force or effect to the extent that it limits CSF's ability to determine the membership of its student body and to adopt the Francophile Clause and Descendant Clause of its Expanded Admissions Policy.

[189] The judge declared that s. 166.25(9) was a valid exercise of the Province's constitutional jurisdiction over education. She concluded the question of whether a minority school board has the unilateral ability to admit children of non-rightsholders was decided in the negative by the Supreme Court of Canada in *Yukon Francophone School Board.* In that regard, she made the finding that the evidence did not establish a threat to the continued viability of any CSF programs requiring the admission of children of non-rightsholders to CSF schools.

[190] The plaintiffs say the judge erred in taking a narrow approach to *Yukon Francophone School Board*. In our opinion, the judge was correct in concluding that the question had been decided.

[191] The primary issue in *Yukon Francophone School Board* was whether the Yukon Court of Appeal, in reasons indexed as 2014 YKCA 4, was correct in directing a new trial on most of the issues as a result of a reasonable apprehension of bias on the part of the trial judge. However, the Court of Appeal did not remit two legal issues for a new trial, and those issues, along with the bias issue, were appealed to the Supreme Court of Canada. One of those issues was the criteria for admission to the French school. While holding that s. 23 did not give the linguistic minority a constitutional right to unilaterally set admission criteria to accept children of non-rightsholders, the Court of Appeal left open the argument that the admission criteria must be relaxed in order to ensure that the minority school remained viable (at para. 229).

[192] The *French Language Instruction Regulation*, Y.O.I.C. 1996/99, provided that only eligible students were entitled to receive French-language instruction. The term "eligible student" was defined to mean a student having a parent entitled under s. 23 to have their children educated in the French language.

[193] Writing for the Court, Justice Abella explained that s. 23 establishes a constitutional minimum and that a province or territory may pass legislation which offers higher protections (at para. 70). She reviewed the authority given by several provinces to minority-language school boards, and she made specific reference to the limited authority given to the CSF in British Columbia (at paras. 71-73). She then concluded:

> [74] In this case, however, the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and <u>nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose</u>: see *Mahe* at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.
>
> [Emphasis added.]

The potential qualification in the third sentence of this paragraph was referring back to the argument left open by the Yukon Court of Appeal, and it was what prompted the judge to express her finding that the evidence did not establish a threat to the continued viability of any CSF programs.

[194] In our view, the Supreme Court of Canada has decided, subject to this potential qualification, that s. 23 does not give French-language school boards the unilateral discretion to enrol children who do not have a parent who is a s. 23 rightsholder. Section 166.25(9) of the *School Act* does not violate s. 23.

[195] The plaintiffs submit the Province delayed implementation of s. 23, and a more inclusive admissions policy is needed to redress the consequences of the fact that there is a generation of people who have lost the right to send their children to French-language schools. However, the judge found that the evidence did not establish any inappropriate delay by the Province in implementing s. 23 (at paras. 234, 1180) or an ongoing breach for a sufficient period of time as to create a generation of lost rightsholders (at para. 1183). As a result, there is no evidentiary foundation for this submission.

Early childhood education

[196] One of the issues at trial was whether the Province was obliged to provide the CSF with sufficient space in its schools to offer French-language early learning programs on the basis that they help students gain early linguistic foundations that are important to their long-term success. The Province acknowledged the value of early learning programs but took the position that they are not constitutionally mandated.

[197] There was expert evidence at trial that led the judge to conclude early learning programs were undoubtedly of great benefit to the language skills of children in the linguistic minority (at para. 1866). The judge heard evidence that the CSF offered a variety of minority-language early learning programs at French-language schools, such as daycare, preschools and the programme Franc-Départ, which is equivalent to the English-language Strong Start early learning programs sponsored by the Province. She also heard evidence that the Province gives the English-language school boards an allowance for capital projects so that there is school space for early learning programs, and the Province funds the operation of Strong Start programs separately from the funding for K-12 operations (at paras. 1847-1849).

[198] In considering the issue, the judge made reference to the decision in *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2 [*Yellowknife*], leave to appeal ref'd [2015] S.C.C.A. No. 95, where it was held that "primary … instruction" in s. 23 does not include preschool. The judge stated s. 23 creates the baseline requirements for services the Province must provide, and there is no positive obligation on the Province to go beyond the minimums (at para. 1867). The judge did not accept the plaintiffs' argument that the Province is required to provide space for early learning programs because it has a positive duty to promote minority-language education. She held that s. 23 does not place a duty on

government to achieve the principle of promoting minority-language and culture through any means, other than providing the minimum level of minority-language education mandated by s. 23 (at para. 1870).

[199] The judge did, however, express the view that the Province should provide the CSF operating funding for programs corresponding to the Strong Start programme and that the Province's capital planning system for the CSF should include the same 15% additional space allocation provided to English-language school boards for the provision of community services, which the CSF can use for early learning programs (at paras. 1872-1873).

[200] As the judge indicated, this issue was considered in *Yellowknife*. Justice Slatter, with whom both Justices Watson and Rowbotham concurred on this point, agreed with the trial judge in that case that preschool instruction is not included in s. 23 if the government does not include it as part of primary education:

> [80] Exactly what is covered by "primary education" might evolve from time to time. If the government legislated pre-kindergarten (or part-time kindergarten) as part of primary education for the majority language schools, it is likely that similar levels of education would be protected under s. 23 for the minority language schools. …
>
> [81] Section 23 only covers "primary and secondary" education. It specifically does not cover pre-primary or post-secondary education. There is no basis upon which the section can be interpreted to include pre-school or daycare; the drafters of the *Charter* clearly excluded those rights. The respondents argue that pre-school francization is a very important component in limiting assimilation. That may be so, but from a legal perspective it simply amounts to arguing that s. 23 should have covered more than it does.

We agree with this reasoning, and it is our view the judge did not err in following *Yellowknife*.

Justification

[201] Section 1 of the *Charter* provides that the rights and freedoms set out in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is common ground that government policies of general application may be classified as a law: see *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31.

[202] At trial, there was a disagreement between the parties whether the governing authority for the s. 1 analysis in this case was *R. v. Oakes*, [1986] 1 S.C.R. 103, or *Doré v. Barreau du Québec*, 2012 SCC 12. The judge held it was *Oakes*, and this is not in issue on appeal. The analytical framework is set out at 138-140 of *Oakes* and can be summarized as follows:

(a) the objective of the measure giving rise to the breach of the *Charter* must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;

(b) the infringing measure must pass a proportionality test that has the following three components:

(i) the infringing measure must be rationally connected to the identified objective;

(ii) the infringing measure should be minimally impairing in the sense of impairing the right or freedom as little as possible; and

(iii) the more severe the deleterious effects of an infringing measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[203] Before she addressed the individual claims put forward by the plaintiffs, the judge discussed general principles to be applied to a s. 1 analysis. She held that courts must have regard to the full context of the government's decision, including economic and budgetary objectives (at para. 976). She concluded the reasons underlying the rarity of occasions when s. 7 infringements are justified under s. 1 do not apply equally to s. 23 infringements, and the limits of pedagogy and cost in s. 23 do not allow the courts to consider broader public goals that might justify a limit to language rights (at paras. 988-989).

