

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*,
2016 BCSC 1764

Date: 20160926
Docket: S103975
Registry: Vancouver

Between:

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

Plaintiffs

And

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

Defendants

And

Conseil-scolaire francophone de la Colombie-Britannique

Third Party

- and -

Docket: S103455
Registry: Vancouver

Between:

L'Association des parents de l'école Rose Des-Vents and Joseph Pagé in his name and in the name of all citizens of Canada residing west of Main Street in the City of Vancouver whose first language learned and still understood is French, or who have received their primary school instruction in Canada in French, or of whom any child has received or is receiving primary or secondary school instruction in French in Canada

Petitioners

And

Conseil scolaire francophone de la Colombie-Britannique, The Minister of Education of British Columbia, and The Attorney General of British Columbia

Respondents

Before: The Honourable Madam Justice Russell

Reasons for Judgment

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I. SUMMARY

[1] The plaintiffs bring this claim pursuant to s. 23 of the *Canadian Charter of Rights and Freedoms*, which guarantees minority language education to certain categories of Francophones where the numbers so warrant.

[2] Here, I will summarize, in brief, my conclusions concerning the plaintiffs' most important arguments. To the extent any of my conclusions in this summary differ from the conclusions in the balance of the decision, the conclusions elsewhere in the decision take precedence.

[3] I find that s. 166.25(9) of the *School Act*, R.S.B.C. 1996, c. 412 which restricts admission to CSF schools to s. 23 rightsholders and the children of non-citizens who would otherwise be rightsholders is not contrary to s. 23 of the *Charter*. That question was decided in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, and I am bound by that decision.

[4] The plaintiffs claim that they are entitled to three types of discrete resources and facilities: increased funding pursuant to the Annual Facilities Grant, increased funding for transportation and space for early childhood education.

[5] The plaintiffs have not shown that the CSF is disadvantaged by the way in which the Annual Facilities Grant is calculated. However, I find that the Province breached s. 23 by failing to apply the AFG Rural Factor to the CSF in 2008/09, 2009/10 and 2010/11. The Ministry treated the CSF differently from majority boards despite recognizing that it might not be appropriate to do so. However, I find that breach is reasonably justified in a free and democratic society.

[6] I conclude that the CSF's transportation system was chronically underfunded pursuant to the Supplement for Transportation and Housing while that funding was frozen between 2002/03 and 2011/12. As a result, the Province failed to provide the CSF with sufficient public funds for its minority language educational facilities. To restore the CSF to the position it would have been in but for the breach, I consider that an award of *Charter* damages amounting to \$6 million is appropriate.

The current transportation funding supplement, the Student Location Factor and Supplemental Student Location Factor, appropriately compensate the CSF for its transportation services when part of the 15% Francophone Supplement is included in the CSF's transportation allotment.

[7] I find that the right to minority language educational facilities in s. 23 does not guarantee the CSF space for early childhood programming in all of its schools. Section 23 requires the Province to ensure baseline educational services are provided to preserve and promote minority language education. Due to the structure of the education system in British Columbia, those services do not include early childhood education. However, where the minority has a right to equivalent facilities and comparator schools offer early childhood services, the presence or absence of early childhood services will inform the analysis of whether rightsholders are receiving appropriate facilities.

[8] The majority of this decision addresses the plaintiffs' claims for new or improved school facilities in 17 communities and claim for a new school board office.

[9] I find that rightsholders in the following communities are receiving appropriate facilities in light of the number of children that would avail themselves of a programme in the best possible circumstances: Whistler (elementary education), Nelson, Richmond, Southeast Vancouver, Nanaimo, Kelowna and Chilliwack. I likewise deny the plaintiffs' claim for a new school board office for the CSF.

[10] With connection to other communities, I find that although educational facilities are substandard, the rights breach is justified as a reasonable limit in a free and democratic society: Pemberton and Victoria. With respect to Mission, I assume without deciding the facilities are substandard, and conclude the limit is justified.

[11] In a few communities, minority language educational facilities are non-existent or substandard, but the defendants are not responsible. This is the case with respect to: Whistler (secondary instruction), Squamish, Northeast Vancouver

and Burnaby. I cannot say whether the breaches in any of those communities are justified.

[12] In four communities, the minority does not have adequate facilities, the defendants are responsible and the breach is not justified.

[13] In Sechelt, Penticton and Abbotsford, rightsholders do not have access to appropriate minority language educational facilities, contrary to s. 23 of the *Charter*. With respect to Abbotsford, the Province's failure to fund any new projects to construct new spaces for students between 2005 and 2011 materially contributed to the right breach. The lack of funding and the defendants' policy of ranking the linguistic minority's capital project proposals against the projects proposed by majority school boards with more resources materially contributed to the rights breaches. None of those breaches is justified in a free and democratic society.

[14] In Vancouver (West), the school afforded to the minority is substandard compared to those afforded to the majority, contrary to s. 23 of the *Charter*. The defendants' policy requiring school boards to identify sites materially contributed to the situation. The policy is not a reasonable limit in a free and democratic society regarding the CSF's circumstances in Vancouver (West).

[15] I provide a more detailed summary of my reasons and findings for each Community Claim at the conclusion of the chapter associated with each community.

[16] The plaintiffs also challenge several aspects of the Province's capital funding system for education as it applies to the CSF.

[17] I find that the fact that the CSF holds some of its educational facilities by way of lease is not presumptively contrary to s. 23 of the *Charter*. However, two aspects of the Ministry's capital funding system concerning the CSF's leases are contrary to s. 23 of the *Charter*: the Ministry's policy requiring the CSF to negotiate leases without Ministry assistance, and the Ministry's policy freezing the CSF's lease funding at 2013/14 levels. Those policies fall short of the Province's duty to ensure

that minority language education is provided where the numbers so warrant. They are not reasonably justified in a free and democratic society.

[18] I find the Ministry's policy of not funding school expansion between 2005 and 2011 and evaluating the CSF's need for capital projects against those of majority school boards with more capital to devote to projects likewise fails to ensure that minority language educational facilities are provided where the numbers so warrant. Those policies are not reasonable limits in a free and democratic society.

[19] The Province's system for prioritizing projects to improve building condition based on a building's economic life rather than building functionality is not ideally suited to ensuring the CSF's facilities meet the standard of majority schools where the numbers so warrant. However, in my view, that breach of s. 23 is justified.

[20] With respect to the Ministry's policies concerning the CSF's acquisitions of surplus schools from majority school boards, I find that the Ministry's policies concerning the disposal of surplus properties, compensation to majority school boards, and the separation of approvals for school acquisition projects from building improvement projects are all consistent with s. 23. None of those policies deprives rightsholders of appropriate facilities or trenches on the minority's right to management and control. They are therefore within the Province's jurisdiction to make.

[21] The only real issue with respect to the system for site and school acquisitions for the CSF is that the Ministry's policies require the CSF to identify school sites for acquisition without Ministry assistance. The policy and practice prevent rightsholders from attaining the types of minority language educational facilities to which they are entitled, and are therefore outside the Province's jurisdiction and contrary to s. 23. They are not justified as a reasonable limit.

[22] There is insufficient evidence to persuade me that the Province's framework for community planning disadvantages the CSF. If the plaintiffs want to challenge

municipalities' official community plans, they ought to do so in the appropriate forum, by way of judicial review.

[23] In my view, the preponderance of the administrative requirements of the Ministry's capital funding system are all valid as they apply to the CSF. Neither the requirement that districts prioritize their projects, nor the PIR requirement, nor the Area Standards, breaches s. 23. They do not infringe on the CSF's right to management and control, and have not caused rightsholders to fail to receive what they are entitled to given their numbers. However, the Ministry's approach to enrolment projections has failed to provide the CSF with substantively equivalent minority language educational facilities in the form of enrolment projections. That breach is not a reasonably justified limit.

[24] With respect to most rights breaches, I find that declarations are the most appropriate remedy. Where the Province's laws and policies materially contributed to a rights breach, I declare them to be contrary to s. 23 and/or make a declaration delineating what rightsholders are entitled to. Where the CSF is responsible, I make a declaration affirming the CSF's jurisdiction to remedy the situation. However, to ensure those remedies are effective, I make two further orders in support of the CSF.

[25] The Ministry must craft a rolling Capital Envelope specific to the CSF. Creating that type of an envelope will ensure funding is available for the CSF, and give it some flexibility to acquire sites when opportunities arise. It will ensure the CSF does not compete against majority school boards for capital projects. It would also allow an avenue for the Ministry to continue to exercise its legitimate role in ensuring that projects are justified. The Ministry cannot claim a lack of funds for the CSF's projects as an excuse given that it has chosen to devote funds to other priorities since 2005.

[26] Additionally, in light of Ministry officials' failure to assist the CSF to identify and negotiate the transfer of school sites in recent years, I order the defendants to craft a policy or enact legislation to either resolve or ensure the Ministry's active

participation in the resolution of disputes between the CSF and majority school boards, and issues concerning the CSF's need for school sites. The Ministry's enactment of the *Education Mediation Regulation* and failure to use it do not absolve it of its duty to assist the CSF to secure appropriate space where the numbers so warrant.

II. INTRODUCTION

A. The Nature of the Claim

[27] The plaintiffs in this action are parents who have the right for their children to receive minority language education. They are joined by the Conseil Scolaire Francophone de la Colombie Britannique ("CSF"), British Columbia's sole Francophone school board, and the Fédération des parents francophones de la Colombie-Britannique ("FCFCB"), a non-profit organization representing the interests of Francophone parents. Together, they urge the Court to conclude that the defendants the Queen in Right of British Columbia (the "Province") and Minister of Education (the "Minister" or "Ministry") have failed to provide British Columbia's Francophone linguistic minority the resources and facilities that are mandated by s. 23 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

[28] Section 23 of the *Charter* provides:

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.

(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.

(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.

[29] The CSF is the Province's means of implementing s. 23 in British Columbia. It offers French language primary and secondary instruction throughout British Columbia. French language instruction is not French immersion instruction. It does not teach English-speakers French as a second language. It teaches Francophone students using French as a language of instruction. In 2014/15, the CSF had 5,382 students enrolled in its roughly 37 programmes province-wide.

[30] Section 23 requires governments to provide the linguistic minority with minority language educational facilities where the numbers so warrant. Since the seminal case of *Mahe v. Alberta*, [1990] 1 S.C.R. 342, it has been clear that the scope of appropriate facilities to which the minority is entitled falls on a sliding scale depending on the number of children likely to participate in the programme.

[31] This case explores, for the first time, the full range of that sliding scale. It addresses what facilities are warranted when there are barely enough students to justify offering minority language instruction. Its reach extends through the centre of the sliding scale to consider when the Province must expend public funds to construct new facilities for a modest and dispersed Francophone population. It reaches to the upper echelons of the sliding scale to investigate what is meant by the guarantee of substantively equivalent minority language educational facilities.

[32] At its core, this case is also about jurisdiction. Section 23 requires the Province to cede its broad and plenary jurisdiction over education to the minority in limited circumstances to allow the minority to exercise a measure of control over matters going to the minority language and culture. This case explores the

boundaries of the minority's right to management and control. It asks when the Province may question the minority's decisions and continue to exert its control over the education system. It examines when the Province must do more than cede jurisdiction, and act as an advocate for the concerns of the linguistic minority.

[33] The plaintiffs bring a vast and comprehensive challenge to the defendants' system for funding capital projects and, to a lesser extent, the operating funding needs of the linguistic minority.

[34] Much of the plaintiffs' claim relates to the amenities (or lack thereof) in 17 communities: École Élémentaire de la Vallée de Pemberton (Pemberton), École Élémentaire La Passerelle (Whistler), École Élémentaire Les Aiglons (Squamish), École Élémentaire du Pacifique (Sechelt), École Élémentaire des Sentiers-Alpins (Nelson), École Élémentaire Entre-lacs (Penticton), École Élémentaire des Navigateurs (Richmond), École Élémentaire Rose-des-Vents (Vancouver (West)), École Élémentaire Anne-Hébert (Vancouver (East)), École Victor-Brodeur (Victoria), École Élémentaire Océane (Nanaimo), École L'Anse-au-Sable (Kelowna), École Élémentaire La Vérendrye (Chilliwack), École Élémentaire Deux-Rives (Mission), the absence of schools in Abbotsford and Burnaby, and École des Pionniers (Port Coquitlam). In a similar vein, they seek funding for a school board office. The nature of the community claims are varied, ranging from complaints about overcrowding to allegations that the CSF does not have a school when it should, to issues about the condition and location of the facilities that the CSF occupies.

[35] Additionally, the plaintiffs seek increased funding and better facilities for the CSF to offer distinct services across the Province: early childhood services, transportation and maintenance. They challenge the entirety of the capital funding system, including the means by which the CSF holds land and improvements, the bases on which the defendants decide what capital projects it will fund and the administrative requirements the plaintiffs must meet to access capital funding. The evidence in support of the claim extends backward in history more than 30 years to

the start of minority language education in British Columbia before the *Charter* was enacted.

[36] Due to the broad scope of the challenge, the trial was lengthy and complex. The plaintiffs filed and served their Statement of Claim in about 2010. The trial began on December 2, 2013, and the evidence concluded in August 2015. The parties argued their case in November and December 2015, and February 2016. Including argument, the trial proceeded over the course of 238 days. On many occasions, the parties were litigating in “real time”, with witnesses testifying about matters that had happened only days before. The Court heard from more than 40 lay witnesses, and considered the evidence of about 13 experts. There were more than 1,600 entered exhibits, some of which numbered in hundreds of pages, and dozens more exhibits for identification. The Court received more than 1,000 pages of written argument.

[37] As a result, this decision is one of the longest-- if not the longest-- in this Court’s history. While I have tried to be comprehensive, it would be impossible for me to refer to every shred of evidence. The parties can rest assured that I have reviewed, considered and based my conclusions on all the evidence, including that which I do not mention here.

[38] This decision proceeds in five parts.

[39] In the first part, I make common findings of law and fact concerning the analytical framework for addressing the plaintiffs’ challenges. It encompasses the following chapters: Chapter IV, Introduction to Part 1: Analytical Framework; Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia; Chapter VI, The Respective Roles of the Province and the CSF; Chapter VII, The Number of Children; Chapter VIII, Entitlement; Chapter IX, Justification; and Chapter X, Remedies.

[40] The second part addresses the plaintiffs’ discrete claims for funding and facilities. I introduce my approach to those questions in Chapter XI, Introduction to

Part 2: Discrete Requests for Facilities. I consider the claimed facilities in Chapter XII, Public Funds; Chapter XIII, The Annual Facilities Grant; Chapter XIV, Transportation; and Chapter XV, Linguistic and Cultural Programming.

[41] The third part makes up the substance of the decision. It concerns the plaintiffs' claims for new or improved schools in 17 communities (the "Community Claims") and a new school board office. I summarize my approach to those chapters in Chapter XVI, Introduction to Part 3: The Community Claims, and address the claims in Chapters XVII through XXXIII.

[42] Chapter XXIV, *École Élémentaire Rose-des-Vents (Vancouver (West))*, serves a dual purpose. In April or May 2015, following the decision by the Supreme Court of Canada in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 [*Association des Parents- SCC*], this case was joined with a related petition (the "Petition"). In *Association des Parents- SCC*, the Court upheld the Petition judge's decision that rightsholders living in Vancouver (West) are not being provided the minority language educational facilities guaranteed to them by s. 23 of the *Charter*. Because the hearing of the Petition was staged, several issues remained to be decided: responsibility, justification and remedies. The evidence in this action stands as evidence in the Petition for the purposes of deciding those questions, which I do in Chapter XXIV.

[43] The fourth part addresses the plaintiffs' challenges to the entirety of the Province's capital funding system. It is based on the findings of fact I make in the preceding Community Claim chapters. I introduce that section in Chapter XXXIV, Introduction to Part 4: the Systemic Claim. I address the substantive arguments in Chapter XXXV, Leases; Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; Chapter XXXVIII, Site and School Acquisition Projects; Chapter XXXIX, Community Planning; and Chapter XL, Administrative Requirements of the Capital Funding System.

[44] In the final part, I consider two of the defendants' defences and the need for the Province to take concrete steps to address the rights breaches that I find in this claim. I introduce that part in Chapter XLI, Introduction to Part 5: The Province's Defences and Remedies in Support of the CSF. The final part includes: Chapter XLII, Lack of Funds and A Capital Envelope for the CSF; and Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation.

[45] Due to the many defined terms in this decision, I include as an appendix a glossary of the most important defined terms that I refer to in more than one chapter.

[46] Before embarking on the analysis, I begin by reviewing the background information essential to understanding the decision: findings concerning the key witnesses and an overview of the capital funding system for education in British Columbia.

B. Key Witnesses and Individuals

1. Ministry Officials

[47] Three Ministry officials testified for the defendants. Each of them served for a period of time in a senior capacity with the Ministry division responsible for the management and allocation of capital funds (the "Capital Branch") for a period of time.

[48] Mr. Keith Miller was employed by the Ministry in various capacities from 1990 until his retirement in April 2013. His background is in urban and regional planning. In 1994, Mr. Miller became the Ministry's Manager of Capital Planning, and in 1999 the Director of Capital Planning. When the position was created in 2002, Mr. Miller became Lead Director, a position equivalent to Assistant Deputy Minister today. Around 2008, Mr. Miller's role expanded as he became Executive Finance Officer, with responsibility for establishing Ministry operating budgets and spending. He held that role until his retirement from the Ministry in April 2013. Mr. Miller was a forthright and credible witness. While his memory was weak on

some occasions, he was always honest about his lack of recollection when his memory failed him.

[49] Mr. Douglas Stewart is a long-time public servant, who was involved with the CSF until his retirement in March 2014. He is an accountant by training, having received his CGA designation in 1990. He began working for the Province in 1985, where he started his career at the Ministry of Health. In 1994, he moved to the Ministry, beginning as Assistant Director in the Ministry's Capital Branch. He also held positions as the Assistant Director of the Capital Branch, and later the Director of Funding, then the Director of Capital. On Mr. Miller's retirement, he became Acting Assistant Deputy Minister until January 2014. He retired in March 2014. While Mr. Stewart was generally credible, his evidence was often couched in the language of a cautious bureaucrat. The use of that language made it so he often did not respond directly to the questions that were put to him. As a result, some of his evidence was vague and non-responsive. I do not find that this took away from his credibility. However, it does make some of his evidence of limited use.

[50] Mr. Joel Palmer has a background in Urban Geography and began working for the BC Public Service in about 2003. Mr. Palmer began his tenure with the Ministry in January 2008, where he began as the Director of Learning Initiatives, with responsibility for the provincial curriculum, graduation standards and green initiatives. He held that position until March 2011, when he moved to the Capital Branch. He worked as a Regional Manager in that branch, overseeing a Planning Officer and a number of districts and branch programmes. In March 2012, he began working with the CSF's Planning Officer, and thus became responsible for the CSF. In August 2013, Mr. Palmer became the Acting Executive Director of the Capital Branch, a position that became permanent in April 2014. After Mr. Palmer finished testifying in the spring of 2015, the Court received evidence that he had left the Ministry. Overall, Mr. Palmer was an honest and credible witness. He gave measured, forthright evidence. He refrained from attempting to malign the CSF when it would have been easy for him to do so. His evidence showed no embellishment or exaggeration.

[51] A notable witness who did not testify is Mr. John Cavelti. Mr. Cavelti is the Ministry Planning Officer who is responsible for working directly with the CSF on all of its capital projects. Given the importance of the CSF and Mr. Cavelti maintaining a working relationship, it is understandable that he did not testify.

[52] Another missing witness is Mr. Peter Owen. Mr. Owen served in senior capacities with the Ministry's Governance and Legislation division for most of the CSF's existence. He retired from the Ministry several years ago. He was heavily involved with the CSF in its early years. Mr. Stewart, at least, testified that he was no longer in contact with Mr. Owen.

[53] The defendants also provided evidence of some records kept in the ordinary course of business by way of affidavits from Mr. Palmer, Mr. Ken Frith, Mr. Karlic Ho, Mr. James Shypitka and Mr. Michael Lebrun. Having reviewed those affidavits, I conclude that the records kept therein are reliable and objective.

2. CSF Administrators and Educators

[54] All three of the CSF's senior facilities administrators testified at trial. Dr. Nicolas Ardanaz was the CSF's first CEO from 1996 until 2004. Mr. Guy Bonnefoy was the Secretary-Treasurer from 2004 to 2009. Mr. Sylvain Allison was the CSF's Secretary-Treasurer from 2010 to present. All three provided historic evidence concerning the CSF's capital requests, interactions with the Ministry and other school districts and the status and condition of CSF schools.

[55] Dr. Ardanaz gave evidence that dates back to the inception of the Programme Cadre in the 1970s and the earliest years and capital requests by the CSF. He was shown to have a strong recollection of most events and circumstances. While his memories were confused on a few occasions, I do not find that this took away from his overall credibility. He was usually professional and courteous, although he became argumentative and un-cooperative while under cross-examination on a few occasions. I found him to generally be a credible witness.

[56] Mr. Bonnefoy was likewise generally a credible witness. He became argumentative on cross-examination from time to time when his personal commitment to the CSF became evident. However, he displayed a professional, credible and objective demeanor through most of his evidence.

[57] Mr. Allison was argumentative and unco-operative while he was under cross-examination. He frequently refused to accede to minor propositions that he had previously agreed to. He tended to embellish evidence to make the CSF appear better, and was shown to have made misrepresentations in his communications with the Ministry. He displayed a passion for the CSF and an animosity to the Ministry that made him appear to lack objectivity. Overall, I did not find him to be a credible witness. Where Mr. Allison's account differs from the account of another witness, I usually prefer the response given by the other witness.

[58] The plaintiffs also called as witnesses 13 educators who work in CSF schools: Ms. Pascale Bernier, Ms. Fariba Daragahi, Ms. Marie-Christine Bellerose, Ms. Caroline Picard, Mr. Réjean Gosselin, Ms. Catherine Drapeau, Mr. Michel Tardif, Ms. Nicole Chagnon, Ms. Marie-Claude Gilbert, Ms. Annie Bédard, Ms. Johanne Asselin, Mr. Daniel Blais, and Ms. Nathalie Butters. Each of them provided current and historical descriptions of the amenities and use of space at the CSF schools where they worked, and various CSF programmes that they were involved with implementing. Where I have concerns about their reliability, I comment on it in the chapters that apply to the communities where they worked.

3. Confidentiality Order

[59] On March 25, 2014, on application by the defendants, I ordered that certain evidence in this trial is subject to public interest immunity and is banned from publication to preserve the confidentiality of Cabinet and Treasury Board documents (the "Confidentiality Order"). The Confidentiality Order endures. From time to time, I make reference to some conclusions that I reach based on the evidence subject to the Confidentiality Order. However, I do not discuss any of the details of their contents.

III. INTRODUCTION TO THE CAPITAL PLANNING PROCESS

[60] BC's education sector is co-managed by the Ministry and 60 elected school boards. Fifty-nine school boards each have responsibility for a specified school district territory, and serve the majority of students living in those regions.