[204] The judge accepted the principle that cost savings will not normally be a sufficiently pressing objective to justify a rights infringement, though they could be in exceptional circumstances such as times of financial emergencies (at para. 997). However, she was of the view that costs may be relevant to the minimal impairment stage because s. 23 requires government to make expenditures out of public funds (at para. 998).

[205] The judge observed that the plaintiffs agreed that the objective of a fair and rational allocation of limited public funds is a pressing and substantial purpose (at para. 1064). She also set out the plaintiffs' concession that the Province's capital funding system is designed to further the objective of a fair and rational allocation of limited public funds (at para. 1065).

[206] In discussing the aspect of proportionality, the judge did not accept the plaintiffs' position that the Province's objective should be linked with the infringing effect of the measure, as opposed to the objective needing to be linked to the infringing measure itself (at para. 1077). She expressed the view that the extent to which an infringing measure minimally impairs the plaintiffs' rights would fall to be determined on the specific infringing measure and the rights at issue (at para. 1086). Finally, she concluded that the salutary and deleterious effects of an infringing measure should be considered at both the local and systemic level (at para. 1098). The deleterious effects at the systemic level will take into account the assimilative impact of the breach (at para. 1101).

[207] The plaintiffs advanced numerous claims at trial. In general terms, the claims fell within two categories: systemic or global claims and community claims. In several cases, the judge found there was either no breach of s. 23 or the Province was not responsible for substandard conditions. She found there was a s. 23 breach in respect of approximately three systemic or global claims and four community claims that were not justified under s. 1. For one systemic or global claim relating to the Annual Facilities Grant and two community claims relating to Pemberton and Victoria, she found s. 23 breaches but held them to be justified under s. 1. In respect of a systemic or global claim relating to the Building Condition Driver that resulted in a substandard gymnasium in Mission, the judge did not

decide whether there had been a s. 23 breach but held that, if there had been, it was justified under s. 1.

[208] On appeal, the plaintiffs assert the judge made two overarching errors in her s. 1 analysis. They say she failed to consider the most significant deleterious effects of the infringing measures and she improperly considered cost savings of the infringing measures. The plaintiffs also make separate submissions with respect to Victoria, Pemberton, Mission and the Annual Facility Grant.

Deleterious effects

[209] The judge heard evidence from experts called by each side regarding linguistic assimilation. She reviewed their evidence at length in paras. 257 to 372 of her reasons for judgment. She noted that the plaintiffs' expert defined linguistic assimilation as "a subtractive process that occurs when members of a Linguistic Community in contact with another language cease to use their own language at home in favour of the other language" (at para. 266). She also noted that the Province's expert used a mathematical approach to examining assimilation (at para. 330). Both experts examined language use in calculating assimilation (at para. 332).

[210] Although the experts used different methods, they arrived at nearly identical rates of assimilation. They calculated that more than 70% of Francophones in British Columbia eventually assimilate, and the judge concluded that the force of assimilation is strong in British Columbia. In discussing the topic of justification when making general comments about the community claims, the judge stated that she agreed with the conclusion of the Province's expert that, in view of the strength of assimilation, French-language instruction would, at most, delay the inevitable assimilation (at para. 2147). As a result, she did not consider heightened assimilation to be a particularly deleterious effect (at para. 2148).

[211] The plaintiffs say the judge unduly narrowed the purpose of s. 23 to promoting the transmission of French as the principal language spoken in the home. They argue the judge's view that s. 23 is futile in British Columbia caused her to underestimate the deleterious effects of infringements. They point to *Mahe* for the proposition that s. 23 is intended to enhance cultural vitality as well as linguistic proficiency.

[212] In our view, the plaintiffs mischaracterize the findings of the judge and endeavour to challenge her factual findings under the guise of legal arguments. The judge never found that s. 23 is futile and, indeed, she stated that s. 23 creates a duty to attempt to fight assimilation (at para. 343). The judge did not ignore the cultural or communal importance of minority-language instruction—for example, she quoted from para. 27 of *Rose-des-vents* that minority-language schools "are a primary instrument of linguistic, and thus cultural, transmission" that are often "vital community centres" (at para. 367).

[213] The plaintiffs criticize the judge for setting an impossibly high standard for the success of s. 23 by requiring the substitution of French for English as the main home language. However, the portion of the reasons for judgment cited by the plaintiffs in this regard (at paras. 339-343) do not support this

criticism. The judge did not impose any such requirement. In these paragraphs of her reasons, the judge was simply reviewing the evidence of the expert witnesses, and it was in para. 343 where she expressed the view that s. 23 creates a duty to attempt to fight assimilation. The judge referred to "main home language" because both of the experts calculated assimilation by examining language use.

[214] The plaintiffs also argue the judge's evaluation of s. 23 placed an undue emphasis on the collective impact of what the Court in *Reference re Public Schools Act* said is an individual right. However, the plaintiffs do not point out where in the reasons for judgment the judge placed undue emphasis on the collective impact or explain how this led the judge to undervalue the deleterious impacts of assimilation. It is an argument in the abstract.

[215] The essence of the plaintiffs' arguments on this point is that the judge should have given more weight to the deleterious impacts of increased assimilation caused by a lack of French-language instruction and facilities. The weight given by her to the factor of assimilation was based on the evidence that French-language schools had only a minor effect in combatting assimilation. The plaintiffs have not demonstrated that she made a palpable and overriding error in her findings leading to her conclusion that heightened assimilation was not a particularly deleterious effect.

Cost savings

[216] The plaintiffs have two alternative arguments in relation to cost savings. They first say the judge erred in considering cost savings at all in her s. 1 analysis. In the alternative, if cost savings are properly considered under s. 1, the plaintiffs submit the judge erred by considering only the cost of the relief sought by them rather than the lesser costs of other potential relief.

[217] On their principal argument, the plaintiffs rely on *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at para. 97, for the proposition that cost savings will rarely be viewed as a pressing and substantial objective, and they say there were no extreme financial circumstances in the present case of the nature that existed in *N.A.P.E*. The judge did not, however, find that cost savings was a pressing and substantial objective. As noted above, she accepted that costs would not be a sufficiently pressing objective in the absence of exceptional circumstances (at para. 997).

[218] As recorded at para. 1064 of the judge's reasons for judgment, the plaintiffs conceded at trial that the fair and rational allocation of limited public funds was a pressing and substantial objective. It follows from this concession, in our view, that the allocation of limited public funds will be considered in the proportionality phase of the s. 1 analysis. As stated in *Oakes* at 139, "there must be a proportionality between the <u>effects</u> of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'" (emphasis in original). If the objective has been identified as the fair and rational allocation of limited public funds, then the proportionality assessment must be made between the effects of the infringing measure and that objective, which necessarily involves a consideration of costs.

[219] In our view, this was recognized by the Supreme Court of Canada in *Rose-des-vents*. That case decided that costs are not relevant at the equivalency stage of the s. 23 analysis, but Justice Karakatsanis stated at para. 49 that costs may be relevant under s. 1, and commented, “[t]here is perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse.” We do not interpret her comment that costs may be relevant under s. 1 to be limited to circumstances of extreme financial distress.

[220] As we conclude that the judge did not err in considering costs when weighing the salutary and deleterious effects of the infringing measures, we turn to the plaintiffs’ alternate argument. Relying on *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the plaintiffs say the judge erred by ignoring less expensive alternatives the Province could pursue. At trial, the sole relief sought by the plaintiffs on the community claims was the construction of new homogeneous schools (except in the case of Mission, where the requested relief was the construction of a new gymnasium), and it was the costs of those schools that the judge considered when weighing the salutary and deleterious effects of the s. 23 infringement.

[221] The plaintiffs did not draw our attention to the passages in *RJR-MacDonald* upon which they rely. It appears they rely on para. 152 where Justice McLachlin (as she then was) referred to the fact that in the trial judge’s minimal impairment analysis, he relied on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals as effectively as an outright ban. Then, in discussing minimal impairment, McLachlin J. stated at para. 160 that if the government fails to explain why a significantly less intrusive, but equally effective, measure was not chosen, the law may not be justified. She also discussed, in paras. 164 and 165, the lack of evidence in that regard and inferred that a less invasive ban would have produced an equally effective result.

[222] In our opinion, *RJR-MacDonald* does not stand for the proposition that in the third component of the proportionality test, a court must consider less costly alternatives when weighing the salutary and deleterious effects of the measure. The comments in *RJR-MacDonald* were made in the context of the second component of the proportionality test of considering whether the means should be minimally impairing. If a less invasive measure can be equally effective, it follows that the measure is not minimally impairing. In the present case, the judge was considering the cost savings in the context of the third component of the proportionally test, not at the stage of minimal impairment.

[223] In any event, the plaintiffs pleaded in their amended notice of civil claim that the construction of new homogeneous schools was the only solution to ensure that the s. 23 breaches were rectified in a timely way, and there was no evidence at trial of the costs of any less expensive alternatives. The judge cannot be faulted in addressing the case put forward by the plaintiffs and, in the absence of evidence of less costly alternatives, she was not in a position to weigh the salutary and deleterious effects in relation to hypothetical alternatives.

[224] We will now turn to the four specific claims in respect of which the judge found a s. 23 breach to be justified under s. 1. The plaintiffs repeat some of their arguments in relation to their asserted

overarching errors in connection with these claims, and we will not address them separately when discussing the specific claims.

Victoria

[225] Victoria's École Victor-Brodeur began operating in the 1970s at an armed forces base and operated under the auspices of an English-language school board when it moved to its present location ten years later. In approximately 1998, École Victor-Brodeur was transferred to the CSF. In June 2004, the Province approved a replacement project at a cost of approximately $8.8 million, and the new school opened in 2007. The enrolment increased relatively quickly in the new school, and it reached capacity in 2009. Beginning in 2010, when the litigation had started, the CSF requested the construction of new K-7 schools on each of the east and west sides of Victoria, which would have a cost of approximately $28 million (in addition to the costs of site acquisitions). The CSF proposes to retain École Victor-Brodeur as a secondary school, to acquire the former Lampson Elementary School and to eventually build a new school in north Victoria.

[226] When École Victor-Brodeur became overcrowded, the CSF leased from the English school board two homogeneous schools, the former Lampson Elementary School (which is used for additional secondary school space) and the former Sundance Elementary School (which is used as an elementary school). As of 2014/15, the enrolment in the three Victoria schools was 714, and the space in the schools was sufficient to accommodate all of the enrolment.

[227] The judge projected the enrolment in the proposed east and west side schools could grow in ten years to about 275 and 299 students, respectively. She concluded that the global educational experience at École Victor-Brodeur was equivalent to comparator schools, but that transportation times in Victoria can be very long. She found there was a breach of s. 23 as a result of the lack of capital funding for expansion projects (at para. 4246).

[228] In finding the s. 23 breach to be justified under s. 1, the judge first found that there was a rational connection between fairly and rationally expending funds and deciding not to build any new spaces for students between 2005 and 2011 (when there was a province-wide freeze on capital spending), and very few spaces thereafter, because of declining enrolment province-wide (at para. 4249). She found the lack of funding minimally impaired the position of rightsholders in Victoria because the Province had negotiated and funded the lease costs for additional space at the Lampson Annex, despite its blanket policy (at para. 4251).

[229] The judge then considered the salutary and deleterious effects of the breach. The salutary effect was primarily the saving of $28 million and the costs of site acquisitions (at para. 4253). She discussed the salutary effects across the system, including the fact that the CSF received more capital funding per capita than about 95% of the English-language school boards (at para. 4254). She also mentioned that CSF has a similar asset base and space per student as the majority, below average replacement value of assets and better than average building condition (at para. 4255).

[230] The judge discussed the deleterious effect of long travel times, but noted that they were offset in many respects by the exceptional facilities at École Victor-Brodeur (at para. 4256). She discussed heightened assimilation, and did not consider it to be a particularly strong deleterious effect (at para. 4258). Her conclusion was that the salutary effects outweighed the deleterious effects and that the breach passed the proportionality test (at para. 4259).

[231] The plaintiffs say the judge erred by holding the infringing measure to be rationally connected to the objective and to be minimally impairing, and by improperly weighing the salutary and deleterious effects. We agree with the Province that the plaintiffs have not identified any legal error committed by the judge, and are re-arguing the weight that the judge should have attributed to various factors.

[232] The plaintiffs submit there has to be a causal connection between the infringement and the benefit sought “on the basis of reason or logic”, and neither reason nor logic dictates withholding funding for much-needed space. To the contrary, there is a logical connection between the objective of fairly and rationally expending public funds and a decision not to spend funds on capital projects for schools which could be more fairly and rationally allocated elsewhere.

[233] Nor do we consider the judge’s conclusion on minimal impairment to be an error. Steps were taken to alleviate overcrowding at École Victor-Brodeur. This allowed the Province to achieve its objective of fairly and rationally expending public funds while still addressing the needs of the s. 23 rightsholders.