[61] School boards operate autonomously from the Provincial government. They own schools and are responsible for delivering the education programme. Since a wave of deregulation in about 2002, school boards have managed their assets and their operations with a great deal of autonomy.

[62] Like majority school boards, the CSF is responsible for delivering education in British Columbia, but only to students in the Francophone linguistic minority. Its territory includes the entire province of British Columbia, and therefore overlaps with the territories of the 59 majority school districts. It, too, operates with considerable autonomy. The CSF owns some of its schools, and leases others. All of the schools the CSF owns and some of its leased schools operate in stand-alone buildings and house only students in the linguistic minority. They are known as "homogeneous" schools. Sometimes, the CSF leases and shares space for its programmes with a majority school board. These programmes are referred to as "heterogeneous" schools.

[63] While school boards exercise a great deal of autonomy, the Minister continues to play a role. The Province funds the education sector and the Minister sets policies and procedures for accessing funds. It also establishes Provincial norms and guidelines with which all school boards must comply.

[64] This case is concerned primarily with the Province's system for funding capital projects. For more than 25 years, the Ministry has decided what capital projects it will fund using some variation of a "Capital Planning Cycle": a regular cycle that involves school boards notifying the Ministry of their needs, the Ministry informing Treasury Board of capital needs across the education sector, Treasury

Board providing the Ministry with a Capital Envelope, and the Ministry and Treasury Board approving capital project funding.

[65] To properly appreciate the evidence in this case, it is necessary to have an understanding of those Capital Planning Cycles. Here, I outline the core concepts and processes underlying Capital Planning Cycles, focusing on the Capital Planning Cycle's components, policy trends that have influenced it, and the tools that allow it to function.

A. Components of the Capital Planning Cycle

[66] The Ministry and school boards share responsibility for managing capital assets. According to Mr. Miller, school boards are responsible for deciding when new schools are needed, and when they should be closed. School boards are also responsible for maintaining schools throughout their economic lives. The Ministry is responsible for allocating capital funding to school boards so they can achieve those ends. It does so using Capital Planning Cycles.

[67] From the Ministry's perspective, a Capital Planning Cycle begins with the Provincial budget. Flowing from the budget, the Ministry of Finance sends the Ministry capital budget instructions, which may give the Ministry some direction about how much capital funding it can allocate and what types of capital projects it should prioritize. The Ministry converts the instructions into "Capital Plan Instructions": a set of instructions that establishes the process for school districts to request capital project funding through that year's Capital Planning Cycle.

[68] From a school board's perspective, a Capital Planning Cycle begins with the Capital Plan Instructions. Based on the instructions, districts prepare a "Capital Plan Submission": a document in prescribed form prepared by school boards to notify the Ministry of the capital projects that the board wants to complete over the course of the next five years. When a district is looking to meet enrolment needs, it is likely to propose acquiring new sites and constructing new schools. It may also consider building additions, or renovating closed schools or non-school buildings that the

district already owns. These are known as “Expansion Projects”. In advance of an Expansion Project, a school board may request the acquisition of a site for that school, known as a “Site Acquisition Project”. If the school’s building asset base is aging, it is likely to request renovations or replacement of schools that are near the end of their economic lives. These are known as “Building Condition Projects”.

[69] Pursuant to the Capital Plan Instructions, school boards are always required to rank their project proposals by order of priority, then submit their Capital Plan Submissions to the Ministry using an electronic programme called “WebCaps”. For their highest-priority projects, districts are also expected to prepare and submit supporting feasibility work, in the form of a Project Information Report, or “PIR”.

[70] School boards submit their Capital Plan Submissions to the Capital Branch’s “Planning Officers” and “Regional Managers”, who review them and assess the relative need for capital projects. They use mapping tools to assess enrolment demand and the relative need for Expansion Projects across the Province. They review data about facility condition, the Facility Condition Index (“FCI”), to assess the relative need for Building Condition Projects.

[71] Using these tools, Ministry staff members assess each project individually, and communicate back to the district how the Ministry views the project using a document called an “Echo Report”. The Echo Report assigns a threshold ranking of high, medium or low, or as “NPIR” to indicate that the district did not submit feasibility work for that project. Further conversations with school board staff might result in some changes to the assessment of the projects in the Echo Reports.

[72] Based on their assessment of the need for the proposed projects, Ministry staff prepare a “Consolidated Capital Plan”: a document that sequentially ranks high-priority projects across the Province against one another by order of relative need. The plan includes a shortlist of projects that the Ministry is prepared to support. It also typically includes a document explaining the strategic need for capital projects across the education sector. This plan is then submitted to Treasury Board for approval.

[73] Based on the Consolidated Capital Plan, Treasury Board allocates the Ministry a “Capital Envelope”: a set of spending targets with associated strategies or priorities for the Ministry to focus on within those targets. In that way, Treasury Board effectively approves all or part of the Ministry’s Consolidated Capital Plan. For example, Treasury Board may direct the Ministry to move ahead with a certain number of the highest-priority Expansion Projects in the Consolidated Capital Plan, up to a certain dollar value.

[74] Then, it is left to the Ministry to notify school boards what projects have been supported. Once a project is supported, the Ministry and the school board work together to create a project definition report, or “PDR”, based on the PIR. The PDR is more detailed feasibility work that finalizes the scope, strategies and budget for the capital project. Once the PDR is complete, the Ministry submits the project to Treasury Board for final approval. Once Treasury Board approves the project, the PDR forms the basis of a “Project Agreement”, which acts as a contract between the Ministry and the school board. The school board then manages the project through its construction in accordance with the Project Agreement.

B. Policy Trends Influencing the Capital Planning Cycle

[75] While the steps in the Capital Planning Cycle have remained relatively constant, the frequency and manner in which they occur have changed with time to align with various policy trends. Here, I explain three of the most important ones: demographics, fiscal trends and Capital Drivers.

1. Demographic Trends

[76] According to Mr. Miller, demographics have historically had a significant impact on Ministry planning.

[77] When Mr. Miller first joined the Ministry in 1990, school districts had experienced stable or declining enrolment for about 10 years. In 1991, enrolment began to increase dramatically. In 1992/93, 17,000 new students entered the school system in one year. This trend continued until about 1998, with 8,000 to 10,000

students entering the system in many years. Between 1990 and 1998, about 85,000 to 90,000 students entered the education system. Enrolment peaked at about 605,000 to 610,000 students in about 1998.

[78] Since 1998, enrolment across the education sector has decreased significantly. As of the 2014/15 school year, there were about 525,000 students in the education system: about 80,000 fewer students than were in the education system at its peak in 1998. The education system has therefore lost as many students in the past 15 years as it gained in the first eight years of enrolment growth.

[79] The enrolment decline has not been uniform across the province. Mr. Miller explained that as of his February 2012 discovery, 55 school districts were experiencing declining enrolment. Five districts had growing enrolment. SD36-Surrey, for example, was growing by 1,500 to 2,500 students per year, and expected to build several elementary schools annually for several years going forward. Other school districts in the Lower Mainland and Fraser Valley regions of the Province had stable or growing enrolment year-over-year. There was also some growth in Northern British Columbia, driven by oil and gas development. The CSF, too, was and continues to be a growing school district.

[80] According to Mr. Miller, for some time, “BC Stats”, the Province’s central statistical agency, has projected that enrolment in BC schools would begin to increase beginning in 2015. Mr. Michael LeBrun, the Ministry’s primary point of contact with BC Stats, testified in 2015 that projections now forecast enrolment growth of a lesser magnitude, and beginning a few years later.

2. Fiscal Trends and the Regularity of Capital Planning Cycles

[81] While Capital Planning Cycles occurred annually for many years, it has become less regular in recent years.

[82] In 1990, when Mr. Miller first arrived at the Ministry, the Ministry’s capital spending was about \$25 million to \$125 million per year. As enrolment began to

increase, the Ministry began to receive large injections of capital funds. In 1991/92, the Ministry's Capital Envelope was about \$650 million.

[83] As enrolment began to increase, Capital Planning Cycles proceeded annually, with the Ministry issuing Capital Plan Instructions in the spring, school districts finalizing their Capital Plan Submissions in the summer and fall, and the Province announcing new projects early the following year.

[84] Mr. Miller confirmed that between about 1992 and 2002 the Province provided the Ministry with funding of almost \$4 billion for school construction: an investment in constructing 104 new schools and 473 additions, and replacing and renovating 102 older buildings. That funding provided 136,650 new spaces for students. About one quarter of that funding (\$1 billion) was spent on maintaining existing buildings, undertaking health and safety improvements, improving access for disabled persons, funding capital losses through self-insurance and purchasing school buses and portable classrooms.

[85] The Provincial Government changed in 2002/03. That year, Mr. Miller explained, the Ministry did not request Capital Plan Submissions from school districts. In 2003/04, the Province directed the Ministry to change its process such that capital projects would be approved three years prior to the planned construction start date. The three-year Capital Planning Cycles continued until 2005/06, at which point there were no further capital project approvals for Expansion or Building Condition Projects until the fall of 2011. In most of those years, the Ministry asked school boards to prepare and submit Capital Plan Submissions, although the Ministry knew it was unlikely that it would receive Capital Envelopes for Expansion and Building Condition Projects.

[86] Mr. Palmer confirmed that since about October 2011, more capital funding has been available than was available in the mid-2000s. The Ministry announced some Expansion Projects in 2011, some projects to improve seismic vulnerability in 2012 and 2013, and several discrete projects. Those projects were not approved through regular, annual Capital Planning Cycles.

3. Capital Drivers

[87] Capital envelopes are designed to address several types of “Capital Drivers”: the strategic priorities based on school district capital needs that drive the capital funding system. The Minister communicates to Treasury Board what he or she views as the most important Capital Drivers in a narrative appended to the Consolidated Capital Plan. Based on that, Treasury Board decides what Capital Drivers the Ministry should address using the Capital Envelope. With few exceptions, these policy objectives are crafted by Cabinet, and implemented by the Ministry, with no input from school boards.

[88] For many years, the most important Capital Drivers were Building Condition (the “Building Condition Driver”) and Expansion or Enrolment (the “Enrolment Driver”). The Province tended to prioritize health and safety Building Condition Projects, then Expansion Projects, followed by Building Condition Projects to address school buildings that had reached the end of their economic lives.

[89] In addition to addressing Expansion and Building Condition needs, in more recent years Treasury Board has targeted Capital Envelopes to other discrete Capital Drivers. In the late 1990s and early 2000s, the Province received Capital Envelopes targeted to Expansion Projects that would reduce the number of portables in the education system.

[90] Since 2004, the most significant Capital Driver has been seismic vulnerability. Beginning in about 2004 the Ministry undertook seismic risk assessments of schools in seismic zones, and identified about 183 schools that presented a high or moderate seismic risk. The high-risk projects are ranked as H1, H2 or H3 depending on their level of risk, with H1 indicating the highest-risk buildings.

[91] The Ministry is currently embarking on a plan to retrofit all the H1 projects in the Province. While districts are meant to request seismic projects in their Capital

Plan Submissions, the Province sometimes supports projects for H1 schools where the school board has not requested the project.

[92] The Ministry is very concerned with ensuring that seismic projects are limited to work intended to retrofit the building to mitigate seismic risk. The Ministry requires special feasibility work (a Seismic PIR) and uses an expert panel to ensure that seismic projects are not used for wholesale school building renewal. However, on rare occasions where seismic remediation is expensive and it is cost-effective over the lifecycle of an aging building, the Ministry may support a school board's request for a full replacement as a seismic project.

[93] The Province also prepared Capital Envelopes in 2010 to create space for instructing all Kindergarten students on a full-time basis. Prior to 2011/12, most students attended Kindergarten on a part time basis. When the Ministry introduced full-day Kindergarten in 2011/12, the Ministry needed to double the number of Kindergarten classrooms in the Province. Ministry staff worked with school districts to identify surplus classrooms. That work suggested school districts required space for 650 additional students. The Ministry worked with a \$144 million Capital Envelope to renovate buildings and to build modular classrooms for full-day Kindergarten.

C. Tools in the Capital Planning Cycle

[94] Over the course of a Capital Planning Cycle, the Ministry and school districts use a number of tools. Below, I highlight the most important tools: the Capital Plan Instructions and Unit Rates; Area Standards; Feasibility Studies; the PIR, PDR and Project Agreement; the Space Rank Formula and FCI Scores; and threshold rankings and the Echo Report.

1. Capital Plan Instructions, Unit Rates and Area Standards

[95] The Capital Plan Instructions establish the Ministry's capital planning policy for a given year. Those instructions explain to the 60 school boards what information they must provide to the Ministry in their Capital Plan Submissions. The

Ministry has provided districts with Capital Plan Instructions every year since at least 2002/03, with the exception of 2011/12.

[96] The Capital Plan Instructions include a compendium of Unit Rates, which the Ministry has used since about 1988. The Unit Rates establish a cost standard in dollars per square metre that applies to capital projects. In that way, they establish uniform budgets for capital projects to ensure equitable school quality from district to district. School boards cannot build schools that exceed the budget established by the Unit Rates.

[97] Mr. Miller explained that the Unit Rates are based on the cost of building a prototype model school. The Ministry determines the cost per square metre of building each amenity in the prototype school if it were to be built in Vancouver. The Ministry then adjusts the base cost to reflect the cost of building in the geographic region where the project is proposed. The Ministry updates the Unit Rates every five to seven years.

[98] The Capital Plan Instructions also append a set of "Area Standards". The Area Standards specify the size of building and amenities that can be built for a given capacity of students. There are Area Standards specific to each type of school district building: elementary, middle and secondary schools; maintenance facilities; board offices and sites. Mr. Miller acknowledged the Area Standards, like Unit Rates, are designed to ensure building size equity across all districts.

[99] For school buildings, the Area Standards establish a size allocation for various spaces within a school, such as a library or gymnasium, as well as the building's overall envelope. School districts have some flexibility, within reasonable limits, to build slightly more or less of a certain type of space so long as the school does not exceed the total space allocation established by the Area Standards. School boards use the Area Standards to develop a budget to support their capital request. This informs the Project Agreement.

2. Feasibility Studies, the PIR, the PDR and the Project Agreement

[100] Beginning in about 2002, Government developed an interest in ensuring that school boards support their proposed capital projects using a business case analysis. The Ministry therefore requires school boards to present feasibility work to show that a proposed project is necessary and cost efficient.

[101] To that end, since about 2009/10, school boards have been required to submit PIRs in support of their highest-priority capital project requests. Most school boards hire outside contractors to prepare their PIRs. Beginning in the summer of 2013, the CSF prepared many PIRs in-house (the “In-House PIRs”).

[102] A PIR must identify options for responding to an identified need, and delineate the relative cost of each option. The PIR recommends the option a school board wants to pursue. While the Ministry may disagree with a recommendation, the PIR is nevertheless important to assist the Ministry to confirm the school board’s request and ensure it is justified.

[103] If the project is supported, it goes through a more detailed feasibility analysis resulting in a PDR. Mr. Miller explained that after the Ministry announces support in principle for a capital project, the Minister will be interested in arriving at the most cost-effective option for responding to the school board’s need. That may differ from the recommendation in the PIR. The Ministry and the school board therefore negotiate to delineate the best option for responding to the need, as well as the appropriate capacity and scope of a capital project.

[104] According to Mr. Miller, the PDR identifies options, chooses the appropriate response, and establishes the budget for the project. It also establishes the timeline for completing the project, outlines how and when money will flow, stipulates the size of the school in light of the Area Standards, and lists identified risks with a mitigation plan.

[105] Mr. Miller advised that the PDR then informs a Project Agreement. The Project Agreement is a contract between a school board and the Minister on behalf of the Province. It sets out the approved scope and budget for the project, and identifies the sources of funding for the project.

[106] Once the Project Agreement is in place, the Ministry provides the school board with a Certificate of Approval that it uses in a manner similar to a line of credit. The funds are only drawn once a contractor invoices the school board for a service.

3. Space Rank and FCI Scores

[107] Mr. Miller advised that school boards often try to lobby the Ministry for capital projects. To mitigate the politicization of the Capital Planning Cycles, the Ministry prioritizes projects using tools designed to ensure that the process is rational and fair: the Space Rank Formula and the FCI Score.

[108] The “Space Rank Formula” is designed to assist the Ministry to analyze and rank the relative need for Expansion Projects. The formula looks at current and projected enrolment and compares that to the capacity in schools proximate to the proposed project. The Ministry’s goal is to ensure that enrolment warrants the construction of more student spaces in the area.

[109] The Ministry assesses the relative need for Building Condition Projects using the FCI score. The FCI is expressed as a ratio of the value of a building’s deficiencies against its replacement value. As the FCI score approaches 1, the building is reaching the end of its economic life. As it approaches zero, the building is fairly new. The Ministry currently maintains a database with the FCI score for every school and administrative facility in British Columbia, which it uses to determine what Building Condition Projects will go forward.

4. Threshold Ministry Rankings and the Echo Report

[110] On receiving Capital Plan Submissions from school boards, Ministry staff perform a threshold ranking of projects, identifying them as low, medium or high priority projects, or as NPIR to indicate that no PIR was prepared for a project. The

Ministry assigns an Expansion Project a high, medium or low threshold priority based on the extent to which enrolment exceeds capacity three years into the future. Expansion Projects are ranked as a high priority where elementary enrolment will be at least 50 students above existing capacity, or where a secondary enrolment will be 75 students over capacity.

[111] Building Condition Projects are given a threshold ranking based on their FCI score. A Building Condition Project receives a high threshold ranking where it has an FCI score greater than 0.6, meaning that 60% of the economic life of the school has been depleted.

[112] In most instances, only projects that have a high threshold ranking move on for further consideration.

[113] Since PIRs became a requirement in 2009/10, if a school district does not prepare a PIR for a proposed project, the Ministry usually will not rank the project as high, medium or low. Without a PIR, the Ministry considers that it has insufficient information to rank the project, and assigns it a threshold ranking of NPIR. In most instances, a project with a threshold ranking of NPIR does not move forward for further consideration.

[114] After performing its threshold rankings, the Ministry sends school boards an Echo Report: a document that reports back to school boards the list of proposed projects the Ministry received, and confirms the school board's prioritization and the Ministry's threshold ranking for projects. Upon seeing in an Echo Report that the Ministry does not give a project a high threshold ranking, a school board may try to persuade the Ministry otherwise. If the school board is successful, the Ministry may update the information and send a new Echo Report.

IV. INTRODUCTION TO PART 1: ANALYTICAL FRAMEWORK

[115] The first part of these reasons defines the legal and factual framework that informs the balance of the decision. I begin by outlining the purpose and background of s. 23, as well as the pertinent factual context in British Columbia

(Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia). I then consider the jurisdictional boundaries at play and the respective roles of the Province and the CSF (Chapter VI, The Respective Roles of the Province and the CSF). From there, I turn to the key steps in the section 23 analysis: calculating the number of children (Chapter VII, The Number of Children), determining what facilities that number is entitled to (Chapter VIII, Entitlement), considering section 1 justification (Chapter IX, Justification) and crafting an appropriate remedy (Chapter X, Remedies).

V. THE REMEDIAL PURPOSE OF S. 23 AND ASSIMILATION IN BRITISH COLUMBIA

[116] Like other provisions of the *Charter*, s. 23 is to be interpreted remedially and purposively. This Court must be alive to the particular background and context in British Columbia: the history of Francophone education and the rate of assimilation. Below, I summarize the legal principles concerning s. 23's purpose before discussing the British Columbia context, and the role that schools play in enhancing the Vitality of the French language and culture.

A. Interpretive Principles

[117] The parties generally agree about the purpose of s. 23 and its interpretive principles. However, they emphasize different aspects of the jurisprudence.

1. Purpose

[118] As I see it, the line of cases that have considered the purpose of s. 23 emphasizes its important goal of protecting Canada's strength and unity by preserving its official languages and their cultures.

[119] In *Re Education Act (Ont.) and Minority Language Rights* (1984), 47 O.R. (2d) 1 (C.A.) [Ontario Education Act Reference], the Ontario Court of Appeal set out at length the historical background of s. 23. The Court opined that s. 23 is aimed at preserving the future strength and unity of the country. To that end, the section

seeks to preserve the minority language and thus the culture of the minority by providing a right to minority language education (at 28):

From the historical background set out earlier, it is possible to draw certain conclusions as to the nature of the problem which s. 23 of the Charter was designed to ameliorate. Since 1867, the French and English languages have had official status in Canada. The Charter has recognized bilingualism. Its provisions apply to both anglophones and francophones wherever they may reside. No doubt with a view to the future strength and unity of the country, it has made provision for minority language education rights. In each province throughout the country, the members of one or other of the official language groups are now and probably always will be in the minority.

Prior to the passage of the Charter, the necessity of preserving the minority language and thus the culture of the minority by educational rights had been recognized. The Royal Commission on Bilingualism and Biculturalism stressed this principle. It has been observed that the Premiers' Conferences held in 1977 and 1978 unanimously recognized and stressed this concept. Section 23 of the Charter has given effect to this principle and made it part of the "supreme law of the land".

[Emphasis added.]

[120] The Supreme Court of Canada elaborated on the purpose of s. 23 in *Mahe*, the seminal case on the interpretation of s. 23. Chief Justice Dickson, writing for the Court, explained that s. 23 seeks to preserve and promote Canada's two official languages, as well as their respective cultures, by allowing each language to flourish in those provinces where it is not spoken by the majority of the population (at 362). Chief Justice Dickson emphasized his reference to minority culture, stressing that a broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. He explained that minority schools promote and preserve minority language and culture by providing community centres where members of the minority can meet, and facilities that can be used to express culture (at 362-363).

[121] The Court in *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201 [*Solski*], emphasized the importance of s. 23 to the broader protection of minority rights noted to be a constitutional principle in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Thus, the Court found that the provision promotes robust and vital minority language communities that are essential for Canada to

flourish as a bilingual country. Section 23 reflects the essential role played by French and English in Canada's contemporary life, and the need for both language communities. To that end, the Court stated that education rights are a requisite tool to achieving linguistic and cultural Vitality, and thus "form the cornerstone of minority language rights protection" (at paras. 2-3; 6-7).

[122] In *Association des Parents- SCC*, Madam Justice Karakatsanis summarized the purposes underlying s. 23 at paras. 25-27. She, too, emphasized the role that s. 23 plays in enshrining Canada's commitment to bilingualism and biculturalism, setting Canada apart among nations. She confirmed that s. 23 is crucial to maintaining the partnership between Canada's two official language groups. She emphasized that s. 23 goes beyond ensuring language rights, and ensures the preservation of the culture associated with the minority language.

[123] I take from the cases the following purpose of s. 23. The right to minority language education in s. 23 is designed to preserve and promote Canada's two official languages, and thus the culture associated with those languages, so that they may flourish, so far as possible, in those regions where the language group is in the minority. By promoting the development of robust minority language communities through minority language education, s. 23 is designed to enhance our country's bilingualism and biculturalism, and maintain the unique partnership between language groups that sets our country apart among nations.