[234] The plaintiffs argue the judge did not give sufficient weight to the deleterious effects of the breach because a significant number of eligible parents were deterred from enrolling their children at École Victor-Brodeur due to long travel times, and this represented a lost opportunity for those children to become s. 23 rightsholders. However, the judge took the long travel times into account, and found they were offset in many respects by the exceptional facilities at École Victor-Brodeur. We cannot say the judge erred in concluding that the salutary effects outweighed the deleterious effects.

Pemberton

[235] The French-language school in Pemberton is a K-7 school called École Élémentaire de la Vallée de Pemberton. It is a heterogeneous school operating out of portable classrooms behind an English-language school and a classroom at a community centre. As of 2014/2015, its enrolment was 48 students. The CSF did not request capital funding for projects in Pemberton until this litigation was underway. It sought an order at trial that a homogeneous school be built at an expense in excess of $8 million plus the cost of site acquisition.

[236] The judge concluded that the number of children who would attend a newly constructed homogeneous school in Pemberton was approximately 55 children, which fell in the middle of the sliding scale and did not qualify for a homogeneous school. She held that the numbers warranted French instruction with proportionate access to core facilities. The judge found s. 23 to be breached because École Élémentaire de la Vallée de Pemberton does not have proper access to those facilities,

most notably a gymnasium and a library, and those deficiencies were not outweighed by smaller class sizes and a superior technology programme at the school. The breach was caused by the Province's policy of funding leases for the CSF's smaller school programs rather than building new schools.

[237] In undertaking the s. 1 analysis, the judge found there was a rational connection between the fair and rational allocation of public funds and the policy requiring the CSF to operate schools out of leased heterogeneous space (at para. 2430). She next found the policy to be minimally impairing because the Province had funded both the lease costs and the costs to acquire the portables to provide instruction, and there are no other schools or amenities in Pemberton to accommodate the CSF (at para. 2432).

[238] The judge then discussed the salutary and deleterious effects. As with Victoria, she found the cost savings to be a salutary effect, and pointed to other school projects with greater needs that the Province was able to fund out of limited public funds (at para. 2434). She discussed the same system-wide salutary effects as she mentioned in respect of Victoria (at paras. 2435-2436).

[239] The judge considered the deleterious effects at the local level. While she held that the deficiencies of having limited access to core facilities was not outweighed by excellent programing and small class sizes at École Élémentaire de la Vallée de Pemberton, the judge did not consider that the CSF was losing out on significant enrolment (at para. 2437). The judge discussed assimilation and repeated her view that heightened assimilation was not a particularly deleterious effect (at paras. 2438-2439). She concluded that the salutary effects of the policy outweighed the deleterious effects and that the infringement was justified (at para. 2440).

[240] Apart from repeating their argument relating to the asserted overarching error made by the judge to the effect she did not consider less expensive alternatives when weighing the salutary and deleterious effects, the plaintiffs say that the infringing measure cannot have been minimally impairing because "[a]t its most basic level, a s. 23 school must provide students with an education". The flaw in this submission is that French-language students in Pemberton are receiving an education. The s. 23 breach was only occasioned by the fact that poor access to resources such as a gymnasium and a library outweighed the advantages the school enjoyed. If the plaintiffs' submission is that the situation in Pemberton does not amount to the basic level of an education, then it would seem that no measure resulting in a breach of s. 23 could ever be minimally impairing.

[241] As with the Victoria claim, the plaintiffs have not identified any legal error committed by the judge; they simply disagree with her conclusion, which is entitled to deference from this Court in the absence of a legal or factual error.

Mission

[242] The judge discussed the Building Condition Driver in two portions of her reasons for judgment. She discussed it generally in paras. 6054-6140 and she discussed it in the context of Mission in paras. 4879-5007. The Building Condition Driver is used to assess the need for capital projects, and

the plaintiffs' complaint is that it prioritizes projects only on the basis of the remaining economic life of the school. It does not take into account the functional standards of the building in the sense of providing access to core facilities that are integral to the educational experience.

[243] Although the plaintiffs' factum refers to the judge's s. 1 justification analysis when she was discussing the topic generally, the only potential instance of the Province's policy with respect to the Building Condition Driver giving rise to a breach of s. 23 was the situation in Mission. During the hearing of the appeal, we asked the plaintiffs to provide us with charts linking their grounds of appeal to the various claims made by them at trial, and specifying the remedies they are seeking from our Court. The table provided by the plaintiffs in relation to the issue of s. 1 justification referred only to Mission in conjunction with the Building Condition Driver and only to the portion of the reasons for judgment containing the discussion about Mission. Accordingly, we will focus on the judge's s. 1 analysis in the portion of her reasons dealing with Mission.

[244] The French-language elementary school in Mission is a homogeneous school called École Élémentaire des Deux-Rives which was purchased from the English-language school board in 1998. The only relief sought by the plaintiffs in respect of Mission was the construction of a new gymnasium at a cost of approximately $1.6 million. The current gymnasium was described as being the size of half a basketball court in a standard gymnasium.

[245] The judge found the situation in Mission to fall at the middle to high end of the sliding scale, warranting a homogeneous school with core facilities that are proportionate to comparable English-language schools. She was persuaded that the physical education experience at École Élémentaire des Deux-Rives was inferior to that provided at English-language schools, but she could not conclude whether there was a breach of s. 23. As the evidence was limited to the physical education experience, she was unable to decide whether the global experience met the appropriate standard. She also found the CSF bore some of the responsibility for the small gymnasium because it had not been requesting funding for it at the time of the commencement of the litigation.

[246] As a result, the judge assumed, without deciding, that there was a breach of s. 23. If there had been a breach of s. 23, it would have been caused by the Province's capital funding system because the Building Condition Driver does not take a school's functional standards into account when prioritizing projects.

[247] The judge's s. 1 justification analysis was similar to her analysis in respect of Victoria and Pemberton. She found there to be a rational connection between the fair and rational allocation of public funds and a system using FCI scores to allocate funding on an objective basis to the schools that are in the worst condition from a property management perspective (at para. 4993).

[248] The judge found the Province's approach to be minimally impairing of rightsholders' entitlement to minority-language education facilities. She noted that the Province funded the acquisition of École Élémentaire des Deux-Rives and had funded renovations to the school and that, once the school

reaches the end of its economic life, the Province will have to fund a new school with a larger gymnasium (at para. 4995).

[249] As with Victoria and Pemberton, the judge found the cost savings to be a salutary effect, and she noted that the Province has been able to devote more funding to other capital priorities, like seismic upgrades and new schools in growing districts. She also discussed the same system-wide salutary effects as she mentioned in respect of Victoria and Pemberton (at paras. 4997-4999).

[250] The judge found the deleterious effects, at the local level, to be the inferior physical education experience for the students in grades 4 to 8 (at para. 5000). She discussed assimilation and again repeated her holding that heightened assimilation was not a particularly strong deleterious effect (at paras. 5001-5002). Her conclusion was that the salutary effects of the Province's policy outweighed the deleterious effects because the relative impact of an inferior physical education system for a small number of students was worth the cost savings (at para. 5003). The breach therefore passed the proportionality test.

[251] The plaintiffs say the judge erred in finding the Building Condition Driver to be minimally impairing and in weighing the salutary and deleterious effects. They submit the judge's finding of minimal impairment fails to address the total failure of the Building Condition Driver to consider building functionality. In connection with the salutary and deleterious effects, they say the judge failed to consider that the Province has given a lower priority to building condition projects, and projects to improve functionality of French-language schools are simply not funded.

[252] In making her finding of minimal impairment, the judge was well aware that the Building Condition Driver does not take building functionality into account. Indeed, it was that aspect of the Building Condition Driver that would have caused a breach of s. 23 if there had been sufficient evidence for her to have determined whether there was a breach.

[253] Similarly, the judge was aware that lower priority had been given to building condition projects and that projects to improve functionality were not being funded. Such projects were not being funded because the Building Condition Driver does not take functionality into account. Again, the plaintiffs are re-arguing their case and asking us to come to a conclusion different from the one reached by the judge. In the absence of a demonstrated error, it is not appropriate for us to interfere with the judge's conclusion.

[254] If we had concluded the judge erred in her s. 1 analysis, we would have agreed with the Province's position that the judge should have held there was no breach of s. 23 in respect of École Élémentaire des Deux-Rives. The onus was on the plaintiffs to prove a s. 23 breach, and they did not introduce sufficient evidence to enable the judge to make a finding that the global educational experience at the school was inferior to comparable English-language schools. As the plaintiffs did not meet their onus, it would have been appropriate to dismiss the claim.

Failure to apply the AFG Rural Factor

[255] The AFG is given to all of the school boards in the province to pay for maintenance of school buildings and minor capital renovations. The amount of the AFG given to each school board is determined primarily on the number of students enrolled in the district, but there are adjustments related to other things, including what is called the AFG Rural Factor. This factor reflects the fact that some rural schools have low enrolment but cannot realistically be closed and consolidated with other schools. Credit is given for the actual enrolment in these schools plus 50% of the unused capacity of the schools.

[256] The Rural Factor was introduced in 2003/04 but was not made applicable to the CSF because most of its schools were located in urban areas and those of its schools in rural areas were located in leased heterogeneous schools, the maintenance of which was the responsibility of the English-language school boards. However, this changed over time as the CSF acquired more rural schools. In 2012/13, when the total amount of the AFG for all districts was increased by $500,000, the Province began applying the AFG Rural Factor to the CSF. The practical effect was that the entire $500,000 increase in the AFG was allocated to the CSF without having to decrease the AFG being given to the English-language school boards.

[257] The judge found the Province recognized in the summer of 2009 that the CSF was incurring a shortfall in its AFG as it was moving from leased heterogeneous space to non-leased homogeneous space. The Province did not make the AFG Rural Factor applicable to the CSF at that time because of the prevailing economic circumstances and because it did not want to take funds away from the other school districts. The judge found this to be a breach of s. 23 because the Province failed to provide the CSF with equitable public funds to deliver French-language education on the basis of equality with the English-language school districts. At para. 1509, she quantified the extra funds the CSF should have received from 2009/10 to 2011/12 to be the amount of $1,000,000 (we note that the judge stated different years and different amounts in other paragraphs of her reasons).

[258] There was evidence that, in addition to the AFG, the Province expected school districts to use a portion of their operating funds to maintain buildings. The Province also did not want school boards to accumulate AFG funds from year to year and, commencing in 2009/2010, the Province implemented a “use it or lose it” policy with respect to the AFG in each year.

[259] In her s. 1 justification analysis, the judge found there was a rational connection between fairly and rationally expending public funds and the policy not to apply the AFG Rural Factor to the CSF. When the CSF was operating out of many leased spaces and was not paying for the maintenance of those buildings, more funds were available for the English-language school boards to perform maintenance work. The Province waited until there were more funds to distribute before making the AFG Rural Factor applicable to the CSF (at para. 1521).

[260] The judge found the failure to make the change earlier was minimally impairing. The CSF was continuing to receive approximately 60% of the Annual Facility Grant to which it would have been entitled if the AFG Rural Factor had been applied to it, and the CSF had a previous advantage in that

it was not spending its AFG on leased space (at para. 1523). The judge had earlier referred to the fact that the CSF had an accumulated surplus on unspent AFG funds of approximately $400,000 in 2008/09 (at para. 1472).

[261] The judge found that the salutary effects of the policy of not applying the AFG Rural Factor to the CSF were that the Province did not have to deal with the political consequences of taking from the majority to give to the minority, and it protected majority boards from additional losses in years when they were receiving only half of the AFG they were used to receiving (at para. 1525). She found the deleterious effects challenging to quantify because the Province had always maintained that school boards ought to be spending part of their operating funds on building maintenance and the CSF had operating surpluses in excess of $1,800,000 in each of the years the AFG Rural Factor should have been applied to it. In addition, the CSF did not point to any projects it was unable to complete due to the deficiency in this period (at para. 1526).

[262] The judge concluded that the salutary effects outweighed the deleterious effects, and the infringement passed the proportionality test. The CSF had been operating from a position of relative advantage as a result of not spending funds on maintenance for its leased space and had considerable operating surpluses. As soon as more funds were secured for the AFG, all of the increase was allocated to the CSF (at para. 1527).

[263] The plaintiffs say the judge erred in relying on improper salutary effects. In addition to repeating their argument that the judge should not have treated cost savings as a salutary effect, they submit it was improper for her to treat the avoidance of political consequences as a salutary effect.

[264] The Province concedes that avoiding political consequences cannot generally be regarded as a salutary effect. Nevertheless, we are not persuaded that the judge erred in concluding that the deleterious effects were outweighed. The judge had difficulty in identifying any deleterious effects of the infringing measure in view of the CSF’s operating surpluses and the lack of any evidence that the CSF had to forgo any maintenance work. Even though the salutary effects of allocating limited public funds in a way that prevented the English-language school boards from greater losses were not strong, the evidence did not establish the deleterious effects to be stronger. There was not even the deleterious effect of depriving the CSF of the opportunity to build up a surplus of the AFG for use in future years as a result of the Province’s policy applicable to all school boards that unused AFG funds could not be carried forward into the future.

Remedies

Damages for Victoria leases

[265] The plaintiffs submit the judge should have awarded $124,000 in *Charter* damages for the Ministry’s failure to fund the CSF’s leases of facilities to alleviate overcrowding in Victoria. The lack of funding was a result of the Ministry’s decision to freeze the CSF’s lease funding, which the judge found was a breach of s. 23. The judge declined to award *Charter* damages on the basis that the CSF

had not complied with the Ministry's policy to seek pre-approval of leases. However, the plaintiffs submit she made a palpable and overriding error in coming to this conclusion as the judge herself found that the CSF wrote to the Ministry in 2013 to request funding. Those requests were then refused on the basis of the funding freeze. The plaintiffs submit that damages would compensate the CSF for the loss it incurred and would deter the Ministry from future unilateral freezes, thus fulfilling two key functions of *Charter* damages.