2. Interpretive Principles

[124] The plaintiffs urge the Court to adopt a liberal and purposive interpretation of s. 23 that will encourage the flourishing and preservation of the French-language minority in the province. The plaintiffs also highlight the remedial purpose of s. 23, suggesting that its aim is to halt the erosion of the minority language and actively promote the flourishing of both language groups.

[125] The defendants agree that s. 23 is a remedial provision. However, in their submission, that is not the sole consideration. The defendants emphasize that s. 23

reflects a political compromise. In that sense, they say that the rights in s. 23 are not absolute, and necessarily involve a balancing of interests.

[126] In *Reference re Public Schools Act (Man.)*, s. 79(3), (4), (7), [1993] 1 S.C.R. 839 [*Manitoba Schools Reference*], the Court proposed a series of principles for interpreting s. 23. First, courts should interpret s. 23 rights purposively. This means that the interpretation of s. 23 should be guided by “that which will most effectively encourage the flourishing and preservation of the French-language minority in the province.” It should also be construed remedially to recognize the previous unredressed injustices that required the entrenchment of protection for minority language rights (at 850). A purposive interpretation may also require that different interpretive approaches be taken in different jurisdictions, to be sensitive to the background context, or the “unique blend of linguistic dynamics that have developed in each province” (at 851).

[127] The remedial aspect of s. 23 is important. In *Mahe*, Dickson C.J.C. stressed that s. 23 seeks to remedy an existing problem in Canada by changing the status quo. In particular, s. 23 was designed to correct the progressive erosion of minority official language groups, and to create an equal partnership between the two languages in the context of education (at 363-364). See also *Association des Parents- SCC* at para. 25, and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 27.

[128] In *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, the Court provided further guidance concerning s. 23’s remedial aspect. The Court explained that since s. 23 is remedial, courts must consider the historic and social context of the situation to be redressed, including reasons why an education system did not respond to the actual needs of official language minorities in 1982 and at the time of the decision. Courts must also take into account the importance of language and culture in instruction and the importance of official language minority schools to the development of the official language minority community (at para. 27).

[129] The focus on the social context and history was emphasized again in *Solski*. There, the Court averted to the sensitive nature of minority language rights, and opined that courts considering language rights must reconcile divergent interests and priorities, while being sensitive to the future of each language community. The Court noted that because of this, the backdrop to the interpretation of language rights would necessarily be comprised of social context, demographics and history (at para. 5).

[130] Despite the Court's focus on a remedial interpretation, some decisions have suggested that s. 23 should be interpreted restrictively. In *Manitoba Schools Reference*, the Court explained that the nature of language rights requires courts to exercise interpretive restraint. The Court observed that language rights are founded on political compromise. Other *Charter* rights are rooted in principle, and are thus more seminal and broad. Accordingly, the Court suggested that "courts should pause" before acting as an instrument of change with respect to language rights, and approach those rights with a greater degree of restraint than they would when construing legal rights (at 851-852).

[131] However, the Supreme Court of Canada appears to have moved away from that view. In *R. v. Beaulac*, [1999] 1 S.C.R. 768, the Court observed that some of the legal rights, particularly ss. 7 and 15 of the *Charter*, also resulted from political compromise. Thus, the Court stated "that the existence of a political compromise is without consequence with regard to the scope of language rights" (at para. 24). The Court emphasized that language rights must be interpreted purposively in all cases, consistent with the preservation and development of official language communities in Canada (at para. 25).

[132] The cases show that courts must seek an interpretation of s. 23 that is remedial and alive to background context. The interpretation of s. 23 should encourage the flourishing and preservation of minority language groups and their culture, bearing in mind the historic and social context of the situation to be redressed. The context includes British Columbia's social context, demographics

and history, and the reasons why an education system does or does not respond to the needs of official language minorities.

[133] Despite initial judicial comments to the contrary, s. 23 should not be interpreted restrictively because of its basis in political compromise. However, because the interpretation of s. 23 is remedial and contextual, as suggested in *Solski*, it will inevitably involve some balancing of interests, and sensitivity to the unique background and situation of the minority language group in each province.

B. The British Columbia Context

[134] Given that s. 23 is to be interpreted purposively, remedially and contextually, the analysis of the plaintiffs' claims must take into account the history and status of the French language and culture in British Columbia. As suggested in *Arsenault-Cameron* at para. 27, it must also be alive to the status of the minority language education system and the response to rightsholders' needs, both in 1982 and at the time of this decision.

[135] The parties tendered evidence concerning the history of British Columbia's Francophone community and minority language education. In this section, I review that evidence and draw some conclusions about the context and the need for remediation in British Columbia. I will take those conclusions into account when interpreting s. 23 throughout this decision. In later chapters, I consider the history and context specific to each community.

1. History

a) Historic Francophone Presence in British Columbia

[136] The Court heard from an expert, Dr. Nicolas Kenny, about the history of Francophones and French-language education in British Columbia. Pursuant to the Document Agreement reached by the parties, the contents of his expert report are admissible for truth to the extent that he recites events that are said by him to have occurred prior to the creation of the CSF.

[137] Dr. Kenny is an assistant professor and historian of French Canada in the Department of History at Simon Fraser University. He has a Ph.D. in Canadian history, and has taught and conducted research with respect to the history of the French-speaking community in British Columbia. The plaintiffs retained Dr. Kenny to provide an account and narrative of the history of the use and status of French in British Columbia, with an emphasis on the communities in the claim.

[138] Dr. Kenny explained that Francophones were involved in the earliest colonisation of British Columbia, and have continued to migrate to and settle in the Province ever since. He noted there was a strong Francophone presence among the European navigators who originally surveyed North America's west coast in the late 1700s and among those involved in fur trading and missionary work in the early 1800s to the 1850s. According to Dr. Kenny, in the early 1800s to the 1850s, French was the most widely spoken non-aboriginal language in what is now British Columbia.

[139] The Francophone presence dwindled to a small minority in the region due to migration associated with the Fraser River gold rush of 1858. Moreover, Dr. Kenny observed the Francophone community in British Columbia has always lacked a geographically-defined core.

b) Francophone Education and The Programme Cadre de Français

[140] According to Dr. Kenny, prior to the development of public education, French was briefly a language of instruction in several missionary schools. It ceased to be used as a language of instruction as demand for English-language instruction grew. When a province-wide secular public school system was established 1872, those schools operated entirely in English, with French taught as an academic subject. The few minority language schools in the Province were Catholic religious institutions, and were not initially recognised by the provincial government. Theoretically, children enrolled in those schools could be fined for truancy. In

Dr. Kenny's view, the lack of recognition for independent schools prior to 1977 caused the absence of official minority language education in the Province.

[141] According to Dr. Kenny, in the early years of public education, there was little demand for French-language school courses. The 1970s, however, saw a dramatic increase in interest and enrolment in French instruction. French immersion programmes, first seen in BC in the late 1960s, expanded dramatically in the 1980s. Those programmes were designed for English-speaking students, and did not meet the needs of children from Francophone backgrounds.

[142] British Columbia's first minority language education programme, the Programme Cadre, began in 1978. It was a minority language programme that was implemented by majority school boards. The origins of that programme were described by Dr. Kenny as well as Dr. Ardanaz, who was involved in the development and implementation of the programme.

[143] The Court also heard from two FPFCEB officials who described the organization's endeavours in connection with the Programme Cadre. Ms. Martine Galibois-Barss, a section 23 rightsholder, was an early advocate for minority language education in British Columbia and served as president of the FPFCEB and a CSF trustee for many years. She became involved with the CSF at its inception, and retired in 2005. Mr. Marc Gignac, another s. 23 rightsholder, worked with the FPFCEB off and on from the 1980s until 2009.

[144] Dr. Kenny's research revealed that majority districts initially opened French-language Programme Cadre classrooms within existing majority-language schools where at least 10 children were enrolled in the programme. By the mid-to-late-1980s, majority boards had opened homogenous Programme Cadre schools in several areas. The curriculum in those schools mirrored the regular provincial curriculum, but instructed students in French and taught English rather than French as a second language.

[145] Dr. Kenny explained, however, that the Programme Cadre was imperfect. Non-Francophone students were permitted to enroll in Programme Cadre classes if no French immersion programme existed in the area. Some, like Ms. Galibois-Barss, believed this diluted the French character of the Programme Cadre. The classes also mixed students at different grade levels. There was no minority language secondary instruction in the province until 1987. The Programme Cadre also faced challenges recruiting competent teachers, dealing with political pressure and fighting a lack of control by parents.

[146] Dr. Ardanaz was hired by the Province to develop the Programme Cadre, which he did with the assistance of a team in Montreal. He acknowledged the programme was a breakthrough for a province outside Quebec.

[147] Dr. Ardanaz and his team developed the Programme Cadre curriculum by translating and adapting the English-language core programme from English to French, and developing French-language materials and textbooks. The only new programme they developed was a French language arts programme designed to target Francophones. They also adapted some aspects of the English-language curriculum to emphasize Francophone language and culture.

[148] After Dr. Ardanaz and his team developed the Programme Cadre curriculum, Dr. Ardanaz moved to BC and became the Executive Director of the programme.

[149] When Dr. Ardanaz arrived in British Columbia in 1978, the Programme Cadre had already been established and publicized by way of a Ministry Circular: Ministry of Education, *French Language Core Curriculum - Policy and Administrative Requirements* (Victoria: Ministry of Education, June 1978) (the “1978 Circular”). The 1978 Circular was repealed and replaced a number of times in the 1980s.

[150] Dr. Ardanaz was not involved in the creation of the 1978 Circular. As the circulars were repealed and replaced, from time to time, Dr. Ardanaz provided

feedback on them; typically he did so unilaterally. Dr. Ardanaz testified that in many instances, the circulars were amended to address his comments and concerns.

[151] The circulars usually indicated that the Programme Cadre was not a French immersion programme, and was designed to teach children of Francophone parents, not French as a second language. The 1978 Circular cautioned against diluting the Programme Cadre by admitting students that did not have reasonable competence in the French language. The requirement was relaxed in 1981, allowing admission of students that had previously been enrolled in French immersion if no immersion programme was available at the student's grade level.

[152] The 1978 Circular required 10 students to start a new Programme Cadre, with additional divisions to be added once enrolment exceeded 25 students. Later circulars specified that three teachers would be warranted once enrolment reached 45 students, and four teachers when enrolment reached 60 students.

[153] The 1978 Circular confirmed the Ministry would provide supplementary funds to school boards for the additional costs associated with the Programme Cadre. Those funds were not to be confused with costs associated with second language and immersion-type programmes. Later circulars clarified that school districts were not entitled to extra funding for transportation.

[154] In 1987, the 1978 Circular was amended to reflect s. 23 of the *Charter*. Enrolment in the Programme Cadre was limited to those persons who qualified for minority language education pursuant to s. 23. The Ministry offered that 10 students would warrant an elementary programme, and 15 students a secondary programme, subject to ministerial discretion to deviate from those numbers on application. The Programme Cadre was to be offered in separate facilities out of public funds "where numbers warrant". Districts would be required to assist rightsholder parents to form a committee to advise the board on the Programme Cadre.

c) The Creation of the CSF

i. The Minority Language Education Task Force

[155] Early on, Dr. Ardanaz observed problems with the implementation of the Programme Cadre. Dr. Ardanaz's experience was that school boards seemed confused about the difference between the Programme Cadre and French immersion programmes. Ms. Galibois-Barss explained that parents were concerned that the admission of French immersion students after 1981 diluted the quality of French spoken in the Programme Cadre.

[156] Dr. Ardanaz also developed concerns about the quality of French spoken by teachers and the location of and transportation services to schools housing the Programme Cadre. Ms. Galibois-Barss advised that programmes struggled with a lack of course offerings, control over the programme by the Francophone community, and low participation in the Programme Cadre by Francophone families.

[157] As the Programme Cadre grew, parents across the Province organized around common issues. What began as a telephone network developed into the Association des Parents de la Programme Cadre de Français, the precursor to the Association des parents Francophone de la Colombie Britannique, which became the FPFGB. For convenience, I refer to the group as the FPFGB throughout these reasons.

[158] Ms. Galibois-Barss became the President of the FPFGB. Parents were concerned about a number of issues with the Programme Cadre, including a lack of transportation, mixing Francophones and non-Francophones, and the quality of teaching, facilities, curriculum and material. In 1989, under her leadership, the FPFGB commenced a court action against the Province and the majority school boards in Delta and Vancouver, claiming a breach of s. 23 of the *Charter*.

[159] *Mahe* was decided by the Supreme Court of Canada in 1990. Shortly thereafter, the FPFGB agreed to stay its legal action under the condition that the Province create a task force to address the issues raised in the litigation. The

Province established the Minority Language Education Task Force (the “Task Force”) in 1990.

[160] The Terms of Reference for the Task Force were negotiated between the Province and the FPFCEB. The Task Force had the object of identifying how to best accommodate the educational rights of Francophones in British Columbia. To that end, the Task Force was to prepare a report to the Province by December 31, 1990, for changes to be implemented before September 1991.

[161] The Task Force was led by Mr. Edgar Gallant, and included representatives of teachers, administrators, Ministry officials and parents. It was not a formal representational body, and attempted to reach conclusions based on consensus rather than formal votes. Dr. Ardanaz and Ms. Galibois-Barss were members of the Task Force and sat on its committees.

[162] The Task Force was asked to “propose methods of providing French education in British Columbia consistent with the provisions of the *Charter of Rights and Freedoms* and taking into account the intent of the Government to implement the programme in a broad and generous way”. Beginning in June 1990, it met seven times over the course of one year, with an additional meeting related to personnel relations.

[163] The Court was taken through the minutes of the Task Force’s proceedings. The minutes show that many issues that arise in this claim were discussed by the Task Force. These issues include: majority boards’ willingness to transfer facilities to the minority; funding for transfers of school facilities and materials between districts; the role of the Ministry in inter-district negotiations and the delivery of minority language education; and how to identify and count students eligible to attend CSF schools for planning purposes.

[164] The Task Force also had several working groups that met separately and reported back to the Task Force as a whole. Those working groups were devoted to

Demographics (chaired by Dr. Ardanaz), Alternative Methods for Programme Delivery, and Financial Arrangements, respectively.

[165] The working groups likewise discussed issues that arise in this claim. The Demographics working group considered whether minority school boards should be allowed to admit non-rightsholders on a discretionary basis. It also considered the potential enrolment growth, projecting ultimate total growth to about 6,000 students province-wide. The working group on Alternative Methods for Programme Delivery discussed the methods by which minority school boards might acquire school facilities, and the advantages and disadvantages of shared school facilities as opposed to stand-alone schools. The working group on financial arrangements considered the costs associated with minority language education, including the costs of acquiring assets, renting as opposed to purchasing schools, and the extra costs of transportation.

[166] Following the Task Force and working group meetings, Mr. Gallant produced the final report, *Minority Language Education Task Force Report* (May 1991) (the “Task Force Report”). He prepared the report to reflect the consensus of the Task Force members. The Task Force Report acknowledges that the representatives were appointed as participants in their own rights, rather than representatives of the bodies that appointed them. Accordingly, the Task Force Report states that it does not necessarily reflect a commitment by the various organizations concerned to all the recommendations in the report.

[167] The Task Force Report is underpinned by the idea that minority language education plays a role in preventing the assimilation of the minority language. It does so by offering instruction in the language of the minority, providing community centres and promoting the culture of the minority.

[168] With respect to governance, the Task Force Report recommended the creation of three French-language school boards, which would take responsibility for the delivery of the Programme Cadre or its successor programme in a given territory. It also recommended changes at the Ministry level, including the creation

of a new Ministry unit dedicated solely to minority language education to assist with negotiating the transfer of facilities, developing curriculum, recruiting personnel and collecting data on minority language education.

[169] The Task Force Report communicated to the Ministry that there were about 45,000 Francophones living in British Columbia, with enrolment of about 2,000 students in the Programme Cadre. The Task Force informed the Ministry that it forecasted substantial enrolment growth, and recommended that some children of non-rightsholders be admissible to minority language schools on approval of an admissions committee: particularly the children of French-speaking immigrants.

[170] With respect to capital assets for the minority education system, the Task Force recommended that new minority school boards acquire the Programme Cadre school buildings, equipment and materials. Majority boards would receive equitable compensation, which would be negotiated by a tripartite committee including the Ministry and minority and majority school boards. The Task Force advised the Ministry that this would require significant capital costs, estimated to be about \$60,000 for each new school board to furnish and equip its assets. Later, there would be additional costs associated with the minority acquiring stand-alone schools where the numbers so warrant.

[171] The Task Force recommended stand-alone school facilities to act as cultural meeting points for the Francophone community, even where those schools might be small. However, the Task Force envisioned that leased facilities would continue to play a role, with the Task Force advising that it remained to be determined whether new minority language school boards would require new construction or rely on rented accommodation.

[172] The Task Force Report also addressed early childhood education programmes, while acknowledging it was outside the scope of the report. The Task Force recommended that minority boards have the capacity, where appropriate, to coordinate daycare and preschool programmes with school programmes to combat assimilation.

[173] The Task Force set July 1, 1993 as a target date for full implementation of the Task Force Report, which would require the Province to reach its policy decisions quickly. The Task Force also recommended that the Province pass enabling legislation as soon as possible, and in any event not later than the spring of 1992. To facilitate implementation, the Task Force recommended that a capital budget be prepared for the French-language programme by June 1993.

ii. 1991-1994: Government Response to the Task Force Report

[174] The Task Force Report was presented in May 1991 at an official tendering ceremony, and made public in February 1992. According to Ms. Galibois-Barss, as president of the FPFCEB, she continued to meet with representatives from the Province and the Ministry in connection with the report through May 1992.

[175] In or about May 1992, staff in Mr. Miller's department at the Ministry estimated the capital costs associated with implementing a minority language school system in British Columbia. Staff considered the Task Force had indicated that about 20,000 students would be eligible to attend minority language schools, and that it preferred stand-alone facilities. Ministry staff proposed that the capital costs be addressed using the same criteria as applied to capital planning for the majority, with the assumption that the Ministry's ongoing Capital Planning Cycles would meet the new system's enrolment needs within eight years.

[176] Based on the enrolment projections in the Task Force report, capital branch staff considered that the new system would require a total of 32 new permanent facilities at a cost of \$149.38 million, including \$57.25 million in land acquisition costs and \$92.13 million in construction costs. The system would require a further 25 portable classrooms at a cost of \$1.09 million and 136 school buses at a cost of \$8.16 million. Thus, it was anticipated that the total cost of implementing the new minority language education system would be approximately \$160 million over eight years.

[177] Following a broader public consultation, in August 1992, Ms. Galibois-Barss and Mr. Gignac attended confidential meetings with senior Ministry officials for two and a half days to discuss the plan for implementing minority language education. Mr. Gignac recalled that the Ministry favoured implementing a single, province-wide school board. The attendees discussed the facilities that would be required to implement the plan, including the Ministry's analysis of the anticipated costs based on the need for 32 new permanent facilities, as well as 25 portables and 136 school buses. The Ministry suggested that schools would move to stand-alone school facilities once they reached enrolment of 50 students.

[178] The evidence suggests that in November and December 1992, Minister of Education Anita Hagan recommended to Cabinet and Treasury Board announcing a single minority language school board for the Province, subject to receiving a guarantee of funding from the Federal Government. Once Federal support was guaranteed, the Ministry would approve negotiations for the transfer of existing schools to the minority school board. Government would also develop a process to force majority boards to surrender assets for compensation at an amount set by the Provincial government. Minister Hagan identified that the Ministry would require additional capital funding to pay for new facilities and negotiated transfers. While this document is signed by the Minister, it was not spoken to before the Court.

[179] Minister Hagan also advised Treasury Board of the need for additional operating and debt servicing costs over six years to create a provincial Francophone school board and to build and purchase facilities for Francophone students. She identified that the Ministry would require about \$60 million, about half of which could be recovered from the Federal government. This documentation was likewise not spoken to. It does not appear to relate to the costs of building 32 new stand-alone schools; it relates primarily to the costs of creating the new school system.

[180] The Court was also provided with a Treasury Board Briefing Note, which evaluated Minister Hagan's proposal. The Briefing Note considered the creation of a single minority school board to be reasonable. However, it identified uncertainty

about some of the Minister's assumptions: that 100% of the eligible Francophone students would enrol in the system; that the cost of minority education would be 50% higher than for the average student; and that a \$38 million capital programme would be appropriate.

[181] In December 1992, Hon. Glen Clark, Chair of Treasury Board, wrote to Minister Hagan and advised her that although Treasury Board approved the idea of a single school board, the Minister would be expected to provide data to support her assumptions. That document is signed by Minister Clark.

[182] On December 22, 1992, Ms. Galibois-Barss, Mr. Gignac and the FPFCEB received a news release that is consistent with Hon. Glen Clark's comments to Minister Hagan. The Ministry announced that it planned to establish a single minority language school district and board of trustees to govern minority language education in British Columbia by 1995, contingent on federal support. No reference is made to the future capital programme.

[183] Even so, there was no movement on the new school board through the spring and summer of 1993. Then, in the autumn of 1993, the Province moved away from its initial plan. When Ms. Galibois-Barss and Mr. Gignac met with Ministry officials in October through December 1993, Ministry officials proposed new models for delivering minority language education. The forefront draft governance model involved leaving majority school boards with the responsibility for delivering minority language education, subject to direction from district-level and provincial minority language advisory councils. The FPFCEB rejected that model due to the potential for conflict between the majority and minority groups.

[184] In February 1994, the Deputy Minister of Education proposed a new model that was similar to the framework for independent schools. The FPFCEB also rejected that concept.

[185] In March 1994, given the unsuccessful negotiations, the FPFCEB wrote to the Minister and confirmed its intent to resume its litigation strategy.

iii. Creation of the FEA

[186] The FPFCB officially resolved to resume litigation by way of a May 1, 1994, resolution.

[187] More than a year later, in July 1995, the Ministry issued a press release indicating it would create a Francophone Education Authority (“FEA”) to govern minority language education in the Lower Mainland and Lower Vancouver Island. The press release indicated that the FEA would employ a Chief Executive Officer to perform the combined role of school Superintendent and Secretary-Treasurer. In connection with the FEA’s capital assets, the Ministry wrote that the FEA would be expected to lease surplus space from school boards wherever possible, and that the Province would not provide capital funding to purchase or undertake capital construction for the new entity.

[188] The FEA was established by way of the *Francophone Education Regulation*, B.C. Reg. 475/95. Dr. Ardanaz’s evidence was that the FEA came into effect on November 2, 1995. Dr. Ardanaz served as its first Assistant Director General, and quickly moved into the role of CEO. Ms. Galibois-Barss was nominated and became a trustee for the FEA. Its jurisdiction was extended to include the entire province in 1998 or 1999.

[189] Pursuant to the *Francophone Education Regulation*, the FEA had the exclusive right and responsibility to provide a Francophone educational programme to eligible students resident in the area of its jurisdiction (s. 3-4).

[190] The *Francophone Education Regulation* gave the Minister the discretionary power to provide the FEA with a grant of its operating and maintenance costs, and for the delivery and support of Francophone programmes (s. 7(1)). On receiving the operating funds, the FEA was required to budget, spend and account for that money in accordance with further directions from the Minister (s. 7(3)).