[266] The Province submits the evidence supports the judge's finding that the CSF did not seek pre-approval as by the time the Ministry declined to provide funding the CSF had already committed to the leases. The Ministry's policy was not simply that the CSF *request* approval before entering into leases, but that they actually *obtain* approval. In the alternative, the Province submits that *Charter* damages are inappropriate for the reasons addressed in their cross appeal.

[267] We agree with the Province that the plaintiffs misconceive the judge's finding on this question. She found the CSF failed to comply with the legitimate requirement to obtain pre-approval from the Province before entering into new leases. The evidence supports this finding. The plaintiffs conflate their *request* for approval with the actual *obtaining* of that approval from the Province.

[268] As the judge did not make the factual error alleged, we do not accede to this ground of appeal. It is unnecessary to consider the Province's alternative argument that *Charter* damages are not appropriate and just. In any event, for the reasons below regarding the application of the *Mackin* principle, *Charter* damages are not appropriate and just in the circumstances.

Damages for transportation costs

[269] On the cross appeal, the Province submits the judge erred in finding the CSF suffered a compensable loss from the Ministry's transportation funding policies. Therefore, a *Charter* damages award was not justified. During the relevant period, the judge found the CSF consistently enjoyed an operating surplus, and therefore the only loss suffered by the CSF was the opportunity to add to that surplus of publicly provided funds. The Province submits that awarding damages does not make the CSF "whole", but instead leads to a windfall, particularly given that the judge also found the current transportation funding system adequately addresses the CSF's needs.

[270] The Province also submits the judge erred by not following the principle from *Mackin* that government should be immune from damages for the mere enactment of a law or policy later held to be unconstitutional. The rationale for the immunity is that government is democratically accountable for policy choices and should not be chilled by fear of liability in damages for good-faith execution and enactment of laws and policies.

[271] The Province points to the judge's finding that the Minister acted in good faith in carrying out the policy, and says she should have gone on to find the *Mackin* immunity applied. The Province says it was an error for the judge not to apply the policy because she thought it was unlikely that the government's policy-making function would be chilled. Instead, the test is simply whether the

government acted in bad faith to vitiate the immunity. The Province argues the immunity must also be clearly applied, as any ambiguity or uncertainty in the principle—such as where it depends on whether a trial judge will find as a fact that the state would be deterred by a *Charter* damages award—would undermine the purpose of the immunity.

[272] The Province further submits it was an error for the judge to find an exception to the *Mackin* principle on the basis that the infringing policy had been replaced by the time of trial. This is inconsistent with her decision to grant declaratory relief with respect to the policy of not approving expansion projects from 2005 to 2011, which had also been rescinded by the time of trial. The Province argues a declaration would still have had practical utility by providing forward guidance to government. Finally, the Province submits the judge's approach leads to the perverse outcome that the Province would have been better off in terms of remedy if it had retained the infringing transportation funding policy until the end of trial.

[273] The plaintiffs submit generally that the judge's decision on remedy, being highly discretionary, should be given deference on appeal. They argue the judge was well aware of the CSF's operating surplus when she calculated the financial loss from the transportation funding deficit, including that those surplus funds were otherwise allocated to providing educational programming. The judge had already reduced the award to reflect that some of the operating surplus should have been spent on transportation. The plaintiffs therefore reject the Province's suggestion that the CSF would receive a windfall from a *Charter* damages award. They characterize the Province's challenge to the functional justification for the award as a thinly veiled attack on the quantum.

[274] The plaintiffs further submit that no remedy other than damages was adequate in this case. They rely on *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, for the principle that declarations should be granted only where they have some practical utility by settling some live controversy between the parties. The plaintiffs argue that a mere declaration in this case would not have had any practical effect or remedied the breach in any way. The plaintiffs further submit the judge had a principled reason not to grant a declaration for the transportation funding breach, despite doing so with respect to the Expansion Projects freeze. The declaration she issued for the latter was directed at more than just the freeze on Expansion Projects, and also included how the CSF's requests were evaluated generally. Moreover, in the circumstances, the plaintiffs say a damages award was not required to remedy the infringement arising from the freeze on Expansion Projects because the judge had also made a declaration that the Province establish a Capital Envelope to address the CSF's funding needs.

[275] The plaintiffs also submit the *Mackin* principle does not apply in this case and there is no good reason to extend the principle, as concerns about the chilling effect on policy-making discretion do not apply where there is no discretion. The plaintiffs submit the problem in this case was not that the Province chose the wrong method for providing transportation funding, but that the Province failed to take action to fulfill a mandatory constitutional obligation at all.

[276] Finally, the plaintiffs submit in the alternative that if the *Mackin* principle does apply, an exception listed in that case can be made out, given that the Province's intentional failure to remedy a policy it knew to be inadequate was "clearly wrong", even if taken in good faith.

[277] We agree with the Province that the judge erred by not applying the limited immunity against *Charter* damages for actions later found to be unconstitutional, and would allow the cross appeal.

[278] In *Ward*, McLachlin C.J.C., for the Court, considered "the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be." The trial judge had awarded Mr. Ward *Charter* damages after finding his *Charter* rights had been violated by Vancouver and British Columbia officials who had detained him, strip searched his person and seized his car without cause. Chief Justice McLachlin said that damages may be awarded under s. 24(1) for a *Charter* breach where it is "appropriate and just" from the perspective of the claimant and the state. There is a four-step inquiry to this analysis:

> [4] … The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[279] Under this framework, the individual making a claim for *Charter* damages bears the initial burden of establishing a *prima facie* case and demonstrating that the first two steps of the *Ward* test are met. Once the claimant has met this burden, the onus shifts to the state to rebut the case at the third step: *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para. 37. Therefore, even where a claimant has shown that damages are functionally justified, the state may establish that damages are inappropriate or unjust: *Ward* at para. 33.

[280] As the Province has not appealed the judge's conclusion that the freeze on the Transportation Supplement breached s. 23 of the *Charter*, or her quantification of damages in the event an award of damages is upheld, the thrust of its submissions concern the second and third steps of the *Ward* analysis. Since the question of whether the Province demonstrated countervailing factors to defeat the functional considerations supporting a damage award is determinative of this cross appeal, our discussion will focus on that step.

[281] While the relevant considerations under the third step are not closed, the Supreme Court of Canada has commented on two in particular—the existence of alternative remedies and concerns for good governance: *Henry* at paras. 37-39.

[282] Where alternative remedies are adequate to satisfy the compensation, vindication and/or deterrence objectives that damages may serve, a further award of damages is not "appropriate and just": *Ward* at para. 34. In the appropriate circumstances, a declaration of a *Charter* breach may provide an adequate remedy and therefore bar a damages award, as "granting damages as well as a

declaration would be superfluous, and therefore inappropriate and unjust in the circumstances": *Henry* at para. 38. But, as "it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach" (*Ward* at para. 35), one commentator has suggested "[i]n general, declarations will only be an adequate alternative remedy in situations where there is no compensable tangible or intangible loss and no need to deter future *Charter* violations" (K. Roach, *Constitutional Remedies in Canada* (Toronto: Thomson Reuters) (loose-leaf updated 2017, release 30), c. 11 at 33).

[283] Concerns for good governance may also render *Charter* damages inappropriate or unjust. While the state bears the burden of establishing that functional concerns should preclude an award of damages, "the availability of *Charter* damages [is] circumscribed through the establishment of a high threshold" in certain circumstances: *Henry* at para. 41. In such instances, the onus is on the state to demonstrate that the nature of the *Charter*-breaching conduct in the case at hand falls within the scope of any proposed limited immunity. Once the state has established that the context engages a limited immunity, or what *Henry* calls a "*per se* liability threshold", a claimant may then demonstrate that his or her case meets the applicable test to overcome the liability threshold to recover damages.

[284] Examples of this qualified or limited immunity as justified by concerns for good governance applying in two distinct types of circumstances are *Mackin* and *Henry*. In the context of the exercise of the government's powers, as in *Mackin*, the requisite hurdle a claimant must overcome is to show the state action was "clearly wrong, in bad faith or an abuse of power" (at para. 78). Conversely, in the context of Crown non-disclosure in criminal proceedings, as in *Henry*, there is a different, but still "heightened" liability threshold that must be met.

[285] As we understand the parties' submissions, the central questions can be framed as follows:

1. Whether the judge erred in finding the Province's *Charter* violation did not fall under the umbrella of a limited immunity; and
2. If she did so err, whether the hurdle imposed by the liability threshold under either an established or new sphere of limited immunity was overcome.

[286] The judge held the *Mackin* principle did not apply in this case because she did not "foresee that damages will chill the legislative and policy-making functions of government" as "there is little risk that the government will not enforce laws out of a fear of retribution" (at para. 1788).

[287] With respect, the judge erred in overriding the limited immunity on that basis. As discussed below, the judge should have asked whether the case fell into the sphere of the liability threshold established by *Mackin*. If so, then it was not appropriate to undertake a case-by-case analysis of the underlying policy concerns that support the need for the limited immunity.

[288] In *Mackin*, which concerned the enactment of legislation subsequently found to be unconstitutional, Justice Gonthier, for the majority, explained the basis for the limited immunity afforded to governmental action:

> [78] According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy <u>limited immunity</u> against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
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>> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]
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> [79] However, as I stated in *Guimond v. Quebec (Attorney General)*, [[1996] 3 S.C.R. 347] since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. 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. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).
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> [Emphasis in original.]

[289] The plaintiffs say the Supreme Court of Canada limited the scope of *Mackin* in *Ward* to "state action taken under <u>a statute</u> which is subsequently declared invalid" (emphasis added), such that this case does not fall within that established liability threshold. To understand this argument, it is necessary to consider the entire context of *Ward*, which, it will be recalled, involved a person whose *Charter* rights were violated when officials detained him, strip searched his person and seized his car without cause. The Court in *Ward* said this about *Mackin*:

> [40] 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:
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>> 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]

> [41] The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[290] While McLachlin C.J.C., in summary at para. 41, did describe a narrower principle for *Mackin* for the purposes of demonstrating why Mr. Ward's circumstances did not fall within its scope, she also recognized 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", with "[l]egislative and policy-making functions" being examples (at para. 40). In effect, the narrower description of the *Mackin* principle was stated to highlight the distinction between the facts of *Mackin* and *Ward*, *Ward* being outside the scope of the limited immunity, with the good governance considerations not applying on the facts of that case (at paras. 68, 78).

[291] In our view, this broader interpretation of *Mackin* is the correct description of the scope of the liability threshold. Justice Gonthier's comments regarding the limited immunity were stated more broadly than the narrow interpretation the plaintiffs urge this Court to adopt. Nowhere in *Ward* does the Court reject Gonthier J.'s broader formulation, nor was the distinction between legislative and policy-making functions raised.

[292] The basis for the *Mackin* immunity lies in the fact the government should not be unduly constrained by fear of pecuniary repercussions in performing, in good faith, the unavoidable public duty of enacting (or not enacting) laws and policies that may later be subject to legal challenge. This has been described as the "chilling effect".

[293] Another basis for this immunity is the "diversion from duties" concern Justice Moldaver noted in *Henry* in the context of Crown non-disclosure, which applies equally in this case. If no immunity existed, or the threshold was set too low, to use his words in this context: "[An] avalanche [of litigation] would no doubt contain a few strong claims of serious wrongful [acts], but would invariably bring with it scores of meritless claims, each of which would have to be defended at the expense of core [government] functions. The collective interest of Canadians is best served when [the government is] able to focus on [its] primary responsibility" of law and policymaking (*Henry* at para. 72).

[294] Where the state action at issue involves the government performing a legislative or policy-making function, government must be assured that it will not be subject to C*harter* damages unless its conduct meets a minimum standard of gravity. Justice Moldaver discussed this in *Henry* as follows:

> [39] ... *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:
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> > 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 of Moldaver J.]

[295] We also observe that the Ontario Court of Appeal in *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435, rejected a distinction between legislative and policy-making functions with respect to the *Mackin* immunity:

> [194] While the rule against combining damages with declaratory relief has been articulated in cases where the declaration of invalidity is sought against legislation, we see no principled basis on which to limit the application of this rule to cases where a statute, rather than some other government action, is declared unconstitutional. Support for this view can be found in the above quoted passage from *Mackin*, in which the Supreme Court refers to the "exercise of their powers" and "government action", rather than legislation *per se*. Moreover, the reasons underlying the general prohibition against damages where declaratory relief is granted apply with equal force whether the declarations are made as a result of a challenge to legislation under s. 52 of the *Constitution Act, 1982* or, as in this case, where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24(1) of the *Charter.*
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> ...
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> [196] A second reason for restricting the availability of damages is the effect that the threat of liability for damages would have on government decision-making. One of the primary functions of government is to advance society through the creation of new policies and programs. Potential liability for damages creates the risk of interfering with effective governance by deterring governments from creating new policies and programs. In *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, after referring to the rule that damages are generally unavailable where a law is declared unconstitutional, the Supreme Court of Canada affirmed that this concern applies in the *Charter* context. At para. 15, the Court quoted from an article by M. L. Pilkington entitled "Monetary Redress for *Charter* Infringement" in R. J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 307 at 319-20:
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>> A qualified immunity for government officials is a means of balancing the protection of constitutional rights against the needs of effective government, or, in other words, determining whether a remedy is appropriate and just in the circumstances. A government official is obliged to exercise power in good faith and to comply with "settled, indisputable" law defining constitutional rights. However, if the official acts reasonably in the light of the current state of the law and it is only subsequently determined that the action was unconstitutional, there will be no liability. To hold the official liable in this latter situation might "deter his willingness to execute his office with the decisiveness and judgment required by the public good" [emphasis added by the Supreme Court].
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> [Emphasis added.]