[191] In connection with capital funding, the Minister also had a mandatory duty to provide the FEA with the Federal funding provided to the Province for capital

expenditures for Francophone education (s. 7(2)). However, the FEA was not given the power to acquire land for educational purposes. Instead, the FEA was given the power to enter into and dispose of leases for land (s. 11(1)). The FEA was also given a power to enter into agreements with municipalities, regional districts and school districts for the joint use of facilities (s. 11(2)). The FEA was limited to using only the Federal funding to pay for its leases, and was required to obtain the Minister's approval before leasing real property (s. 11(3), (4)).

iv. Previous Litigation

[192] Ms. Galibois-Barss explained that the FPFCB decided that it would continue to pursue its legal action despite the creation of the FEA. Mr. Gignac advised that the FPFCB was concerned with the FEA's lack of powers concerning capital and funding for minority language education. The Board of the FPFCB determined to proceed by way of a summary trial to save time and money.

[193] Ultimately, the FPFCB challenged the *Francophone Education Regulation* for being *ultra vires* the *School Act*, R.S.B.C. 1989, c. 61 [*Former School Act*]. In the alternative, the FPFCB argued that the regulation was unconstitutional on several bases: in not providing for mandatory funding for the FEA; by prohibiting the FEA from using provincial funds for capital expenditures; for not providing a dispute resolution mechanism to ensure the FEA would be able to obtain facilities and equipment; for being enacted through regulation rather than primary legislation; and/or by reason of government delay.

[194] Mr. Justice Vickers considered these issues in *Assn. des Parents Francophones (Colombie-Britannique) v. British Columbia* (1997), 27 B.C.L.R. (3d) 83 [Vickers #1].

[195] Mr. Justice Vickers began by considering whether the Francophone Education Regulation was *ultra vires* the *Former School Act*. He found the Francophone Education Regulation conflicted with provisions of the *Former School Act* that placed on "school boards" the duty to deliver educational programmes, and

imposed a duty on persons to attend programmes provided by “school boards” (at para. 10). The FEA, as a product of regulation, was not a “school board” within the meaning of the *Former School Act*. He found that he could not reconcile the differences without forcing an interpretation that violated specific provisions of the *Former School Act* (at para. 14). Thus, relying on *R. v. National Fish Co.*, [1931] Ex. C.R. 75 at 81, he concluded that the *Francophone Education Regulation* was *ultra vires* the *Former School Act* (at paras. 11, 17).

[196] Given the long history leading up to the litigation, Mr. Justice Vickers went on to comment on other issues raised by the regulatory regime. He began by considering the FPCB’s argument that the Minister was given a discretionary power to fund the FEA, but had a mandatory duty to fund the majority-language school boards. In light of the requirement for funding equivalence in *Mahe*, Vickers J. concluded that the funding provisions did not satisfy s. 23 of the *Charter* (at paras. 31-32).

[197] He then turned his attention to the challenge to the provisions prohibiting the FEA from using money provided by the Province for capital expenditures. Mr. Justice Vickers concluded that limiting the FEA’s access to capital funds while giving greater powers to the majority did not fulfill the Province’s constitutional obligations. He determined that the Province was clearly attempting to shift its constitutional responsibility by allowing the CSF to only use federal government money for capital expenditures (at para. 36). He suggested the denial was particularly problematic because the FEA was only allowed to lease property, unless federal funds were provided, while the majority could purchase as well as lease capital assets (at para. 37).

[198] In connection with the leasing requirements and the absence of a dispute resolution mechanism, Mr. Justice Vickers found difficulty with the absence of an opportunity for the minority to acquire land and improvements in its own name (at para. 38). He pointed out that the limitation on the form of tenure placed the FEA at the mercy of school boards unless there was some dispute resolution mechanism in

place. That, he said, did not afford the FEA the measure of management and control envisioned by s. 23 of the *Charter* (at para. 40).

[199] Next, Mr. Justice Vickers addressed the argument that the FEA ought to be established by primary legislation rather than regulation. Based on the numbers presented in the agreed statement of facts, he concluded that the numbers throughout the Lower Mainland and Southern Vancouver Island warranted the maximum level of management and control necessary to preserve language and culture in the proposed area (at para. 47). He pointed to statements in *Mahe* and the *Manitoba Schools Reference* which required legislatures to enact precise legislation (and if necessary, regulations) for minority language education (at paras. 45-46). He concluded that provincial legislation, not regulation, was necessary to provide a measure of security beyond a regulatory scheme. Thus, he concluded that the use of regulation rather than legislation did not meet the requirements of s. 23 (at paras. 48-49).

[200] Finally, Mr. Justice Vickers considered that it was unnecessary for him to comment on whether the Province's failure to act "without delay" breached the obligation to "offer, promote and encourage" the use of minority language services and facilities. He simply reiterated that the importance of the Province acting without delay to enact appropriate legislation (at paras. 50-51).

[201] With respect to remedy, Mr. Justice Vickers stressed the importance of allowing the government some freedom to create a comprehensive legislative scheme to meet the obligations imposed upon it by s. 23. To respect that freedom, he declared the *Francophone Education Regulation* was *ultra vires*. However, he also declared that the *Francophone Education Regulation* would remain in full force and effect pending the enactment of legislation by the Province giving effect to s. 23 of the *Charter*. He also declared that the numbers of children in the proposed area warranted the highest measure of management and control of education programmes and facilities contemplated by s. 23, and that s. 5 of the *Former School Act* did not meet the requirements of s. 23 of the *Charter* (at para. 53).

[202] In September 1998, Mr. Justice Vickers heard a second challenge, focused on whether amendments made in 1997 to the *Former School Act* met the obligations of the Province under s. 23 of the *Charter*. In *Assoc. des parents francophones (Colombie-Britannique) v. British Columbia* (1999), 61 B.C.L.R. (3d) 165 [*Vickers #2*], Mr. Justice Vickers explained that by that point, the FEA (which had been continued as the CSF) had entered into a series of agreements with majority-language school districts for the use of their facilities and for educational and administrative services. The CSF had also prepared a five-year Capital Plan Submission, and the Province had passed legislation that would extend the CSF's jurisdiction to the entire province by July 1999 (at paras. 10-15).

[203] However, the FPFCB remained dissatisfied with the legislative scheme. They sought declarations that s. 23 required the Province do a number of things (at para. 3):

- a. transfer, at no cost to the C.S.F., all existing stand-alone Francophone schools or their agreed upon replacements, to the C.S.F.;
- b. transfer to the C.S.F., proportionate ownership and equal co-management of all shared schools where there are not sufficient numbers to warrant stand-alone Francophone schools;
- c. enact provisions, either by legislation or regulation, to allow for the immediate transfers referred to in (a) and (b) above; and,
- d. enact provisions creating a dispute resolution mechanism to address any disputes that may arise in
 - i. implementation and operation of the transfers of assets,
 - ii. the co-management of shared assets; and
 - iii. lease negotiations of any facilities that are not transferred.

[204] Mr. Justice Vickers consolidated those complaints into three issues: whether legislation should provide for the transfer of schools and other assets between majority and minority school boards; what level of school and asset ownership, if any, the legislation should provide for in the case of shared facilities; and whether the legislation should provide a dispute resolution mechanism to resolve any impasse that might arise between the majority and minority boards concerning ownership, management and control of schools and other assets (at para. 28).

[205] The proceedings turned on s. 166.29 of the *School Act*, which allowed the CSF to enter into agreements for the transfer of assets and for the construction, maintenance and use of facilities with the prior approval of the Minister. Before Mr. Justice Vickers, the FPFCB argued that s. 166.29 did not create a precise legislative scheme, as it left the transfer of assets to negotiation between the parties. The plaintiffs further pressed that using the regular Capital Planning Cycles to address the CSF's capital needs would not address the CSF's immediate need to acquire assets. The lack of a precise scheme, in the FPFCB's submission, left the CSF at the mercy of majority boards when seeking assets from majority boards, which might result in the CSF paying high rents, lacking control over shared facilities, and suffering from impermanent school programmes. They also expressed concern that the arrangement would always leave Francophone students with second-rate facilities.

[206] In response, the Province argued that the need for a "precise legislative scheme" did not require the Province to put every detail into legislation. It pressed its need for the widest discretion in how to establish a body to exercise management and control over minority language instruction and facilities (at para. 33).

[207] Mr. Justice Vickers conceded that s. 166.29 was not reassuring to Francophone parents (at para. 37). Nevertheless, he concluded that the provision could be interpreted as placing an affirmative obligation on government to ensure an appropriate conclusion to agreements negotiated between a majority board and the CSF (at paras. 39-42). He acknowledged that it was possible that in the future the Minister might exercise his discretion in a manner that would infringe s. 23. However, he held that possibility was incidental to the purpose of the discretion, which is to ensure that all eligible students receive minority language education (at para. 44).

[208] With reference to the requisite level of ownership, Vickers J. confirmed that to prevent assimilation, standalone schools should be provided where the numbers warrant. Where the numbers dictate a shared facility, every effort should be made to

provide sufficient management and control of its programme to the CSF (at para. 45). Nevertheless, he was satisfied that ownership was not the only way to provide for management and control of a school programme (at para. 46). Thus, he concluded that failure to provide for ownership of school property, in whole or in part, did not make the legislation flawed. He pointed out that in some circumstances, flexibility in ownership might better serve the parties (at para. 47).

[209] In connection with the dispute resolution mechanism issue, Vickers J. found that although the legislative scheme was compatible with the *Charter*, he was concerned that it lacked a process to ensure management and control of the Francophone programme by the CSF without constant reference to majority school boards. In particular, he noted that the CSF's ability to carry out its mandate was hampered by its need to bargain for space on a continuing basis (at para. 48). He noted that in other contexts, particularly labour relations, there were legislative enactments in place to provide a process to achieve legislative objectives (at para. 49). He noted that the legislation left the CSF to negotiate on its own in negotiations, subject to an offer by the Province to "call us if you need us." (at paras. 52, 55).

[210] To ensure active participation by the Province, Vickers J. determined that the *Charter* required some provision requiring the parties to a dispute (the CSF, the majority board and Ministry officials) to engage in a dispute resolution process. The Ministry could not sit back and decline to become involved unless invited (at para. 57). He concluded with an order requiring the Province to introduce that form of dispute resolution process.

v. The CSF's Capital Acquisitions

[211] Against that backdrop, the CSF began acquiring school facilities. By November 1999, the CSF operated 47 leased, shared or owned facilities throughout the Province. The CSF owned five of those facilities: École Élémentaire La Vérendrye (Chilliwack), École Victor-Brodeur (Victoria), École André-Piolat (North Vancouver), École Élémentaire Deux-Rives (Mission) and École L'Anse-au-Sable

(Kelowna). All those schools were assets that had been transferred to the CSF from a majority board for compensation provided by the Province.

[212] Of those owned school facilities, only École Élémentaire Deux-Rives was subject to renovations at the time of the transfer. The CSF received an almost immediate replacement of École André-Piolat. École Victor-Brodeur and École L'Anse-au-Sable were renovated shortly after the transfer. Both the latter were replaced within a few years: École Victor-Brodeur on the same site, and École L'Anse-au-Sable on a different site.

[213] In addition to those five facilities, the CSF occupied six leased homogeneous facilities. In the remaining 36 programmes, the CSF operated in leased heterogeneous facilities. The Province has consistently paid the CSF's leases.

[214] Since then, the CSF has continued to grow its programmes. In 2000 the CSF acquired a surplus majority school in Port Coquitlam. In the early 2000s, the CSF acquired a new site and built a new school in Surrey. In 2003 or 2004, the CSF acquired surplus majority schools in Prince George and Powell River. In about 2004, the CSF also acquired a surplus school from SD39-Vancouver. In 2005, the CSF acquired a surplus majority school in Nanaimo. In 2007, it acquired and replaced a surplus majority school in Campbell River. In 2009, the CSF acquired a second surplus school from SD39-Vancouver on the east side of Vancouver. It acquired and replaced another surplus majority school in Comox in 2009. More recently, in about 2013 or 2014, the CSF acquired a surplus majority school in Rossland.

[215] In 2014/15, 18 of the CSF's programmes (12 elementary and 6 secondary) operated entirely in leased school facilities: École Élémentaire des Navigateurs (Richmond, homogeneous), École Élémentaire du Pacifique (Sechelt, homogeneous on a heterogeneous campus), École Élémentaire La Passerelle (Whistler, heterogeneous), École Élémentaire de la Vallée de Pemberton (Pemberton, heterogeneous), École Élémentaire Les Aiglons (Squamish, homogeneous), École

Élémentaire Entre-lacs (Penticton, homogeneous), École Élémentaire des Sentiers-Alpins (Nelson, homogeneous), École élémentaire des Grands-Cèdres (Port Alberni, unknown make-up), École élémentaire Collines-d'Or (Kamloops, homogeneous), École élémentaire Jack-Cook (Terrace, homogeneous), École élémentaire Sophie-Morigeau (Fernie, heterogeneous); École élémentaire des Glaciers (Revelstoke, unknown make-up), the Nanaimo Francophone Secondary Programme (heterogeneous), the Penticton Francophone Secondary Programme (heterogeneous), and the Sechelt Francophone Secondary Programme (heterogeneous), the Powell River Francophone Secondary Programme (heterogeneous), the Campbell River Francophone Secondary Programme (heterogeneous), and the Prince George Francophone Secondary Programme (heterogeneous).

[216] In addition to those programmes, the CSF also leases two additional school facilities that serve as annexes to École Victor-Brodeur (Victoria): the Lampson Annex and the Sundance Annex.

d) Discussion and Findings of Fact

[217] Francophones have a long presence in British Columbia. From the beginning, they have been immigrants: European navigators, fur traders and missionaries. They were among the first non-aboriginal settlers in British Columbia. French was the most widely spoken non-aboriginal language in the first half the 1800s.

[218] However, the dominance of French in British Columbia was short-lived. With the Fraser River gold rush in 1858, and the rise of public English-language education in the 1870s, French dominance dwindled, and Francophones became a small minority. This history suggests the need for remediation in British Columbia.

[219] British Columbia, though, was proactive about minority language education before the promulgation of the *Charter* in 1982. It implemented a secular minority language education programme, the Programme Cadre, in 1978. That programme

was not perfect. Due to admissions practices and staff recruitment problems, the level and quality of French spoken in classrooms was inadequate. The programme also had low enrolment, few course offerings and was managed by majority school boards rather than French-language communities.

[220] While minority language education was implemented early in British Columbia, it did not take its current form until 1999. Faced with the *Mahe* decision and litigation by the FPFCB, in 1990 the Province established the Minority Language Education Task Force to examine the best means of providing Francophone education in British Columbia. The Task Force submitted its response to Government in 1991, and recommended full implementation by July 1993.

[221] In the plaintiffs' submission, the conclusions and recommendations in the Task Force Report foreshadow many of the claims in this litigation. They note that the Task Force Report recognized that new school districts would need to acquire an asset base. They also note that the Ministry was given estimates about how many students would be likely to enrol in minority language education programmes.

[222] In the plaintiffs' submission, the Province did not allocate sufficient funding to implement the Task Force's recommendations. They suggest the Minister knew the magnitude of the capital funding required to implement the recommendations of the Task Force and s. 23 since at least 1992. In support of this, the plaintiffs rely on the recommendations in the Task Force Report, as well as the Ministry's own analysis of capital costs demonstrated in its internal briefing notes. The plaintiffs also note the Province was aware of this issue at a time when it was investing significantly in capital projects in education. The plaintiffs say that despite this, no minority language schools were constructed in British Columbia until around 2000.

[223] Relying on the briefing notes, the plaintiffs also point out that in 1992, Ministry staff foresaw that there could be issues persuading majority boards to provide a minority language school board with facilities. They note that the Minister considered that it might be necessary to develop a process to require majority

boards to surrender assets to the minority school board, with or without compensation. The plaintiffs note that no such process was ever put in place.

[224] The defendants' view is that it is unfair to say that the Province knew what the CSF's capital costs would be and determined that it would be too expensive to address them. The defendants point out that although the briefing notes were put to Mr. Miller, he was unable to say much about them. They take the position that the briefing notes show that the Ministry's view of what the costs would be evolved.

[225] In connection with the work of the Task Force, the defendants say that the recommendations of the Task Force were never meant to be binding. They also suggest that the Task Force's recommendations do not coincide with the requirements of s. 23 of the *Charter*.

[226] I conclude that many of the issues that arise in this claim were in the mind of the Task Force in 1991 when it reported to the Ministry. In particular, the members of the Task Force envisioned that there might be problems convincing majority boards to transfer their assets to the minority, and compensating the majority boards for transferring assets to the minority. Members of the Task Force envisioned significant enrolment growth in minority language education, and additional costs associated with transportation.

[227] Much of this knowledge was passed on to the Province by way of the Task Force Report. The Province was given estimates of potential enrolment growth, although Dr. Ardanaz, the chair of the demographics working group, suggested those estimates were not based on the work of a demographer. The Province was also informed that the start-up costs of establishing multiple school boards could be substantial. It was also suggested to the Ministry that it ought to involve itself in the transfer of assets from the majority to the minority system, that the system might allow admission of non-rightsholders pursuant to a committee, and that the minority system ought to involve some early childhood education and daycare services.

[228] However, the Task Force was not a formal, representative body. The Task Force Report is also explicit that its recommendations do not necessarily reflect the views of all of its members. The Province was not required to act on all the Working Group's recommendations. The Ministry was entitled to- and did- engage in broader public consultations that informed its views.

[229] Very little was said about the Ministry's briefing notes, or about the discussions within the Ministry that led it to propose a single school board, then the advisory committee model. The evidence falls short of establishing why the Province eventually moved away from the idea of a single board. Ms. Galibois-Barss and Mr. Gignac alluded to statements by Ministry officials that the Province delayed to wait for confirmation of federal funding, and moved away from the one-district format because it was concerned about costs and backlash from majority boards. I admitted those statements for non-hearsay purposes, subject to the ability of the plaintiffs to argue that those statements should be admitted for truth later. Since the plaintiffs did not advance such an argument, and the Province eventually created a single school board, I reach no conclusions about those statements or why the Province moved away from creating a single minority school board. I take from those proposals only that the Ministry was unsure about the best method of implementing s. 23 in the Province, and proposed a system that offered management and control to the minority without an independent school board (as I note was envisioned in *Mahe* at 375-376), before returning to a single-school board model.

[230] The documentation does show that in 1992, staff within the Ministry's capital branch were aware that if new schools were built to accommodate the enrolment projected by the Task Force, the new system could include costs of up to \$160 million over eight years. It is not clear if this was communicated to the Minister or to Treasury Board.

[231] Minister Hagan and Treasury Board appear to have considered at one point that the cost of implementing the system could be about \$60 million if a single

provincial school board were implemented. It is not clear that this would include the construction of 32 new homogeneous schools. Further, the assumptions underlying this estimate were questioned by Treasury Board. I conclude that while the Province knew that there would be significant costs associated with implementing minority language education, the evidence falls short of showing that the Province had concrete knowledge of the extent of those costs.

[232] Even so, Mr. Justice Vickers found that the Province attempted to shift its responsibility for funding the capital costs of minority language education. Although the Province studied the capital costs associated with delivering minority language education, when the FEA was first created the legislation suggests that the FEA would not be eligible for capital funding from the Province. It would be required to rely on Federal funding. Mr. Justice Vickers held that was unconstitutional because it did not fund the minority in a manner equivalent to the majority.

[233] The result of these events is that although minority language education existed in British Columbia beginning in 1978, and was amended to take into account the requirements of s. 23 in 1987, the Province did not fully cede management and control of minority language education until 1999. The CSF began acquiring assets in about 1999 through regular Capital Planning Cycles.

[234] In my view, this does not amount to impermissible or undue delay. Notably, in *Mahe*, Dickson C.J.C. explained (at 374) that creating an independent school board risks isolating minority language boards from physical resources enjoyed by the majority, to the detriment of students. Chief Justice Dickson commented that “[i]t is not possible to give an exact description of what is required in every case in order to ensure that the minority language group has control over those aspects of minority language education which pertain to ... minority language and culture” (at 376). He also commented that “completely separate school boards are not necessarily the best means of fulfilling the purpose of s. 23” and suggested that the appropriate “degree of control can be achieved to a substantial extent by guaranteeing representation of the minority on a shared school board” (at 375).

[235] It seems to me that the Ministry was exploring those ideas in the mid-1990s. Faced with further litigation, the Ministry held back, leaving the question of what level of management and control was warranted to be decided by the Court. Doing so was consistent with the jurisprudence at the time. In *Mahe*, Dickson C.J.C. envisioned further litigation for those reasons, as he noted (at 376) that public authorities may choose the means of fulfilling their duties, which may, in some instances, “result in further litigation to determine whether the general requirements mandated by the court have been implemented.” In my view, given the small Francophone community in British Columbia as compared to other provinces, the Ministry was right to examine all options for deciding how to appropriately implement section 23 in British Columbia.

[236] This is particularly so because the Province lacked well-documented evidence on the number of children likely to take part in a programme. The Task Force was not relying on a demographer. Notably, even after 25 years, the CSF has fallen short of achieving the 6,000 student enrolment that the Task Force Report envisioned. If the Province had built new schools based on the Task Force’s numbers, it would have substantially overbuilt facilities for minority language education.

e) Res Judicata Argument

[237] Tangential to this history, the defendants raise a *res judicata* argument concerning *Vickers #1* and *Vickers #2*.

[238] The defendants argue that to the extent that the plaintiffs rely on facts or seek relief based on events that occurred prior to the litigation before Mr. Justice Vickers in 1998, the plaintiffs are estopped and barred from doing so by virtue of the rule against relitigation of causes of action that have already been adjudicated upon. For this purpose, a cause of action means “every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court”: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54.

[239] The defendants suggest that if there were merit to the allegations pre-dating 1998, the plaintiffs have already had their day in court over those issues. They point to the evidence of Ms. Galibois-Barss, who admitted that all the complaints she raised in her testimony about historical events were also placed before Mr. Justice Vickers. They also suggest that the complaint about a failure to abide by the recommendations in the Task Force Report were before Mr. Justice Vickers. A failure by the plaintiffs to raise all the issues out of a desire for the matter to proceed quickly are tactical considerations and do not qualify as the exceptional circumstances to depart from the rule against re-litigation: *Wild Bill's Work & Western Wear (Fort St. John) Ltd. v. Central Trust Co.*, [1987] B.C.J. No. 2324 (C.A.); *Dowling v. Bhandar*, 2009 BCSC 1812.

[240] In the defendants' submission, the stale claims are in any event unsupported by the evidence. They suggest that to the extent the plaintiffs base any claims in a failure to implement the Task Force recommendations, those claims cannot stand because the Task Force recommendations were not co-extensive with the requirements of the *Charter*.

[241] The plaintiffs take the position that they are not re-litigating matters determined by Mr. Justice Vickers in 1996 and 1998. They maintain that the evidence concerning events prior to November 23, 1998 do not form the basis for a cause of action in this case, except to the extent that they provide context for the circumstances, state of affairs and events that took place after that date. They suggest that the historic evidence is particularly relevant to the remedies the plaintiffs seek, including their claim for *Charter* damages, a trust remedy, and the Court's retention of jurisdiction over specific remedies ordered in the case. They suggest that none of those matters was before Mr. Justice Vickers in 1996 or 1998.

[242] The plaintiffs argue that, in any event, the various doctrines of cause of action estoppel, issue estoppel and abuse of process do not apply. Citing *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para. 83, they suggest that cause of action estoppel does not apply because the parties are not the same as

those in the litigation in 1996 and 1998. Similarly, they urge that issue estoppel cannot apply as the plaintiffs as a whole are not the privies of the *Vickers #1* and *Vickers #2* decisions. In their submission, the Association des Parents Francophones de la Colombie Britannique, in its new iteration as the FPFGB, does not have an identity of interest in this case.

[243] Finally, the plaintiffs say that the doctrine of abuse of process does not apply because there is no risk that the litigation would violate the principles of consistency or finality, citing *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 at paras. 23 and 37. They note that in this case, the plaintiffs do not seek to attack the rulings made by Vickers J. Rather, this litigation is an extension of those earlier motions, as was contemplated by Vickers J. in his 1998 decision. They also take the position that there is no threat to judicial economy, as the Court will still have jurisdiction to award the remedies sought for events occurring after *Vickers #2*.

[244] The defendants' argument assumed the plaintiffs would ground breaches of s. 23 in the Province's failure to implement the recommendations in the Task Force Report. I do not understand that to be the plaintiffs' argument. As I see it, they rely on the history concerning the creation of the CSF as evidence that the Province has long been aware of potential problems and issues related to minority language education, and has failed to act on that knowledge. They rely on that evidence not as a basis for a claim, but as a circumstance relevant to their claim for specific remedies.

[245] In my view, the history that predates *Vickers #1* and *Vickers #2* is also relevant background context that can help explain the reasons why the background situation does, or does not, respond to the needs of the minority today, and why it did not in 1982. It is important to ensuring that the claim is interpreted with a view to remediating historic circumstances.

[246] Given that background, and in light of the nature of the claim in this case, I am satisfied that the doctrines of *res judicata* and abuse of process do not bar the

plaintiffs' claims in this case. The plaintiffs argue this case in such a way that liability only arises after *Vickers #2*.

[247] The doctrine *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the relitigation of issues previously decided in court in another proceeding. It requires that three conditions be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies: *Toronto (City)* at para. 23 citing *Danyluk* at para. 25, *per* Binnie J. Issue estoppel ensures the integrity of the judicial system by protecting the efficiency of the trial process and the credibility and authority of judicial findings: *Petrelli* at para. 81.

[248] In my view, the first condition of issue estoppel, that the issue must be the same as one decided in the prior decision, is not satisfied. In reaching that conclusion, I note the defendants did not point to any specific issue that was decided before Mr. Justice Vickers that the plaintiffs should be estopped from raising again.

[249] In *Vickers #1*, the issues centred around the validity of the *Francophone Education Regulation*, which was held to be invalid. The plaintiffs do not challenge the *Francophone Education Regulation* as it existed in 1997 in this litigation.

[250] There is greater overlap between the issues in *Vickers #2* and this case, as Vickers J. considered arguments that are very similar to those being advanced by the plaintiffs here: that the CSF was forced to have constant resort to negotiations with majority boards, and might be forced to pay high rents, lack control over shared facilities and suffer from impermanent school facilities. However, in *Vickers #2*, the plaintiffs based their argument on the lack of a precise statutory scheme in s. 166.29 of the *School Act*. The plaintiffs also speculated on the likely future effects of that statutory scheme. In this case, the plaintiffs challenge a broader category of laws and policies, and base their claim in facts that have arisen and schools that opened since *Vickers #2* was decided.

[251] As a result, since the claims here challenge different statutory provisions and are based in a different set of facts and circumstances, I am satisfied that there is no risk to the authority and credibility of Mr. Justice Vickers' findings.

[252] Cause of action estoppel is broader than issue estoppel. It focuses primarily on fairness to the litigants by requiring parties to bring forth all of the claims and defences with respect to the cause of action at issue at first instance, so that a party should not be twice vexed with litigation: *Petrelli* at para. 81.

[253] The plaintiffs do not argue their case in such a way that the defendants are being "twice vexed". As I understand it, they only rely on the evidence concerning the Task Force and the establishment of the CSF to show that when the CSF was created, the Ministry had information that made some of the issues that arise in this case reasonably foreseeable. They do not raise new claims in this trial that they ought to have raised in *Vickers #1* and *Vickers #2*; they could not have raised the claims in this trial in those proceedings because those facts and circumstances arose after *Vickers #2* was decided.

[254] I reach a similar conclusion about the doctrine of abuse of process. The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its procedure to protect the administration of justice from being brought into disrepute. It is typically used to preclude relitigation where the strict requirements of issue estoppel are not met, but the action is likely to violate principles of consistency, finality, judicial economy and the integrity of the administration of justice: *Toronto (City)* at para. 37. In my view, since the plaintiffs do not attempt to relitigate issues that were previously decided or that should have been brought before Mr. Justice Vickers, there is no risk to the administration of justice, and the doctrine of abuse of process should not apply.

[255] Overall, I conclude that the doctrines of *res judicata* and abuse of process do not apply to bar any of the plaintiffs' claims in this case. I reach that conclusion because the plaintiffs base their argument on minority language education as it has evolved since 1998.

[256] The consequence of this is that evidence that pre-dates *Vickers #1* and *Vickers #2* is of limited relevance. It is relevant to understanding the background context of certain government actions taken after 1998, and the length of time government actors were aware that certain problems might arise. In that capacity, it might also be relevant to the plaintiffs' claims for specific remedies. Aside from that, it will normally not be necessary to examine the facts and circumstances that pre-date *Vickers #2* in detail when deciding if s. 23 has been breached.

2. Assimilation

[257] A purposive, remedial and contextual interpretation of s. 23 also requires the court to consider the use and status of French in British Columbia today. The Court heard evidence from several experts who spoke to linguistic assimilation generally, and in British Columbia specifically. Dr. Rodrigue Landry gave evidence for the plaintiffs, and Dr. Charles Castonguay testified for the defendants.

a) Dr. Rodrigue Landry

[258] Dr. Landry holds bachelor's degrees in psychology and education and a master's degree in educational psychology, all from the Université de Moncton. He also holds a Ph.D. in educational psychology from the University of Wisconsin. Dr. Landry has taught in the public school system, and served as a professor, the director of the Department of Special Education and the dean of the Faculty of Education of Université de Moncton. From 2002 to June 2012, he was the director of the Canadian Institute for Research on Linguistic Minorities, a national institute that conducts research on Canada's official language minorities to guide linguistic policy. He was qualified without objection as an expert in the following areas:

- a. ethnolinguistic vitality, cultural autonomy and factors associated with language revitalization;
- b. education of linguistic minorities;
- c. pedagogy, including pedagogy in a minority language environment;
- d. factors contributing to psycholinguistic development, including language acquisition, language transfer, vitality beliefs, and student

- identity building in Francophone communities;
- e. the use of quantitative research methods in the social sciences, including the use of statistical methods and the interpretation of statistical data, including census data;
- f. educational psychology;
- g. the psychology of language; and
- h. sociolinguistics

i. Language Vitality

[259] Dr. Landry and his colleagues have developed several models that they use to study “Linguistic Communities”: communities of people who reside in the same area and speak the same language. The models centre on the idea of ethnolinguistic vitality, or the force that makes a language group act as an active and distinct entity in an intergroup context (“Vitality”). In the absence of Vitality, the minority language has a low social position, a phenomenon known as “Diglossia”.

[260] Dr. Landry’s first model explains the relationship between Vitality and language development in minority Linguistic Communities. He explains that members of minority Linguistic Communities who live their lives in the majority language tend to experience decreased knowledge of the minority language. This is known as “Subtractive Bilingualism”. When those persons live their lives predominantly in the minority language, they experience an “Additive Bilingualism”, whereby they do not lose their ability to speak in the minority language.

[261] The relationship between the minority and majority Linguistic Communities is shaped by both collective and individual factors and characteristics. The interplay of collective and individual factors can result in the minority language taking a higher or lower social position in relation to the majority language. In other words, depending on the interplay of social and collective factors, the situation becomes more or less Diglossic, or the group demonstrating more or less Vitality. This manifests in the extent to which the minority language is used in community affairs or is relegated to the private sphere.

[262] The collective factors that shape the Vitality of a Linguistic Community include the ideological, legal and political framework, including the number, power and status of the minority group and the position the state takes toward the minority language. At the individual level, the relationship between the minority and the majority is shaped by linguistic and cultural socialization, which relate to frequency of contact with language, personal motivation and a person's knowledge of their own power and place in the Linguistic Community. Another individual factor is psycholinguistic development, the end result of socialization, which includes an individual's personal perception of the status of the language, their desire for integration, and factors related to the person's identity, motivation, skills and behaviours.

[263] Dr. Landry explained that the collective and individual factors have an impact on one another. The minority group's number, power and status and the strength of social institutions dictate the strength of the social network, which has an impact on linguistic and cultural socialization and psycholinguistic development. When the individual factors impose themselves at collective levels, members of the minority group may, individually and collectively, exercise some "self-determination" to emphasize the collective factors.

[264] Dr. Landry also developed a model explaining how minority Linguistic Communities take control of their collective destiny to achieve cultural autonomy. He explained that a Linguistic Community's collective identity is a product of its institutions and social organizations. For the group to achieve cultural autonomy, it must transmit language across generations at the family level and create strong institutions to give life to the minority language in the public sphere, while government must implement policies to recognize and provide for the minority language.

[265] Weaknesses in any of these three pillars of cultural autonomy can have a negative impact on Vitality. Vitality can be improved by language revitalization

interventions, especially a global language plan involving family, civil society and government or state actors.

[266] Dr. Landry explained that “Linguistic Assimilation” is 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. This in turn results in less socialization into the Linguistic Community’s culture, and contributes to cultural assimilation or acculturation. When the rate of Linguistic Assimilation is high, a large proportion of Francophones cease to use the language at home and do not transmit French as a mother tongue to their children. With time, the number of Francophones and the use of French in society diminish.

ii. Census Methodology

[267] Dr. Landry was asked to assess the rate of Linguistic Assimilation in British Columbia. He explained that his responses to the questions he was asked on that topic are shaped by the questions asked on the census, and the changes to how it has been administered since 2006.

[268] According to Dr. Landry, in 2006, the short-form census (which was sent to 80% of Canadians) asked about the “first language learned and still understood” by the respondent (the “Mother Tongue” question). The 2006 long-form census (sent to 20% of Canadians) asked several language-related questions: the Mother Tongue question; the language spoken most often at home (the “Main Home Language” question); other languages spoken on a regular basis at home (the “Regular Home Language” question); whether the person can speak English or French well enough to conduct a conversation; and whether the person can speak any other languages well enough to conduct a conversation.

[269] In 2011, the format and process for the Canadian census changed. That year, 100% of people were asked to complete the mandatory short form census. 30% of Canadians also received a longer questionnaire called the “National Household Survey” that could be completed voluntarily. The short-form census

asked several questions related to language: The Mother Tongue and Home Language Questions, as well as whether the person can speak English or French well enough to conduct a conversation.

[270] Because of those issues, Dr. Landry suggests caution when comparing 2006 and 2011 census results.

iii. Assimilation in British Columbia

[271] Using census data, Dr. Landry calculated the rate of Linguistic Assimilation in British Columbia to be 74%. He made that calculation by determining the ratio of the number of persons who identified on the 2011 short-form census that French was one of their Mother Tongues to those that have French as one of their Main Home Languages. He also referred to a publication by Statistics Canada, *Portrait of Official-language Minorities in Canada: Francophones in British Columbia* by B. Chavez and C. Bouchard-Coulombe (Ottawa: StatCan, 2011) [*Official-language Minorities in Canada*], which calculated the rate of assimilation to be 72.9% based on data from the 2006 census.

[272] Dr. Landry went on to calculate a Linguistic Attraction Index, which states the ratio of the total number of persons who use French as their Main Home Language against the total population (including persons who do not have French as one of their mother tongues). A Linguistic Attraction Index below 1.0 indicates some assimilation, while a score higher than 1.0 tends to show either a low degree or no assimilation. He noted that the Linguistic Attraction Index for Francophones in BC based on 2011 census data is 0.35.

[273] Dr. Landry concluded that, whether using the Linguistic Assimilation calculation or the Linguistic Attraction Index, linguistic assimilation among Francophones in BC is very high; approximately twice the average of Francophones outside Quebec as a whole.

[274] Dr. Landry observed that in British Columbia, the rate of transmission of French as a mother tongue to children is, on average, 26%. While couples where

both parents speak French (or “Endogamous” couples) transmit the language 79% of the time, the transmission of French as a mother tongue is only 11% to 23% among couples where only one parent speaks French (or “Exogamous” couples).

[275] Dr. Landry noted that with such a low transmission rate, the Francophone population in British Columbia will necessarily diminish unless it is counterbalanced by immigration or high fertility levels. He observed that the fertility rate of Francophone mothers in British Columbia is lower than the birth rate needed to stabilize the population. With respect to the effect of immigration, Dr. Landry commented that British Columbia has the second-largest number of French-speaking immigrants to any province outside Québec. Interprovincial migration accounts for 63.6% of persons in British Columbia for whom French is their First Official Language Spoken (“FOLS”). However, he also observed that net migration appears to be decreasing.

[276] In summary, Dr. Landry concluded that the assimilation rate in British Columbia is worsened by a low fertility rate and is only partially compensated for by interprovincial and international immigration.

b) Dr. Castonguay

[277] Dr. Castonguay is a retired professor of the Department of Mathematics and Statistics at the University of Ottawa. He holds a master’s degree in Mathematics from the University of Ottawa and a Ph.D. in mathematics from McGill University. He was an associate then a full professor at the University of Ottawa from 1973 to 2005. He has continued his research activities since his retirement in 2005. Since 1971, Dr. Castonguay’s research has focused on census data concerning language use in Canada, with a particular focus on the French minority language context. Dr. Castonguay was qualified as an expert on statistical analysis, linguistic assimilation and language Vitality, as well as Canadian census data measuring linguistic assimilation and language Vitality in Canada.

[278] Dr. Castonguay was asked to provide an expert opinion “on the methodology used and conclusions reached in the expert report of Dr. Landry with respect to the phenomenon of linguistic assimilation among the francophone minority in British Columbia and in particular, the role played therein by the state of francophone school facilities.”

i. Language Vitality

[279] In Dr. Castonguay’s view, the Vitality of a language is best measured by its degree of use: the extent to which native speakers continue to use it (language maintenance), and native speakers of other languages adopt it (language shift or Linguistic Assimilation).

[280] Dr. Castonguay observed that Linguistic Assimilation is not an abrupt change. It occurs gradually and can take several generations to complete. He pointed to a five-step process where a Linguistic Community shifts from using the Mother Tongue to the majority language. At the third step, individuals reach balanced bilingual behaviour, where the new language is used to the same extent as one’s own mother tongue. Dr. Castonguay sees this third step of assimilation as a transitional stage that stands as a half-way point in the assimilation process. He therefore opined that only a small number of persons will report two or three main home languages. The very nature of assimilation is such that it will only give rise to those mid-point “grey areas” to a very limited extent.

[281] Dr. Castonguay also noted that the flow of Linguistic Assimilation is not a one-way street. While Linguistic Assimilation may typically flow from, say, French to English, there will sometimes be a return shift from English to French among a small number of offspring or the descendants of previously anglicized Francophones. He advised that incomplete return shift can also result in reporting two languages as Home Languages or Mother Tongue, but this number, too, would be very low.

ii. Census Methodology

[282] Like Dr. Landry, Dr. Castonguay based his analysis on census data. Dr. Castonguay spoke to some problems with census data over time. After 1971, Statistics Canada was criticized for instructing respondents to indicate only one language in response to the Mother Tongue and Home Language questions. After the 1981 census, Statistics Canada began publicizing the double and triple answers that were made to those questions despite the instruction to list only one language. Subsequently, Statistics Canada removed the instruction to report only one language.

[283] After 1986, the census regularly allowed for and counted double responses to language questions. The total number of reports of two or three Mother Tongues in BC increased from 57,275 in 1981 to 84,520 in 1986. The number of reports of two or three Home Languages increased even more, from 59,430 to 122,975.

[284] In 1991, Statistics Canada implemented sweeping changes to its questionnaire design to reduce the incidence of individual respondents changing their Mother Tongue over consecutive censuses, which Statistics Canada counted as response errors. In 1991, the re-engineered questionnaire cut reports of two or three Mother Tongues in BC down to 34,290. Reports of two or three Home Languages also decreased to 56,970. Those changes, too, were problematic, as they caused a significant number of respondents to report a different single Mother Tongue than they had in the past.

[285] Because of these changes, Statistics Canada considered that the language data collected from 1991 onwards provides better information than the data obtained from the censuses of 1971 to 1986.

[286] According to Dr. Castonguay, Statistics Canada made further changes to the Census in 2001 and 2011. In his view, the research shows that rates of overall shift from French to English does not seem to have been disrupted by the changes to the census in 2001.

[287] In connection with 2011, though, for the reasons given by Dr. Landry Statistics Canada has explicitly warned users that the 2011 data for the composition of the Canadian population by Mother Tongue and Home Language are not directly comparable to the corresponding data for 2006. The changes also coincide with a significant increase in the frequency of double and triple responses to the language questions in British Columbia.

[288] Dr. Castonguay also cautioned that the census numbers tend to undercount Linguistic Assimilation. He observed that the Mother-Tongue question asks about a person's first language learned "and still understood". Thus, the question does not capture persons who have undergone the deepest form of assimilation: those who learned French at home in childhood, but came to use English so exclusively that they lost their ability to understand French. Dr. Castonguay observed that this deepest form of Linguistic Assimilation is not uncommon for members of a relatively small Francophone minority such as British Columbia's, especially by middle age.

iii. Assimilation in British Columbia

[289] In Dr. Castonguay's view, a sound assessment of the Vitality of French in BC must take into account three factors: It must equally distribute multiple answers to the Mother Tongue and Home Language questions between the reported languages, and must examine the data by age group and place of birth.

[290] Dr. Castonguay noted that before 1996, when data was available, most persons reporting both English and French as their Mother Tongue or Main Home Language were of French origin. Thus, persons who made dual responses appeared to be those that were transitioning from speaking French to English. Dr. Castonguay therefore takes the view that the appropriate means of dealing with reports of two or more Mother Tongues and Home Languages is to apportion the responses equally between the reported languages. That, he opines, respects the half-maintenance, half-shift nature of the respondents' profiles. He also noted that this is the approach favoured by Statistics Canada since 1981 when broadly describing the linguistic composition of the total population.

[291] Dr. Castonguay also urged that the age structure of a population must be taken into account when assessing data on language Vitality and Linguistic Assimilation. He observed that census data after 1971 tend to show that language shift usually occurs during the transition between living with one's parents, and establishing oneself in one's own self-determined home environment. Thus, the age structure of a minority language group can cause its assimilation rate to fluctuate without there being any change in the power of linguistic assimilation.

[292] Dr. Castonguay also noted the importance of examining linguistic assimilation with reference to place of birth. He observed that Francophone immigrants typically arrive in BC in their mid- to late-twenties. Since linguistic assimilation takes a number of years, it is appropriate to delay gauging the full impact of the power of assimilation on them until they have reached the age of 45.

[293] Dr. Castonguay used census data on Mother Tongue, Main Home Language and language of work to measure language maintenance and language shift, and thus language Vitality and Linguistic Assimilation. While he was under cross-examination, Dr. Castonguay was asked why he chose to focus on Main Home Language rather than Regular Home Language. He confirmed that he focused on Main Home Language because demographers are unanimous that the Main Home Language is the one that becomes the Mother Tongue of the next generation. Thus, in his view, the indicator he chose is one with deep implications.

[294] Taking his numbers from the 2011 census, Dr. Castonguay reported that, using equal apportionment of multiples, 71.2% of the population of British Columbia is of English Mother Tongue, 1.5% has a French Mother Tongue, and 27.3% has an "Other" Mother Tongue. From the standpoint of Main Home Language, the same population was 82.3% English-speaking at home, but only 0.5% was French-speaking, and 17.2% spoke another language at home.

[295] Dr. Castonguay related the difference between the makeup of the total population of British Columbia by Mother Tongue and Main Home Language entirely to Linguistic Assimilation. He observed that language shift in British Columbia

typically flows from French and Other languages to English. Dr. Castonguay's calculations show that in BC, assimilation toward French by persons of Other Mother Tongue "is practically nil." Since French attracts very few new speakers in BC, in Dr. Castonguay's opinion, the Vitality of French in BC is essentially determined by the overall outcome of language shift between French and English, or the Anglicization of Francophones in BC.

[296] Dr. Castonguay observed that in 2006, the overall Anglicization rate for the entire Francophone population was 72%. Like Dr. Landry, Dr. Castonguay emphasized the role that Exogamy plays in assimilation. He noted that most Exogamous couples are likely to raise their children in English. Among children of Exogamous couples, 80% have English as their sole Mother Tongue, and 11% were reported as having only French as a Mother Tongue. By contrast, among children of Endogamous Francophone couples, 82% were reported as having French alone as Mother Tongue. Dr. Castonguay gave this particular importance given the high rate of Exogamy in British Columbia, which he stated to be about 78%, or higher once one takes into account those who have lost their ability to understand French.

[297] Castonguay used customized tabulations from Statistics Canada to assess the Anglicization rate of Francophones by age group. That information shows the Anglicization rate of Francophones increases rapidly with age. The Anglicization rate is about 60% by age 15-24, 66% by age 25-34, 70% or more by age 35-44, and around 80% by age 45 or older.

[298] Dr. Castonguay also looked at the loss of ability to speak French over time, which similarly increases as the population ages. He anticipated that given the frequency of the loss of ability to speak French, there must also be a number of persons who have experienced deeper assimilation: the loss of the ability to understand French. Thus, Dr. Castonguay postulated that the language loss reflected in the census data "is but the tip of the iceberg." He also predicted that as a given birth cohort of Francophones grows older, the invisible portion of the iceberg grows in size.

[299] Looking at the Anglicization rate by year, Dr. Castonguay noted that there appeared to be a drop in the Anglicization rate between 1971 and 1981, and a general trend towards “very slightly lower Anglicization rates from census to census between 1991 and 2006.” However, he did not conclude that there has been a significant change in the language dynamic between English and French in British Columbia. He attributed the change in language dynamic to extraneous factors.

[300] In particular, Dr. Castonguay observed that the portion of BC’s Francophones who are immigrants has increased greatly between 1971 and 2011. That group tends to maintain the use of French at home to a greater degree than Francophones born in BC. He noted that in 1971, that group formed 33% of BC’s Francophone population. By 2006, it had reached 52% of the total Francophone population, and 65% of those aged 25 to 44. In his view, the growing importance of Francophone immigrants explains the drop in the Anglicization rate between 1971 and 1981, as well as its more gentle reduction between 1991 and 2006.