[296] Therefore, under the *Mackin* framework, an appropriate balance is struck between the objectives of ensuring *Charter* compliance and the need for effective governance, while still ensuring protection of constitutional rights and the availability of *Charter* damages in the appropriate circumstances.

[297] As noted in *Henry* at para. 91, "[c]ourts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far." To use Moldaver J.'s words (at para. 81) in this context, in practice "[i]t is only by keeping liability within strict bounds that we can ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation" of government. Therefore, a liability threshold or limited immunity protects the

capacity of government to fulfill its important and critical function in society without the concern of incurring *Charter* damages, provided it acts in good faith and does not abuse its power.

[298] With these considerations in mind, these findings of the judge dispose of the cross appeal:

1. The policy freezing the Transportation Supplement was enacted for a pressing and substantial purpose;
2. The Minister "only acted in good faith";
3. The Province implemented the retroactive Francophone Supplement in 2006/2007 upon being advised of the CSF's concerns about the Transportation Supplement in 2004; and
4. The CSF did not advise the Ministry that the Francophone Supplement was inadequate.

[299] These findings squarely situate the circumstances of the transportation funding *Charter* breach within the sphere of the limited immunity from damages. In our view, the judge erred in overriding this immunity on the basis that she did not "foresee" that damages would chill the policy-making role of the Legislature. The appropriate question was whether the government's action was "clearly wrong, in bad faith or an abuse of power" so as to vitiate the immunity, not whether the threat of damages in a particular case might stymie the future exercise of legislative and policy-making powers. The authorities do not establish that it is a question of fact to be determined by each individual trial judge whether legislative and policy-making functions may be deterred by a damages award. So long as the state action is the kind of action that falls within the recognized immunities, then good governance concerns limit liability to specific circumstances where the state conduct meets a minimum level of gravity. With respect, by awarding *Charter* damages because there was "little risk that the government will not enforce laws out of fear of retribution" the judge engaged in exactly the kind of case-by-case weighing of the competing policy considerations that was expressly rejected in *Henry* (at para. 75).

[300] The plaintiffs' alternative argument that "*Mackin* also recognizes state conduct that is 'clearly wrong' as triggering state liability for damages" overlooks the judge's express finding of fact, though stated in a slightly more general context, at para. 1193, that there was no "evidence of bad faith, an abuse of power or clearly wrong decisions" by the Province following previous litigation regarding French-language education. Moreover, the plaintiffs have been unable to point to a specific finding that there was a "clearly wrong" decision, and the tenor of the judge's reasons as a whole does not reflect any such finding.

[301] In their response to the cross appeal, the plaintiffs raised a number of other arguments. They say the lower liability threshold test set out in *Henry* applies in this case because a parallel can be drawn between where the government makes policy and legislative decisions concerning the s. 23 *Charter* obligation and a prosecutor's disclosure obligation in the criminal context.

[302] The Province's obligations under s. 23 might superficially appear similar to a Crown's continuing duty to disclose relevant information to guarantee full answer and defence. In substance, however, government budgeting involves polycentric decision making. In *Henry*, the Court was clear

that what motivated the lower threshold for liability was that disclosure decisions “do not implicate the high degree of discretion involved in the decision to initiate or continue a prosecution” (at para. 61). The latter squarely implicates the independence of prosecutors who should not lightly be subject to interference by other branches of government. The narrow discretion involved in complying with disclosure obligations in a criminal proceeding simply does not compare to the wide discretion involved in complying with the duties under s. 23 and doing “whatever is practical in the situation to preserve and promote the minority-language education”: *Mahe* at 367. This discretion applies where the numbers warrant substantively equivalent facilities and instruction. Such an inquiry is “contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times”: *Rose-des-vents* at para. 39. That wide range of potential outcomes, and the attendant lack of clarity as to what s. 23 might require in any individual case, justify not holding the state liable when it exercises that wide discretion in a way that results in a *Charter* breach, except as outlined in *Mackin*.

[303] The plaintiffs also say *Mackin* does not apply because the judge explicitly declined to issue a declaration, and the “remedial redundancy” of an award of damages in addition to a declaration foreclosed by *Mackin* was not present in this case.

[304] However, the Province correctly says, in our view, that the judge’s failure to issue a formal declaration of constitutional invalidity with respect to the policy does not preclude application of the *Mackin* principle. We also agree with the Province that *Daniels*, where Justice Abella upheld the trial judge’s refusal to grant declarations because doing so lacked practical utility, is distinguishable on the basis that in that case any declaration would have merely restated settled or existing law (at paras. 53, 56). There is no well-established law in the present circumstances and a declaration could have provided practical guidance for future policy-making. Declarations provide legal and practical guidance to governments charged with developing constitutionally compliant policy, and in this sense may have practical utility even in cases where an unconstitutional policy has expired by the time of judgment.

[305] We find it unnecessary to address the plaintiffs’ argument that the judge’s reasons, as a whole, show she also declined to grant a declaration because a declaration was not sufficient to remedy the *Charter* breach. The presence of good governance concerns, including our conclusion that the plaintiffs have not overcome the liability threshold set out in *Mackin*, is an independent and sufficient basis to preclude *Charter* damages: *Henry* at para. 83; *Ward* at para. 38. Nor have the parties requested this Court make any such declaration.

[306] In the circumstances, it is also unnecessary to address whether the CSF suffered a compensable loss, because in our view, the good governance countervailing factor is determinative of the cross appeal. Further, we do not address whether the CSF had standing to seek a *Charter* remedy as it was not raised at trial or on appeal.

[307] Thus, it follows that the award of *Charter* damages was not appropriate and just.

[308] For the reasons explained, we conclude that the *Mackin* principle applies. Therefore, we allow the Province's cross appeal and set aside the award of *Charter* damages in the amount of $6 million.

Conclusion

[309] In light of the reasons above, the appeal is dismissed. The cross appeal is allowed and the order requiring the Province to pay to the CSF $6 million in *Charter* damages over 10 years is set aside.

"The Honourable Chief Justice Bauman"

"The Honourable Mr. Justice Tysoe"

"The Honourable Madam Justice MacKenzie"