[301] Dr. Castonguay observed that among non-immigrant BC Francophones, the Anglicization rate is more than 10% higher than the rate for the overall Francophone population. He observed that with that group, the Anglicization rate does not echo the general gentle decrease observed for the total Francophone population after 1996. Instead, the Anglicization rate remains constant over the four censuses from 1991 to 2006, and “phenomenally” high. The exception to the rule is Francophone children age 0-14. Between the censuses of 2001 and 2006, the Anglicization rate for that group decreased from 32% to 23%.

[302] Using further census data to perform a finer investigation, Dr. Castonguay commented that in 2006, the Anglicization rate was 21% among children age 0 to 4, 13% among those age 5 to 9, and 35% among those age 10 to 14. He found those rates supported the general rule that assimilation increases with age.

[303] Following an age cohort through three censuses, Dr. Castonguay observed an erratic fluctuation in the assimilation rate, which dropped as the cohort reached age 5 (at the time of the 2006 census), then increased again once the group

reached age 10 (at the time of the 2011 census). The assimilation rate for children age 5 to 9 showed a similar fluctuation pattern between the 2006 and 2011 censuses. In Dr. Castonguay's view, the size of the fluctuations could not be explained by only the comparability break between 2006 and 2011 censuses.

[304] Dr. Castonguay concluded that there is serious doubt about the validity of the exceptional Anglicization rate for Francophone children age 5 to 9 in 2006, and thus the Anglicization rate of the 0 to 14 age group in 2006. Because the total number of Francophone children age 5 to 9 in BC in 2006 was fairly small-- only 1,140 children-- he opined that "it is not impossible that the unusually low value ... may be mainly due to sampling error". He also suggested that if the 13% value "corresponds to some kind of reality," then based on the census results in 2011, that reality was "ephemeral."

[305] While he was being cross-examined on this point, Dr. Castonguay agreed that it was not possible to say if the anomaly he observed was due in whole or in part to sampling error. He agreed that he had not studied the point, and admitted that something else might explain the change to the children's language behaviour.

[306] Unlike Dr. Landry, Dr. Castonguay also examined the census data on language most often used at work. Dr. Castonguay noted that the adult working population identified by the 2006 census was 72.5% Anglophone, 1.6% Francophone and 25.9% Allophone. The distribution by language of work is different. 95.9% of that group reported working mainly or exclusively in English. Only 0.3% used French most often at work, and 3.8% mainly used other languages at work. Thus, he noted an overall Anglicization rate of 84% based on language of work in 2006. Since that is greater than the Anglicization rate based on language used at home (75% in 2006), Dr. Castonguay suggested that "the Anglicization of Francophones at work can thus appear indeed to drive the Anglicization of Francophones at home."

[307] Dr. Castonguay observed that French enjoys a somewhat higher Vitality at work as compared to other languages. He related this to the relatively high

proportion of Francophone workers employed in the education sector, where the use of French is exceptionally frequent. In 2006, 11% of Francophone workers in BC were employed in education, as compared to 7% of Anglophone workers. And among Francophones employed in education, 42% reported using French as their main language of work.

[308] Looking forward, Dr. Castonguay examined how Anglicization, Exogamy and inadequate fertility are likely to influence the number of Francophone children in British Columbia. Like Dr. Landry, he noted that the fertility of BC's Francophone population has hovered around 1.4 children per woman, less than the 2.1 children per woman required to ensure the intergenerational replacement of a population. He opined that the intergenerational shortfall is compounded by the very high rate of Anglicization of Francophone youths, and the high rate of Exogamy. Taking all these factors into account, he observed an intergenerational replacement rate of 0.31, or 31%, for BC's Francophone population in 2006, which yields a replacement shortfall of 69%. Dr. Castonguay concluded that due to the low rate of intergenerational replacement, the Francophone minority is totally dependent on immigration and interprovincial migration to keep its numbers up.

[309] In contrast, the power of assimilation to French among allophones is practically nil: 99.8% of allophones that experience language shift will shift to English. Dr. Castonguay suggested that those who shift to French most likely do so abroad, before coming to Canada.

[310] Taking the low maintenance levels among Francophones born in BC and newcomers together with the lack of language shift to French, Dr. Castonguay observed that the factors together produce a very low Vitality index for the use of French in the home environment, and an even lower Vitality in the work world.

c) Dr. Castonguay's Critique of Dr. Landry

[311] In Dr. Castonguay's view, Dr. Landry's analysis did not soundly and adequately assess the census data on language Vitality and assimilation regarding

French in British Columbia. He took issue with Dr. Landry's failure to look at language of work at all. He also concluded that Dr. Landry's analysis of the data on the Vitality of French and Linguistic Assimilation in the home environment lacked both rigour and scope.

[312] Dr. Castonguay's basic critique-- what he calls a basic shortcoming in Dr. Landry's analysis of the census data-- relates to Dr. Landry's method of calculating the rate of Linguistic Assimilation. Dr. Castonguay noted that Dr. Landry did not equally apportion double census responses. Instead, he included among the Francophones ALL persons who indicated that French was one of their Mother Tongues and/or one of their Main Home Languages. Thus, of the 70,675 persons who indicated that French was one of their Mother Tongues, Dr. Landry counted 18,205 as being Francophone. The remaining 52,560 Francophones (who no longer spoke French at home) were considered to be assimilated, resulting in an assimilation rate of 74% for Francophones in BC.

[313] In Dr. Castonguay's view, it does not make sense to pool all multiple-response Francophones into the same population when calculating assimilation. Rather, Dr. Castonguay suggested that where language shift is concerned, an equal apportionment is better able to account for the fact that language shift is in transition.

[314] Dr. Castonguay also noted that Dr. Landry's approach would result in the same person being counted as an English-speaker in one circumstance and French-speaker in another. In addition to being "fundamentally incoherent", Dr. Castonguay observed that it results in the language shift of different language groups being examined in isolation. Dr. Landry's approach therefore overlooks the interplay between French, English and non-official languages. His data cannot provide a nuanced account of what languages are attracting others.

[315] Dr. Castonguay also criticized Dr. Landry for inflating the count of Francophones. In particular, his approach inflated the count of French Main Home Language speakers to its highest possible value of 24,445, as compared to the lowest possible value of 16,685.

[316] In Dr. Castonguay's view, aside from making a few passing remarks about the problems with the 2011 census, Dr. Landry did not pay adequate heed to the lack of comparability between 2006 and 2011. He noted that in many instances, Dr. Landry pointed to population increases and other changes during that period without mentioning the comparability break between the two data sets. Dr. Castonguay pressed that one must abstain from comparing data which are not comparable.

[317] Finally, Dr. Castonguay took issue with Dr. Landry's reporting of the rates of Vitality and Linguistic Assimilation due to the tendency of the census to undercount and underreport on assimilation. Because the deepest form of assimilation is invisible in the census data, Dr. Castonguay cautioned that the census data systematically underestimates the rate of Anglicization of the French minority in British Columbia. He stated that Dr. Landry failed to account for this, and also failed to analyze language shift by age group and the outcome of language shift by place of birth, as must be done for a sound analysis.

d) Dr. Landry's Response to Dr. Castonguay

[318] Dr. Landry likewise prepared a reply to Dr. Castonguay's report.

[319] Dr. Landry disagreed with Dr. Castonguay's view that language Vitality is best measured by its degree of use. In Dr. Landry's view, Dr. Castonguay's construct of Vitality does not help to identify the conditions that could help increase language use. In Dr. Landry's view, the preponderance of sociolinguists would agree that the construct of Vitality involves factors that cannot be analysed from census data alone, and involves much more than simply the degree of language use.

[320] Dr. Landry also responded to Dr. Castonguay's comments about the importance of equal apportionment of double and triple response among the reported languages.

[321] Dr. Landry offered that, contrary to Dr. Castonguay's suggestion that equal apportionment has been standard practice at Statistics Canada since 1981, the approach taken by the institution has in fact changed since that time. Dr. Landry noted that since 2001, Statistics Canada has used equal apportionment when examining responses in some circumstances, while applying Dr. Landry's approach of double counting in other instances. Dr. Landry pointed to several publications where Statistics Canada combined single and multiple responses when dealing with a specific population.

[322] Additionally, Dr. Landry noted that equal apportionment of multiple responses has been strongly criticized by some demographers because it "does not recognize and respect the growing multilingualism of the Canadian population." In particular, Dr. Landry observed that it does not respect the children of Exogamous couples raised in both languages.

[323] Finally, Dr. Landry argued that equal apportionment is not valid from a sociolinguistic perspective. Dr. Landry suggested that Dr. Castonguay's approach is informed by his background as a mathematician, and his related desire for all his calculations to balance. Dr. Landry's view is that there is no problem with overestimating the total population if one is not reporting on all three language populations together.

[324] Dr. Landry went on to state his opinion that it is more appropriate to pool single and multiple responses for Mother Tongues and Main Home Languages and to consider only one language group at a time. That way, all responses involving Mother Tongue that include French are seen as reflecting members of the Francophone population, and all responses to the Main Home Language question that include French form part of the French-speaking minority.

[325] Contrary to Dr. Castonguay's view, Dr. Landry also noted the importance of including in any analysis persons who speak French at least regularly at home. He suggested that a sociolinguistically valid analysis of linguistic assimilation should consider languages used regularly at home as well as the primary home language.

Notably, though, Dr. Landry's own analysis of the rate of assimilation seems to focus on Main Home Language rather than Regular Home Language.

[326] In any event, Dr. Landry observed that despite their differing methods, his methodology and that of Dr. Castonguay lead to very similar results.

Dr. Castonguay found 72% assimilation, while Dr. Landry found 74% assimilation.

[327] Further, Dr. Landry suggested the rate of assimilation is of less pressing importance than the rate of transmission of French as a Mother Tongue. He suggested the rate of transmission of language at an early age is more relevant to questions around schooling than linguistic assimilation because it can be an indicator of whether children will attend a minority school. He suggested that with increased marketing, more Exogamous couples that transmit French as Mother Tongue to their children could aid with recruitment of children to CSF schools. He called Dr. Castonguay's analysis of how the rate of linguistic transfer varies with age and place of origin "interesting" and suggested the information could be useful for planning the social marketing strategy he proposed.

[328] Dr. Landry also agreed with some of Dr. Castonguay's conclusions. He agreed that linguistic assimilation is the rule for young Francophones, making linguistic transmission to the next generation suffer. He also agreed that this is compounded by low fertility, and that the Francophone population born in British Columbia offers no greater resistance to assimilation than Canadian-born allophones. He agreed the power of assimilation in British Columbia is very strong.

e) Discussion and Findings of Fact

[329] As Dr. Landry explained, language Vitality and Linguistic Assimilation are complex phenomena. The Vitality of a minority Linguistic Community is linked to a range of personal and social factors that extend from personal motivation, to the life of the family, to the strength of civil society, to actions by the state. These factors are inter-related and influence on another. The actions taken by the state and civil society can change individual perceptions and motivations concerning the minority

language. Those perceptions and the level of motivation in turn influence the strength of minority language civil society and the actions taken by the state.

[330] Consistent with his background in mathematics, Dr. Castonguay takes a simpler, mathematical approach to examining Vitality and assimilation. He focuses on degree of use.

[331] The experts' different approaches can be explained by their respective backgrounds. Dr. Landry's theoretical background leads him to seek indicators of Vitality; Dr. Castonguay is much more interested in a scientific, rigorous, observation of the diminution of language use as it occurs. Dr. Landry is focused on the nuances of social structures that result in language use declining or growing; Dr. Castonguay is focused on the reality of language decline. Dr. Landry is focused on cause; Dr. Castonguay is focused on effect.

[332] I accept Dr. Landry's nuanced explanation of how language Vitality is influenced by personal and social structures, and how the actions of the state can influence individual and social factors, and thus the Vitality of a minority language community. I also accept that indicators of Vitality, like the rate of Linguistic Assimilation or the rate of transmission of French as a mother tongue to children, can be calculated by examining language use. Both Dr. Landry and Dr. Castonguay make these types of calculations.

[333] Dr. Landry calculated the rate of assimilation to have been about 74% in 2011. He also counted the rate of transmission of French to be very low, at about 26%. He concluded that the low transmission rate was aggravated by low fertility, and was only partially compensated for by interprovincial and international migration. Based on those numbers, it appears that the number of Francophones and the use of French in British Columbia are likely to decline over time.

[334] Dr. Castonguay's approach to calculating assimilation is more nuanced than that of Dr. Landry. He took into account other factors that provide insight into assimilation: the age structure of the population and the impact of migration. He

also reported assimilation rates in a way that shows language shifts between all language groups in British Columbia, and that provides a broad description of the language situation in British Columbia. This does not detract from Dr. Landry's analysis, as Dr. Landry was not asked to perform those types of calculations.

[335] Dr. Castonguay's analysis shows that French typically attracts very few new speakers in BC. His work also reveals that as French speakers in BC grow older, they are more likely to adopt English as their primary language. While the Anglicization rate in BC appears to have declined very slightly since 1971, Dr. Castonguay concluded the decline is more likely related to higher rates of immigration than differences in the Diglossic nature of BC.

[336] Overall, though, Dr. Castonguay's conclusions are consistent with Dr. Landry's. He observed that the Anglicization rate across the entire Francophone population in 2006 was 72%. He, too, noted the linguistic assimilation rate is not likely to be counterbalanced by increased fertility, and is compounded by the province's high Exogamy rate and the Anglicization of Francophone youth. He also observed virtually no shift of new immigrants from other languages to French. He concluded that the Francophone minority is totally dependent on immigration and interprovincial migration to keep its numbers up. He observed a very low level of Vitality for the French language at home, which is even lower in the work world. I note that Dr. Landry agreed Dr. Castonguay's numbers are generally accurate.

[337] When calculating assimilation and transmission rates, the experts' methodologies differed in how they dealt with individuals that reported speaking multiple languages. Dr. Castonguay equally apportioned double responses between French and English, as is done, at times, by Statistics Canada. He believed that best reflected the shift in language behaviour that occurred across generations. Dr. Landry counted all persons with double answers as speakers of both French and English, out of respect for the speakers of the language. He suggested that Statistics Canada takes this approach in some circumstances, particularly when researchers are examining only one language group. The consequence of this is

that Dr. Landry will count more persons who have French as their Mother Tongue and more persons who speak French as their Main Home Language than would Dr. Castonguay.

[338] In my view, it is not necessary to resolve that dispute. Despite their differences, Dr. Landry and Dr. Castonguay arrived at nearly identical rates of assimilation.

[339] Taken together, the work of both experts leads me to conclude that the force of assimilation is strong in British Columbia. More than 70% of Francophones in British Columbia assimilate. This is the case whether or not one apportions persons with multiple languages between reported languages. I also accept Dr. Castonguay's view that this assimilation rate underreports the rate of Anglicization due to the census' failure to account for the deepest form of assimilation: the loss of one's ability to understand French.

[340] Dr. Landry is correct that language transmission is also an important consideration. It tends to indicate whether a child is or is not likely to attend a Francophone school. As Dr. Landry observed, the rate of transmission is very, very low--about 26%-- and particularly low among Exogamous couples, at only 11% to 23%. With such low transmission, the situation is indeed dire for the plight of Francophone Vitality in British Columbia.

[341] Dr. Castonguay's work tends to show that assimilation compounds and increases as a given age cohort grows. I agree with his conclusion that in those circumstances, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[342] Where Dr. Landry mostly disagrees with Dr. Castonguay is in connection with whether the situation is, for lack of a better term, hopeless. Dr. Landry has developed helpful models that show how schools and institutional structures can support minority language communities. Dr. Castonguay seems to take the view

that no amount of institutional tinkering will be able to remedy the situation or combat assimilation in British Columbia.

[343] In the context of this litigation, whether Dr. Castonguay's views are correct is irrelevant: Section 23 guarantees the right to minority language education as a tool for combating assimilation. It is a constitutional bargain that was struck, and it requires governments to provide minority language education out of public funds where the numbers so warrant. Schools 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.

[344] But where these findings do have an impact is on the long-term expectation of growth of the population of rights holders' children in British Columbia. As I explain in Chapter VII, The Number of Children, due in part to the high rate of assimilation, it is unlikely that CSF schools will see significant enrolment growth.

3. The Role of Schools in Combating Assimilation

[345] The experts in this case also spoke to the important role that schools play as sites for the fight against assimilation. They include Dr. Castonguay and Dr. Landry as well as Dr. Angéline Martel, who testified for the plaintiffs.

a) Dr. Castonguay

[346] Dr. Castonguay was not asked, and did not report on, the role schools play in combating assimilation. However, he offered some general observations about the situation in British Columbia. He referred to the work of Professor Frank Vallee and Albert Dufour, "The Bilingual Belt: a garrotte for the French?" (1974) 6:2 *Laurentian University Review* 19 at 41, where the authors conclude that where fewer than 50% of Francophones speak mostly French at home, "the assimilation process has penetrated deeply into the personal networks. No amount of institutional tinkering can change such situations in any meaningful way."

[347] Looking at the census data for BC, Dr. Castonguay's view is that the numbers bear out Vallee and Dufour's judgment. Despite improvements brought to

the general institutional situation of French, particularly in the education sector, he noted that the Anglicization rate of the province's Francophone minority has not been influenced to any significant degree. In his view, assimilation has penetrated deeply into personal networks, as reflected by the high levels of linguistic Exogamy. Thus, he suggested that any further institutional improvements cannot reasonably be expected to have any greater effect.

[348] Dr. Castonguay's data did cast some light on assimilation rates among young Francophones in British Columbia. As I explain in more detail above, Dr. Castonguay observed a decline in the rate of Anglicization of children aged 0 to 14 between 2001 and 2006. This coincided with a period of rapid growth in Francophone education in British Columbia. He attributed the decline in the Anglicization rate to sampling error that casts doubt on the validity of the 2006 figures for the age group age 0 to 14, but could not be certain that was the case. He agreed some part might reflect a real change in language behaviour. However, since the Anglicization rate increased significantly in 2011-- more than would be attributed to the comparability break between 2006 and 2011-- he opined that any difference based on actual changes must have been "ephemeral".

[349] The plaintiffs argue that Dr. Castonguay's evidence should be understood as suggesting that the decline in the Anglicization rates for school-aged children between 2001 and 2006 is related to the contemporaneous growth of minority language education in British Columbia. However, Dr. Castonguay did not study that topic. It certainly does not show causation, or even a strong correlation given the Anglicization rate in 2011. In my view, the decline in Anglicization rate between 2001 and 2006 is most likely as Dr. Castonguay suggests: a sampling error due to the small number of young Francophones in the Province.

b) Dr. Landry

[350] Dr. Landry opined that schools are the most important institutions for a minority group, as they set the foundation for other institutions and community leadership, while also socializing children. Dr. Landry spoke to the specific role

Francophone schools play socializing young Francophones into the minority language, and their more general importance to the Francophone minority's community Vitality.

[351] A theme in Dr. Landry's expert report and oral testimony is the best manner of socializing children into the French language and culture in a minority setting. According to Dr. Landry, children in a minority language community will easily learn the majority language. Thus, to ensure full Additive Bilingualism, the family should encourage use of the minority language at home and enrol the children in minority language schools. Even where a child is born to an Exogamous couple, those factors combined will ensure a child experiences Additive Bilingualism.

[352] Where, however, the minority language is not emphasized at home, or children receive their education in the majority language, children will experience a Subtractive Bilingualism that will result in less than optimal knowledge of the minority language. Importantly, a bilingual or French immersion education will not suffice to properly socialize children into the French language and culture.

[353] With reference to his Vitality models, Dr. Landry explained that the school operates in the private sphere for students, for whom school is a site of primary socialization. Thus, for them, minority language education enhances ethnolinguistic identity.

[354] Dr. Landry also addressed the more general role that minority language schools play combating assimilation and strengthening the minority language community. He opined that minority language schools are "the cornerstone of a linguistic minority's institutional completeness". He noted that schools and the family serve as a "counterbalance" to majority language influences. He stressed that schools build community leaders and therefore serve as building blocks for the creation of other institutions.

[355] Dr. Landry emphasized that the school is "unquestionably the most important and basic institute" for a minority language community, although he

acknowledged that it cannot assure strong cultural autonomy and lasting Vitality on its own. Rather, French-speaking communities must increase their institutional completeness by looking for other venues for increased community Vitality.

c) Dr. Martel

[356] Dr. Martel holds a Bachelor of Education, a Master of Arts and a Doctorate of Philosophy from the University of Alberta. Since 1988, she has been a professor of sociolinguistics and languages at Télé-université in Montreal. She has published extensively on linguistic minority education, and has advised governments and international organizations with respect to language policy. She was qualified as an expert in the following areas:

- a. Sociolinguistics, including language planning and discourse analysis;
- b. The implementation of government programmes to preserve and promote minority language education and culture;
- c. The role of schools in the development of French-language communities outside Quebec;
- d. Applied research and methodologies regarding the implementation of government programmes to preserve and promote minority language education and culture, including applied research and methodologies regarding French-language schools outside Quebec.

[357] Dr. Martel was asked to describe the impact of a new homogeneous French-language school facility on enrolment and the Vitality of a French-language community. She answered the question by performing original qualitative research. As I explain in Chapter VII, The Number of Children, there are many problems with her original research that make it impossible to give her conclusions significant weight.

[358] Using the Vitality model that Dr. Landry uses, Dr. Martel extrapolated 10 indicators that could show what impact a new, homogeneous French-language

school facility has on the Vitality of a minority language community. The indicators, which Dr. Martel ranked from the most to least frequently observed, consist of:

- a. Indicator 1: Did school enrolment increase? (demolinguistic)
- b. Indicator 2: Did individuals and the collectivity show pride? (subjective)
- c. Indicator 3: Is the school and its community actively attracting external and prestigious activities? (status and subjective)
- d. Indicator 4: Were new knowledge distribution networks created? (informal and/or institutional)
- e. Indicator 5: Were the local community networks amplified and linked to provincial/national/international networks? (formal institutional)
- f. Indicator 6: Were new francophone associations and networks created? (formal and informal institutional)
- g. Indicator 7: Were sociocultural activities held in greater numbers and scope? (informal institutional and subjective)
- h. Indicator 8: Is there evidence of more organized community planning? (formal institutional)
- i. Indicator 9: Is there evidence of the building of a francophone neighbourhood around the school? (demographic and status)
- j. Indicator 10: Is there evidence of the building of a francophone economy around the school? (status)

[359] Dr. Martel observed that each of the first four indicia was present in almost all of the schools she studied. She observed the amplification of community networks (Indicator 5) in the sense that French-language associations located in school facilities were able to form links with one another. She noted that the sixth indicator, the creation of new associations and networks, occurred particularly where schools served as community centres. She also observed instances of both the seventh and eighth indicia, but did not observe any instances of indicia nine and ten.

[360] Dr. Martel observed that her indicia were present more often in new schools built to serve small and medium population centres than large, urban population centres. She related this to the existence of active French-language community institutions in large urban centres prior to the construction of the new school. Since small and medium population centre have fewer French-language institutions, a new school facility can bring life to the community.

[361] There are problems with Dr. Martel's conclusions. It is not clear from her methodology that the indicia emanate from the construction of a new, homogeneous French-language school facility. For instance, as an example of active expression of pride emanating from a new, homogeneous French-language school, Dr. Martel referred to students from School #8 (St. Paul, AB) participating in a literacy walk. Notably, that literacy walk took place years after the announcement of the new facility, and years before the school was occupied.

[362] Dr. Martel admitted that she did not do a thorough search on literacy walks to determine if such walks had been done before the announcement. She also admitted that she could not be sure whether the literacy walk would have occurred without the announcement of the new facility. Dr. Martel did not consider whether there was more pride demonstrated before or after a project was announced, or look at the strength of expressions of pride.

[363] There are also issues with Dr. Martel's conclusions with respect to the presence of new community partnerships. Dr. Martel indicated that School #126 (Charlottetown, PEI) had gradually grown to create and include many associations. She admitted on cross-examination that she was not sure that the associations were created after the school.

[364] Dr. Martel's conclusions with respect to the eighth indicator, evidence of more organized community planning, are also problematic. Dr. Martel stated that following the opening of a new, homogeneous French-language school facility, associations "were able to locate their offices in the school facility, and thereby enjoyed greater stability". Dr. Martel did not provide any examples or citations to

support that conclusion. She stated on cross-examination that she reached her conclusion based on a statement by a Francophone organization in Surrey, but she could not point the Court to the relevant document.

[365] Importantly, since Dr. Martel's report only considered expressions of community Vitality at new homogeneous French-language school facilities, it cannot be said whether such a facility is a pre-requisite to the manifestations of Vitality. A comparative aspect would be required to reach such a conclusion.

[366] Accordingly, I take from Dr. Martel's conclusions that where new, homogeneous French-language school facilities have been constructed, there may have been some indicia of increases in Vitality. However, it cannot be known whether those indicia are caused by the new, homogeneous school facility, or whether the French-language minority community would have experienced the same Vitality without the new facility. In this respect, her report only serves to confirm what various courts have held numerous times, what Dr. Landry states, and what the Province seems prepared to admit: that Francophone schools, generally, are important sites and community centres for minority Francophone communities.

d) Conclusions on the Role of Schools

[367] There is no doubt that schools are important sites for minority language communities. This has been recognized by many courts over the years. In *Mahe*, Chief Justice Dickson wrote that "minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture" (at 363). In *Association des Parents- SCC*, Karakatsanis J. noted that minority language schools "are a primary instrument of linguistic, and thus cultural, transmission" that are often "vital community centres" (at para. 27).

[368] These conclusions are borne out by the expert evidence in this case. As Dr. Landry noted, minority language schools provide a foundation for other

institutions and community leadership, counterbalancing the influence of the majority language. They also serve as a primary site for socializing children into the French language and culture, and play an essential role ensuring children experience Additive, rather than Subtractive Bilingualism.

[369] Some of the evidence in this trial bears out Dr. Landry's conclusions. Ms. Johanne Asselin, a long-time CSF administrator, gave evidence about her experience with the French language in Victoria since the mid-1980s. École Victor-Brodeur (Victoria) was rebuilt and opened as a new elementary/secondary school in about 2007. Ms. Asselin explain that, over the past 10 years, she has been involved with French Language scouting, theatre, a folk dance troupe and preschool, all of which met at École Victor-Brodeur. In that way, the school provided a home for the French language community and its many institutions. Many parents and CSF educators testified about how minority language schools improved the level of French and Francophone identity of CSF students.

[370] Dr. Castonguay's evidence concerning the extent to which individuals work in French emphasizes another role that minority language schools play in creating Francophone institutions in British Columbia. His evidence shows that those Francophones who work in French in BC tend to work in the education sector. That sector also employs a disproportionately high number of Francophones. Thus, minority language schools create institutions where adult Francophones can live and work in French.

[371] While schools play an important role increasing community Vitality, they are not a panacea. Assimilation runs deep in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on that assimilation rate. I accept that given the high rate of Exogamy and the low fertility rates in British Columbia, as Dr. Castonguay suggests, minority language schools are not likely to have a significant impact on the rate of assimilation. While minority language schools can make the life of a Francophone community more vibrant, they cannot magically increase birth rates and immigration.

Minority language schools may slow the tide of assimilation, but they will only prolong the inevitable.

[372] Regardless, though, s. 23 mandates their creation, and schools do their best to increase the Vitality for British Columbia's small minority language community.

VI. THE RESPECTIVE ROLES OF THE PROVINCE AND THE CSF

[373] To ensure that schools can fulfill their role enhancing the Vitality for British Columbia's minority language community, s. 23 guarantees the minority language community a degree of management and control over minority language educational facilities. Additionally, the Province has a positive duty to ensure that minority language educational facilities are provided out of public funds where the numbers so warrant. Those rights temper the Province's broad, plenary jurisdiction over education.

[374] The respective jurisdiction of the CSF and the Province is an essential issue informing my analysis of the plaintiffs' claims that the Province's capital funding system is contrary to section 23 and invalid. The overlapping roles of minority language school boards and the Province also give rise to questions about responsibility for any breach of *Charter* rights, and how they should be resolved in s. 23 cases.

[375] Here, I discuss how constitutional powers over minority language education are divided between the Province and minority language school boards, before drawing some conclusions about the role responsibility plays in the s. 23 analysis.

A. The Allocation of Constitutional Powers

[376] Section 93 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*], confers on British Columbia the exclusive power to make "laws in relation to education". In *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15 [*Ontario Catholic Teachers*], the Court held (at para. 61) that s. 93 "gives the provincial government

the plenary power over education in the province, and it is free to exercise this power however it sees fit in relation to the public school system.”

[377] The Province’s jurisdiction pursuant to s. 93 is limited by both the right to minority language education in s. 23 of the *Charter* and the rights to denominational schools in s. 93(1) of the *Constitution Act, 1867*. There are interesting parallels between the rights given to the linguistic minority in s. 23 and the rights given to denominational schools in s. 93(1). In *Adler v. Ontario*, [1996] 3 S.C.R. 609, a majority of the Court drew an analogy between the rights conferred on denominational schools by s. 93 and those guaranteed in s. 23. The majority commented that both were founded in political compromise, and granted special status to particular classes of people for the purpose of education (at para. 31).

[378] Further, the rights to denominational schools limit the Province’s jurisdiction over education in a similar manner to s. 23. Denominational schools have a right to control the denominational aspects of their education programmes and the right to a measure of equality in the education services they are entitled to: *Ontario Catholic Teachers* at para. 60 citing *Adler* at para. 45. Section 23 affords the linguistic minority similar rights: a right to management and control over matters pertaining to the language and culture of the linguistic minority, and a positive right to facilities on the basis of equality to the majority.

[379] As a result, when interpreting the continuing jurisdiction of the Province over minority language education, I will take into account some of the jurisprudence concerning the interpretation of s. 93(1) of the *Constitution Act, 1867*, and the manner in which the rights of denominational schools limit provincial jurisdiction over education.

[380] Section 23 limits the Province’s plenary power in two ways: by the linguistic minority’s right to management and control over some aspects of the education system, and by the positive obligation on government to provide minority language education services. I define each of those limits below, including the extent to which the Province retains its plenary jurisdiction over education pursuant to s. 93.

1. The Linguistic Minority's Right to Management and Control

[381] It has been clear since *Mahe* that the term “minority language education facilities” in s. 23(3)(b) of the *Charter* invokes the concept of management and control rather than physical structures. In *Mahe*, the Court observed that the term “minority language education facilities” is not intended to refer to physical structures. Instead, where the numbers so warrant, the majority is entitled to a degree of management and control over education (at 369-370):

In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to “instruction” includes an implicit right to be instructed in facilities. If the term “minority language educational facilities” is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting “facilities” as a reference to physical structures. Indeed, once the sliding scale approach is accepted, it becomes unnecessary to focus too intently upon the word “facilities”. Rather, the text of s. 23 supports viewing the entire term “minority language educational facilities” as setting out an upper level of management and control. [Emphasis added.]

[382] The Court in *Mahe* observed that its interpretation of s. 23(3)(b) is supported by its articulation of the purpose of s. 23. Specifically, the Court opined that “[s]uch management and control is vital to ensure that [parents’] language and culture flourish” as “a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns.” Accordingly, the Court opined that the “health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues” (at 372). See also *Association des Parents- SCC* at para. 30.

[383] In *Mahe*, Dickson C.J.C. also stressed the importance of management and control as a means of ensuring the majority takes account of the linguistic and cultural concerns of the minority. He noted that “the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.” As a result, management

and control of education by the minority is important to ensuring that s. 23 remedies past injustices and ensures they are not repeated in the future (at 372).

[384] While the parties agree that s. 23 typically affords the minority a measure of management and control, they disagree about the extent of that management and control. The plaintiffs say that the minority must have control over those aspects of education that pertain to and have an impact on language and culture. In the plaintiffs' submission, a minority language school board must have control over a number of factors, which they say were all identified by the Court in *Mahe* at 377 and *Arsenault-Cameron* at paras. 48-57:

- Expenditures of funds provided for instruction and facilities;
- Appointment and direction of those responsible for the administration of such instruction and facilities
- Establishment and delineation of catchment areas
- Location of minority language instruction and facilities
- Organization of transportation and evaluation of transportation requirements
- Establishment of programs of instruction
- Recruitment and assignment of teachers and other personnel; and
- Making of agreements for education and services for minority language pupils

[385] In the plaintiffs' view, the right to management and control therefore guarantees the CSF the exclusive authority to make decisions about how both capital and operational funding are to be spent. They also suggest the right to management and control includes the authority to make a wide range of decisions concerning the delivery of minority language education services in particular geographic areas, including decisions related to catchment areas, school location and transportation.

[386] The defendants emphasize the limited nature of the right to management and control. They stress that the CSF's right is limited to the business of language and culture, and does not exclude the right of the Province to exercise control over other aspects of the system. They note that in *Mahe*, the Court held the right to tax was not incidental or essential to satisfying the concerns of s. 23 with linguistic and

cultural security. They also emphasize comments in *Mahe* at 375-377 to the effect that “the public authorities may choose the means of fulfilling their duties”.

[387] A school board’s right to management and control gives it a measure of control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. In *Mahe*, the Court wrote that, in order to further the purpose of s. 23, where the numbers warrant the minority must “possess a measure of management and control over the educational facilities in which their children are taught” (at 371-372). What is essential, the Chief Justice wrote, “is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture” (at 375). In suggesting that the minority need not have control over all aspects of the minority language education, he commented that the minority should have “exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns” (at 375-376).

[388] This idea was expanded upon in *Arsenault-Cameron*, where the Court confirmed that the concept of management and control extends beyond the right to an independent school board. The Court explained that if the numbers warrant the creation of facilities, “the representatives of the official language community have the right to a degree of governance of these facilities” (at para. 42). Thus, if a minority board has been established, it represents the minority and has the right “to decide what is more appropriate from a cultural and linguistic perspective” (at para. 43).

[389] The Courts have pointed to a number of factors that are, or are not, relevant to the minority’s language and culture and thus within its exclusive right to management and control. In *Mahe*, Chief Justice Dickson made an inexhaustive list of items that representatives of the minority ought to have the exclusive ability to make decisions in respect of, including (at 377):

- (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.

[390] *Arsenault-Cameron* presents an example. The Court considered a situation where the Minister did not defer to the linguistic minority's decision that a small school ought to be built in a minority community instead of transporting children to a school in a neighbouring community. The Court considered whether the location of minority language instruction and facilities fell within the cultural and linguistic authority of the minority board. In concluding that it did, the Court found the Minister ought to have deferred to the Board's judgment concerning what number of students were required to make a programme pedagogically appropriate (at para. 48) and what travel times were appropriate (at paras. 49-50). The minority school board's right to management and control also included the right to make decisions concerning geographic boundaries for assembly of students (at para. 57).

[391] In connection with items that are clearly outside the realm of language and culture and thus the right to management and control, in *Mahe*, the Court gave the example of the right to tax, which is not "essential to satisfy the concerns of s. 23 with linguistic and cultural security" (at 376).

[392] To summarize, to ensure that the minority language and culture flourish, and past injustices are *remedied*, where the numbers so warrant, the minority community is entitled to exclusive control over aspects of minority language education that pertain to or have an impact on language and culture. This is necessary because the majority cannot be expected to understand and appreciate how certain practices might bear on the minority's language and culture.

[393] As I see it, the right to management and control is limited to matters going to the minority's linguistic and cultural *concerns*. Given the remedial nature of s. 23, context will be important: what matters pertain to the language and culture will depend on the unique circumstances of the minority group in question.

[394] Generally, some factors identified in *Mahe* will often tend to relate to language and culture: expenditures of funds for minority language instruction and facilities, the administration of those facilities, establishment of new programmes, recruiting and assigning teachers and personnel, and entering into agreements for education services for minority language pupils.

[395] Other times, the context and need for remediation may bring other factors within the ambit of language and culture. For example, in *Arsenault-Cameron*, the geographical distribution and concentration of a minority language community brought decisions about catchment areas, transportation and the location of schools within the ambit of language and culture. This was necessary to ensure that the language and culture of the particular community would flourish.

[396] Matters that are outside the scope of language and culture (for example, the right to tax) will fall *outside* the minority's right to management and control. They remain within the Province's plenary jurisdiction over education pursuant to s. 93.

[397] The defendants stress that the CSF's right to management and control is not absolute, and the CSF is not entitled to absolute deference. Rather, they say that *Mahe* spoke of a "degree" of management and control. In their view, the distinction is significant. They stress that there is a proper role for government oversight over the minority's right to management and control. The defendants take the view that the same point was made in *Arsenault-Cameron* at paras. 51 and 54.

[398] The plaintiffs submit that the CSF's right to management and control limits the Province's jurisdiction over education. While they acknowledge the Province's interest in the content and qualitative standards of educational programmes, they say that the *Province* cannot interfere with the legitimate linguistic and cultural concerns of the minority. They submit, citing *Arsenault-Cameron* at para. 53, that regulation of school size, facilities, transportation and assembly of students must have regard to the specific circumstances of the minority and the purposes of s. 23.

[399] Since some matters clearly fall within and some outside the right to management and *control* over matters pertaining to language and culture, the Province clearly retains some of its jurisdiction over the education provided to the linguistic minority pursuant to s. 93.

[400] In *Arsenault-Cameron*, the Court commented that it should not be taken as saying that the Minister's role is unimportant (at para. 52). The Court held that while the minority was *entitled* to a measure of management and control over matters going to its language and culture, it had to exercise its powers "subject to the objective provincial norms and guidelines that are consistent with section 23" (at para. 54). The Court also held that minority boards must exercise their rights "in light of the role of the Minister" (at para. 51).

[401] The Court held that "[t]he principal role of the Minister is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province" (at para. 43). In particular, the Minister was able to fix "legitimate parameters to the exercise of the right of management by the Board", and enforce provincial norms (at para. 58). The Court confirmed that the provincial government had a legitimate interest in minority language education, and an ongoing role to play (at para. 53):

The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[402] The Court went on to hold that, in light of the minority board's primary jurisdiction over the construction of new schools, the Minister's authority "was limited to verifying whether the Board had met provincial requirements." Since all provincial requirements had been complied with, the Minister had no power to impose his own criteria as a substitute, or his own decision for that of the Board, once the Board had decided what facilities were appropriate (at para. 55).

[403] I also take some guidance from *Ontario Catholic Teachers*, a case pursuant to s. 93 of the *Constitution Act, 1867*. After acknowledging the religious community's right to management and control over the denominational aspects of education (at para. 60), the Court stated (at para. 61) that the denominational school board's right to management and control did not provide "constitutional protection for the design of the public school system", which continued to fall within the Province's plenary power with regard to education [Emphasis in original].

[404] In another s. 93 case, *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, the Court considered a constitutional challenge to Alberta legislation that placed spending restrictions upon school boards, and strengthened ministerial control over school board senior staff. The plaintiffs in that case argued that school districts have a constitutional right to a sphere of reasonable autonomy, which Justice Major, writing for the Court, rejected. He confirmed that school boards, like municipal institutions, are delegates of provincial jurisdiction under the *Constitution Act, 1867* (at para. 33). He acknowledged that school boards are "the vehicles through which the constitutionally entrenched denominational rights of individuals are realized" (at para. 34). Despite this, he concluded that "educational institutions are malleable and subject to legislative reform" (at para. 35). Thus, the Court concluded that Alberta enjoyed a broad, plenary power over education, and that "[a] claim to an institutional sphere of reasonable autonomy is inconsistent with, and would impair, this plenary power." Thus, Alberta was permitted to "alter educational institutions within its borders as it sees fit" subject only to constitutional and legal limits (at para. 37).

[405] Taking these principles together, I find that where a matter falls within the minority's exclusive right to management and control over matters going to language and culture, the minority school board is entitled to some deference. As suggested in *Arsenault-Cameron*, to the extent that the Province interferes with the minority's management and control over matters going to language and culture, those actions or regulations will be invalid.

[406] On the other hand, the Province is entitled to develop institutional structures and regulations governing the minority's right to management and control. The linguistic minority is not entitled to any particular design of the education system. The Province continues to enjoy the jurisdiction to alter the education system pursuant to its plenary power over education. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise their right of management and control consistently with them.

2. The Positive Obligation to Provide Facilities to the Linguistic Minority

[407] The plaintiffs submit that, unlike other *Charter* rights, s. 23 confers a special status on a minority group, and imposes a positive obligation on the Province to mobilize resources and enact legislation. In their submission, given the purpose of s. 23, the Province is required to do "whatever is practically possible to preserve and promote minority language education": *Arsenault-Cameron* at para. 26.

[408] Thus, the plaintiffs emphasize the distinct, positive obligations that s. 23 places on the Province. Citing *Conseil des écoles séparées catholiques romaines de Dufferin et Peel v. Ontario (ministre de l'Éducation et de la Formation)* (1996), 30 O.R. (3d) 681 (Div. Ct.), aff'd (1996) 30 O.R. (3d) 686 (C.A.) [*Dufferin Peel*] at para. 7, they urge that the Province must be taken to have recognized the financial obligations that flow from its commitment in s. 23 of the *Charter*, such that it cannot subvert minority language rights to changing priorities or economic exigencies. They therefore say that the Province cannot rely on cost, a lack of legislation or capital funding mechanisms as a defence for not responding to minority language rights, citing on *Doucet-Boudreau* at para. 39.

[409] The plaintiffs urge that s. 23 rights are also time sensitive. The plaintiffs note, as was implied in *Doucet-Boudreau* at para. 29, that for every school year the Province fails to meet its obligations under s. 23, there is an increased likelihood of assimilation and cultural erosion, which carries with it the risk that the number of

children may cease to warrant the same educational facilities. In their submission, the time sensitivity of s. 23 requires both “vigilant implementation of s. 23 rights, and ... timely compliance in remedying violations”: *Association des Parents- SCC* at para. 28.

[410] The defendants distinguish *Dufferin Peel* and *Doucet-Boudreau*. In connection with *Dufferin Peel*, they note that Ontario had admitted a rights breach and committed to remedying the breach once financial circumstances allowed. In this case, the defendants say, the Province does not take the position that Government’s commitment is satisfied with a promise to fund at a later date.

[411] Unlike other provisions of the *Charter*, s. 23 and the other language rights are more akin to rights than freedoms. In *Ford c. Quebec (Procureur general)*, [1988] 2 S.C.R. 712, the Court acknowledged that s. 23 entitles rightsholders to specific benefits from the government, and obliges the government to provide those services or benefits in both languages. The Court differentiated s. 23 from other rights in the *Charter*, which guarantee freedoms to choose a course of activity without government interference. In that way, they are said to guarantee a “precise scheme” of opportunities to receive services in English or French “in concrete, readily ascertainable and limited circumstances” (at 751).

[412] In *Mahe*, the Court explained that s. 23 grants special rights to a select group of individuals: members of minority language communities. Thus, the Court found that it “provides a comprehensive code for minority language educational rights”. It specifically has its own internal qualifications and its own method of internal balancing (at 369). Within those limits, there is an obligation on government to “do whatever is practical in the situation to preserve and promote minority language education” (at 367).

[413] The words of s. 23 establish that the positive obligation on government extends to providing minority language education facilities “out of public funds” where the numbers warrant. In *Doucet-Boudreau*, the Court affirmed the trial judge’s conclusion that concerns including “lack of funds” could not justify a failure to

fulfill admitted obligations under s. 23 (at para. 39). Similarly, in *Dufferin Peel*, the Court held that in the context of that particular case and minority language group, a delay in funding (admittedly needed) minority language education facilities due to the Government's deficit elimination strategy was contrary to s. 23. In that case, Hawkins J. emphasized that this was so because of the constitutional entrenchment of minority language education rights (at 684):

The sentiments expressed in this quote contain the germ of the problem which brings us all together. The right of citizens of Canada to have their children educated in what is called, conveniently and popularly, a "minority" language is a right constitutionally protected by s. 23 of the Canadian Charter of Rights and Freedoms. A democratically elected government may in most cases and quite properly determine what in its view are "the services we value most". If it is wrong in that determination it answers at the ballot box. In a climate of job loss, welfare cuts and general reduction of government services it is not difficult to imagine that a capital expenditure of over \$10 million for an improved French language secondary school might not qualify as a service that "we value most", supposing that the "we" referred to therein is the non- Francophone majority. It is to avoid such a result that we have constitutionally protected rights. Elected representatives of the people create constitutions, leaving it to non-elected judges (in Canada at least) to decide what exactly they have created.

[414] The nature of the right is also such that governments must act quickly. In *Doucet-Boudreau*, the Court observed that government delay or inaction can increase the likelihood of assimilation, carrying the risk that the numbers might cease to "warrant" whatever services are required (at para. 29). Madam Justice Karakatsanis confirmed this in *Association des Parents- SCC* at para. 28, where she noted that "[l]eft neglected, the right to minority language education could be lost altogether in a given community. Thus, there is a critical need both for vigilant implementation of s. 23 rights, and for timely compliance in remedying violations."

[415] The defendants take the position that the duty on government is limited. They stress the requirement for governments to do "whatever is necessary" is tempered by a practical consideration: "whatever is practical in the situation to preserve and promote minority language education", citing *Mahe* at 367. That, they say, is the tension in the provision.

[416] I agree with the defendants. The practical limit to the obligation on government was first noted in *Mahe* at 367. Citing that statement, in *Arsenault-Cameron*, Justices Major and Bastarache, writing for the Court, opined that s. 23 places on provincial governments a duty to “do whatever is practically possible to preserve and promote minority language education” (at para 26).

[417] The positive obligation to provide facilities where the numbers warrant therefore places a second limited restriction on the provinces’ plenary jurisdiction over education. Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, (Toronto: Carswell, 2007) [Hogg] observed that the rights included in s. 23 are constitutional minimums. Subject to meeting the minimum standard, it is open to the government to make laws pursuant to education in accordance with its plenary power over education (at 56-28):

The minority language education rights of s. 23 are a “constitutional minimum”. This means that provincial legislation which is more restrictive of access to minority language education than s. 23 will be unconstitutional (unless justified under s. 1). But, subject to the constitutional minimum, the provinces retain their constitutional power to make laws in relation to education (s. 93) and they can enact laws that broaden access to minority language education.

[418] Section 93 of the *Constitution Act, 1867*, places a similar positive obligation on those provinces that have historically offered denominational schools. In *Adler*, the majority emphasized that governments are free to go beyond the mandatory minimums included in s. 93, but there is no obligation to do so (at para. 48):

One thing should, however, be made clear. The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1). Section 93 grants to the province of Ontario the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province’s legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1). See the words of Gonthier J., writing for the Court, in *Reference re Education Act (Que.)*, *supra*, at p. 551. However, an ability to pass such legislation does not amount to an obligation to do so. To emphasize, s. 93 defines the extent of the obligations of the province to set up and fund denominational schools when public

schools are established. In this respect, it is a comprehensive code thereby excluding a different or broader obligation regarding denominational schools, while not restricting the plenary power of the province to establish and fund such other schools as it may decide. [Emphasis in original.]

[419] As I see it, s. 23 has a unique place in the *Charter*. Rather than recognizing a universal freedom, s. 23 creates an individual right (with a collective aspect) that is peculiar to Canada. Because the right to minority language education is constitutionally entrenched, the obligation on government to act can require expenditures out of public funds even where political vagaries might lead a government to want to do otherwise. It also requires prompt action to prevent the very assimilation that s. 23 is intended to guard against.

[420] While the duty on government is positive, it is also limited by the words of s. 23 and the broader context. Through its own internal limitations, s. 23 creates a complete code for the obligation placed on Government to provide minority language education rights in Canada. The duty and limits inherent to the provision require governments to do whatever is practical in the circumstances to preserve and promote minority language education. Given the contextual, remedial interpretation that must be given to s. 23, determining what is practical in the circumstances will necessarily require the Court to consider the broad background context of a minority language group and the educational services they receive.

[421] In many instances in their argument, the plaintiffs go further than this. They suggest that s. 23 places an affirmative duty on government to preserve and promote the French language and culture, or minority language education, in British Columbia. This goes too far. As was explained in the *Ontario Education Act Reference* at 28, s. 23 gives effect to the principle of preserving the minority language and culture. It provides education rights as a means of strengthening our country's bilingual and bicultural character. It does not, however, place a duty on government to achieve those ends through any means other than providing the mandatory minimum level of minority language education. As suggested in *Mahe, Ford and Adler*, s. 23 creates a complete code, and the Government is not required

to provide services that go beyond what is envisioned by the rights created in the text of s. 23.

B. The Role of Responsibility

[422] The overlapping jurisdiction of the Province and the CSF gives rise to the question of responsibility for breaches of rights. The Province and the CSF share jurisdiction over education. In the defendants' submission, the question who is responsible for a s. 23 breach ought to be taken into account at some stage of the s. 23 analysis, whether separately or as part of the justification analysis pursuant to s. 1 of the *Charter*.

[423] The defendants argue that minority language school boards like the CSF wear two hats. They are both a branch and creature of government and representatives who exercise the ancillary right of management and control on behalf of rightsholders. In the defendants' view, with the right to management and control comes responsibility. Because the CSF is responsible for exercising management and control over matters pertaining to language and culture, it must also be accountable for its choices, particularly if Government must defer to it.

[424] In the defendants' submission, the choices made by a well-funded minority school district exercising delegated powers of management and control can disentitle the district to redress for issues arising out of their own choices. The defendants point to *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWT- CA 2 [NWT- CA] at paras. 85 and 87, where the Court held that rightsholders must "marshal their resources" and cannot complain about a lack of space for core programming where they or their representatives have chosen to dedicate space to ancillary uses.

[425] The defendants therefore suggest that it is important to assign responsibility for a breach of s. 23. They note that in *Association des Parents- SCC*, Karakatsanis J. noted that Justice Willcock's finding in *L'Association des parents de l'école Rose-des-vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC

1614 [*Association des Parents- BCSC*] was not a complete finding of a *Charter* violation because responsibility had not yet been assigned (at para. 61). In the defendants' view, if determining responsibility is not a separate step, the issue is best considered as part of the s. 1 justification analysis. They say it is not appropriate to deal with the issue as a remedy, because the issue goes further than the question of who should fix the breach. In many cases, they say, the CSF will not be able to fix a breach of its own making without involvement from the Province.

[426] The plaintiffs urge that the defendants' position is misguided. They say that since the *Charter* binds both the Province and the CSF, even if the CSF were found solely responsible for any breach of s. 23, it would not insulate the Province from its constitutional responsibility. They say that, at most, the issue of responsibility is relevant to crafting an appropriate remedy, which might require action and expenditure on the part of both the CSF and the Province. In that connection, they cite *Association des Parents- SCC* at para. 62.

[427] The plaintiffs' view is that even if a minority school board made an independent decision in breach of the *Charter*, those decisions could not permanently extinguish rightsholders' claims to appropriate school facilities. At most, they say, such responsibility would justify allowing the Province more time to correct the violation. Otherwise, a decision by a minority board could permanently disentitle rightsholders in a community to the educational experience guaranteed by s. 23. In their view, s. 23 is a continuing right that must be satisfied on an ongoing basis; decisions made at one time by a minority board could never permanently absolve the Province from further obligations or immunize it from further challenge.

[428] The question of responsibility for a breach of s. 23 is novel territory. The issue arose in *Association des Parents- SCC*, where the Province argued that courts determining s. 23 cases should assess responsibility for a breach when deciding if minority language facilities are equivalent to those of the majority. The Court rejected that approach as it would provide "no insight into the question of whether a given minority language school is equivalent to its majority counterparts" (at

para. 43). However, the Court went on to hold that establishing responsibility “may be relevant to crafting an appropriate remedy, should one be necessary” (at para. 62). The Court also held that Mr. Justice Willcock’s declaration that the facilities at École Élémentaire Rose-des-Vents were not equivalent was “subject to the future determination of responsibility” (at para. 63).

[429] The question of responsibility also arose indirectly in *NWT- CA*. There, the Court held that, “[a]s a general rule, the s. 23 rights holders are required to marshal their resources” and cannot claim for inadequate funding or facilities where they use resources provided by government for other things (at para. 85).

[430] There is some merit to the positions of both the plaintiffs and the defendants. On the one hand, as the plaintiffs suggest, rightsholder parents are entitled to educational facilities where the numbers so warrant, sometimes at a standard of equivalence. To the extent that rightsholders’ children are not able to enrol in those facilities, it is irrelevant whether the CSF or the Province is responsible for the absence of facilities. It may well be that they both are, to varying extents.

[431] On the other hand, there is some merit to the idea that a minority board’s right to management and control ought to include a responsibility to effectively manage its resources. Minority boards have exclusive jurisdiction over matters pertaining to language and culture. They override the Province’s plenary jurisdiction over education in that respect. Governments must not interfere with those decisions, at risk of violating s. 23.

[432] This is particularly so in this case because the CSF is a representative body. It was established to give effect to s. 23 of the *Charter*, and in that way is intended to give rightsholder parents a measure of management and control over the linguistic and cultural aspects of minority language education.

[433] This is accomplished through democratic participation. Pursuant to s. 166.13 of the *School Act*, rightsholders are entitled to apply to the CSF to become members, and the CSF must admit them. Section 166.14 of the *School Act* gives all

rightsholder members of the CSF the right to vote in the CSF's election of regional trustees. The trustees then carry out the management and control function of the school board.

[434] In that way, while the CSF is responsible for meeting the requirements of s. 23, it is also the representative of the very rightsholders to which it owes its duty. It is both the holder and the guarantor of rights. It is hard to conceive of the CSF suing itself for a breach of its own rights.

[435] One way of dealing with the issue is to examine s. 23 breaches through the lens of causation. Given the nature of the duties on both sides, in my view, it is necessary to take into account what caused any lack of minority language education facilities, and the nature of that cause.

[436] The idea of causation is not foreign to *Charter* rights. It was discussed in the context of s. 7 of the *Charter* in *Canada (Attorney General) v. Bedford*, 2013 SCC 72. There, the Attorney General argued that state prohibitions concerning prostitution were not the cause of potential harm to sex workers. The Attorney General's position was that the potential harm to sex workers arose out of inherently risky behaviour. The Court confirmed that s. 7 included a flexible causation standard, which asks whether there is a "sufficient causal connection" between the state-caused effect, and the prejudice suffered by the claimant (at para. 75).

[437] Causation also arose in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. The Court there was concerned with a claim for *Charter* damages as a result of unconstitutional wrongful non-disclosure by prosecutors. The majority held that, in addition to establishing a *Charter* breach, the claimant must establish that "as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of "but for" causation" (at para. 95). Doing so ensured that "liability is restricted to cases where the intentional failure to disclose was actually the cause of the harm to the accused (at para. 97). The standard could be modified in situations involving multiple alleged wrongdoers,

in which case “the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered” (at para. 98). In their minority opinion, Chief Justice McLachlin and Justice Karakatsanis would have left the causation question for another day, but expressed caution that the but-for causation test might not be appropriate (at para. 118).

[438] In my view, causation is also important to the s. 23 analysis. If the breach was caused by the Province’s interference in the minority’s exclusive right to management and control, then the Province must be held accountable. The Province may interfere with that right in two ways: by either trenching on or refusing deference to the minority’s legitimate exercise of its right to management and control, or by failing to fulfill its positive duty to provide appropriate facilities where numbers warrant.

[439] Circumstances are different when the situation was caused by decisions taken by the minority. A situation may, for example, arise out of decisions taken by the minority board in exercise of its exclusive jurisdiction over language and culture. It may also arise out of the minority’s failure to abide by legitimate institutional structures and regulations governing the minority’s right to management and control. In those situations, liability will not attach to the Province.

[440] For example, where a minority board is well funded but mismanages its funds, causing a breach of s. 23, the minority board is responsible and must put its resources toward remedying the violation. Or, where a minority board has sufficient space but chooses not to use that space for educational purposes, causing a lack of space for rightsholders, the school board is responsible for the breach and must reallocate its space to its intended purpose. Since a minority board is the vehicle for rightsholders to exercise their exclusive right to management and control, it must exercise a measure of self-determination to remedy rights breaches of its own making.

[441] Where both the minority school board and the Province are responsible, there are multiple causes. In that instance, the plaintiffs will satisfy the causation

requirement and liability will attach to the Province provided that the Province materially contributed to the breach of section 23.

[442] Ultimately, the issue of causation will be relevant in two ways. First, the cause of any rights breach is important to know for the purposes of the s. 1 justification analysis. As I explain in detail in Chapter IX, Justification, the parties have the right to justify any infringing measure that is prescribed by law. Therefore, it is essential to know what infringing measure caused a rights breach to assess whether that breach is justified.

[443] Second, causation is important to the assessment of what remedy ought to be granted, as the Court suggested in *Association des Parents- SCC*. In the event that mismanagement by the minority board is the sole cause of substandard services, as a representative body, it must act within its jurisdiction to remedy the breach. This might require taking steps to make capital requests not previously made, or re-allocating existing space or funding to its intended purpose. If the Province is solely responsible or materially contributed to a breach, then orders may issue declaring laws or policies to be of no force and effect, or requiring the Province to take certain steps.

C. Conclusion

[444] British Columbia enjoys broad, plenary power over education pursuant to s. 93 of the *Constitution Act, 1867*. That jurisdiction is limited by s. 23 in two ways.

[445] Section 23 places a unique positive duty on governments to ensure that appropriate minority language educational facilities are made available where the numbers so warrant. To that end, it must make expenditures out of public funds and to act promptly to prevent assimilation. At the same time, the duty on government is limited by the words of s. 23, which set a baseline requirement of services that the government must provide. While it is open to Government to exceed those standards, it is not required to do so.

[446] Government's jurisdiction is also limited by the requirement that it cede to the minority language community management and control over those aspects of the education system that concern the minority language and culture, where the numbers so warrant. What, exactly, goes to the linguistic and cultural aspects of minority language and culture will depend on the context: whether the matter in questions relates to the pursuit of the remedial objectives of s. 23. If the CSF is acting within that jurisdiction, s. 23 requires that the Province not interfere.

[447] The Province does, however, continue to have a legitimate interest in crafting an appropriate, constitutionally-compliant framework within which the minority must exercise both its statutory and constitutional duties. The minority is not entitled to any particular education system, and must operate within constitutionally compliant structures set by Government: those structures that do not trench on its right to management and control or fail to provide the minority with the educational facilities to which it is entitled.

[448] Given the overlapping jurisdiction of the Province and minority boards, either or both can cause a breach of s. 23. It is essential to know what caused the rights breach to determine whether that measure is justified pursuant to s. 1 of the *Charter*. Further, if the Province has either solely or materially contributed to a breach by failing to meet its positive duty or interfering with the minority's exercise of its rights, then the remedy must hold the Province accountable. If the minority board caused the breach through an exercise of its management and control, or its failure to abide by a legitimate educational framework, then the remedy must require the minority board to remedy the situation by exercising its jurisdiction.

VII. THE NUMBER OF CHILDREN

[449] The positive duty on the Province turns on the number of rightsholders' children in a given community. Thus, the question how many students are likely to attend a minority language school is a crucial one. Its determination is essential to the s. 23 analysis as well as the Province's capital planning system for education.

[450] In this chapter, I resolve issues of fact and law to arrive at a common methodology for calculating the number of children likely to attend CSF programmes. By way of introduction, I address the relevance of enrolment projections to the s. 23 analysis and the Province’s capital planning system for education. Then, I consider how the number of students ought to be calculated. This involves a consideration of how the total universe of children of s. 23 rightsholders should be quantified, including whether that universe should include any children of non-rightsholders or persons who would be rightsholders if they were Canadian citizens. From there, I resolve common issues concerning the number of children of rightsholders that can be expected to take advantage of the programme, with reference to the impact new school facilities are likely to have on enrolment.

[451] A tangential issue concerns the plaintiffs’ claim that the Province has failed to appropriately assist the CSF to calculate potential enrolment. Since that question is a separate ground for the plaintiffs’ claim and is not relevant to the framework I apply to calculate the number of children in these reasons, I address it in Chapter XL, Administrative Requirements of the Capital Funding System, where I consider a number of the CSF’s arguments that certain administrative requirements of the Province’s capital funding system do not respond to its needs.

A. Enrolment Projections

[452] Enrolment projections are at the heart of this decision. They are crucial in two respects. Quantifying the number of children likely to attend a programme is essential to the “numbers warrant” criterion in the s. 23 analysis. It is also fundamental to the Province’s capital planning system, particularly the question whether a new school is necessary, and for how many students it should be built.

1. Enrolment Projections and s. 23

[453] Section 23(3)(a) guarantees minority language instruction where “the number of children of [rightsholders] ... is sufficient to warrant the provision [of it] to them out of public funds”. Thus, the starting point in the analysis is the number of children of rightsholders that can be expected to attend the programme.

a) Categories of Rightsholders

[454] There are three categories of rightsholders entitled to have their children attend minority language schools. Pursuant to s. 23(1)(a) of the *Charter*, rightsholders include citizens of Canada whose first language learned and still understood is French. Occasionally in this decision I will refer to such individuals as “Mother-Tongue Rightsholders”. This group includes any citizens that grew up speaking French that still understand the language, no matter where they grew up, and no matter whether French was the only or one of many languages spoken in the household.

[455] Section 23(1)(b) includes among rightsholders citizens of Canada who received their primary school instruction in Canada in French. From time to time, this decision will refer to this group as “Education Rightsholders”. This group includes parents who attended British Columbia’s minority language programme that preceded the CSF, the Programme Cadre, as well as parents who attended primary school in French anywhere in Canada.

[456] The third category of rightsholders are those who became rightsholders pursuant to s. 23(2) of the *Charter* by virtue of having a child receive his or her primary or secondary school instruction in French, whether in the past or at present. This group includes parents of children that received French-language education anywhere in Canada, so long as the programme was not a French immersion programme. I will occasionally refer to this group of rightsholders as “Sibling Rightsholders”.

b) The Number of Children of Rightsholders

[457] The parties generally agree on the test for calculating the number of children for the purpose of s. 23: The question is what number of children can reasonably be expected to take advantage of minority language education services. However, they propose calculating it in different ways. The plaintiffs emphasize the total universe of rightsholders’ children in an area. The defendants suggest that the total number of children of rightsholders need not be calculated with any precision.

[458] In the plaintiffs' submission, the starting point for the numbers warrant analysis is the number of children of s. 23 rightsholders that live in an area. From there, the Court must estimate the number of children who will eventually take advantage of the contemplated service, which will fall somewhere between the known demand for the service and the total number of persons who potentially could take advantage of it: *Mahe* at 384.

[459] The plaintiffs suggest that, to ensure that the remedial objects of s. 23 are achieved, new facilities must be built with sufficient capacity to accommodate both the current student population and potential enrolment growth. They say that courts must look beyond current demand to recognize that providing minority language education services will cause increased demand. Thus, the plaintiffs say the Court should adopt a "prospective approach" to the question of numbers.

[460] The plaintiffs urge some leniency when evaluating the evidence they can provide to quantify the number of children in an area. They suggest that they are required only to provide the information reasonably available to them to avoid imposing too heavy a burden and defeating the rights in s. 23. The plaintiffs say that census evidence is the most readily available information available to them.

[461] The defendants agree that, as stated in *Mahe*, the relevant figure for the purpose of the s. 23 analysis is the number of persons who will eventually take advantage of the contemplated programme or facility, which will fall somewhere between the known demand and the total number of persons who could potentially take advantage of the service. In the defendants' submission, though, it is not essential to know the outer brackets of that range, or to know the range with precision. What is essential, in their submission, is that the Court discern the number of children likely to attend the proposed programme.

[462] The defendants seem to agree with the prospective approach urged by the plaintiffs, but only to a limited extent. They urge the Court to follow the reasoning in *NWT- CA*, where the Court held at para. 99 that the test involves both determining a

range, and within that range, the relevant number of students who will take advantage of the opportunity “within a reasonable period of time”.

[463] The defendants also suggest that the location of the children of rightsholders is important. They point to *Mahe* at 386, where the Court commented that redrawing school boundaries will have cost implications. They say that this raises a question of whether the CSF ought to be entitled to deference in how they draw their catchment areas and the resulting number of children that they anticipate attending minority language programmes.

[464] The question of what numbers are spoken of in connection with the “numbers warrant” criterion was addressed in *Mahe* at 384. There, Dickson C.J.C. explained that there was some force to the contention that schools should not be built to accommodate only the existing demand, as well as the idea that they should not be built to encompass every student that could potentially attend the school. Mediating between those two concerns, he concluded that “the relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility.”

[465] Chief Justice Dickson conceded that it would not normally be possible to know that figure exactly. So, he suggested that Courts ought to be able to roughly estimate it by considering the parameters within which it will fall: the known demand for the service and the total number of persons potentially able to take advantage of it (at 384). He observed that when making the assessment, “a number of complex and subtle factors must be taken into account beyond simply counting the number of students.” He pointed to several factors, like the difference between rural and urban settings, and school catchment area boundaries as factors that might prove relevant to the analysis (at 386).

[466] The issue of determining the numbers arose again in *Arsenault-Cameron*. There, the Court stated that “[t]he relevant number is the number who will potentially take advantage of the service, which can be roughly estimated as being somewhere

between the known demand and the total number of persons who could potentially take advantage of the service” (at para. 32).

[467] The Court went on to hold that the appeal division erred by focusing only on existing demand. The Court approved of the trial judge’s approach. The trial judge began with demographic projections concerning the total number of children that could potentially take advantage of the service, looking as far as 10 years into the future. The trial judge also took into account the actual demand as reflected by the school’s enrolment at the time. The trial judge considered the experience at a minority language school in Charlottetown, where enrolment surpassed projected numbers once the facility was in place. He also compared the populations in each location, and inferred that the same result could be expected. The Court suggested that was a reasonable approach (at para. 33).

[468] Since the test focuses on the actual number of children likely to attend the programme, the outer boundaries of the range need not be stated precisely. They may be estimated based on the best evidence the parties can marshal. To require otherwise would place an undue burden on the plaintiffs.

[469] The number of children likely to attend the programme likewise may be difficult to state with precision. The task of the trial judge is to do as the trial judge did in *Arsenault-Cameron*: to look at evidence of the broader context and attempt to draw inferences about what number within that range could be expected to attend the programme. As Dickson C.J.C. suggested in *Mahe*, a court will need to take into account subtle and complex factors, like catchment area boundaries and the difference between rural and urban settings. As in *Arsenault-Cameron*, this might include drawing inferences based on the experiences in nearby communities. The context might also include demographic and community factors, like the strength and concentration of the Francophone community, the location of students in relation to the school, and other factors.

[470] There is no doubt that the approach to the question of numbers must be, to some extent, prospective. The Court in *Mahe* recognized that the concern is with

the number of students that will “eventually take advantage” of a programme once that programme is in place (at 384). This suggests a view to the future. However, the Court did not go further and say how far into the future one should look.

[471] There is little guidance in the case law concerning how far into the future one should look. In *Arsenault-Cameron*, the trial Court looked 10 years into the future because the demographic projections extended that far.

[472] In *NWT- CA*, the Court held that the number should be that which will take advantage of the opportunity “within a reasonable period of time”. The Court went on to note that “[s]ection 23 rights should be determined having regard to the foreseeable future, not with respect to some indefinite point in time so far into the future as to preclude reasonable estimates” (at para. 99).

[473] In my view, the relevant number for the purpose of s. 23 should include an allowance for reasonably foreseeable future growth, as established by expert evidence and evidence of the broader context. Whether the number should also include a view to prospective growth farther into the future depends entirely on the evidence that the parties can marshal. The evidence from experts and lay witnesses in this case suggested that enrolment projections tend to be reasonably accurate in the short term, and less accurate in the long term. As the parties look farther into the future, they are less able to prove on a balance of probabilities what the numbers will be.

[474] As a result, in most cases, the numbers will be those that are reasonably foreseeable based on demographic population projections and the broader context. However, if there is some evidence to prove that the number is likely to increase far into the future, then it may lead a court to conclude that a school should be built with a view to future growth. On the other hand, if the projections are purely speculative and far into the future, then there is no evidence to suggest that the future numbers will warrant any particular facilities.

[475] Given the prospective nature of the numbers warrant question, in my view there is also a temporal aspect to the question. The evidence may show that the number of children will grow gradually. When a programme first begins, it may only have a few children enrolled. Ten years into the future, it may have dozens more. The numbers will warrant different levels of instruction and different facilities depending on the programme's stage of development.

[476] Likewise, very little has been said about the geographic boundaries within which the numbers must reside. In *Mahe*, the Court stated at 386 that since s. 23 speaks "wherever in the province" the numbers warrant facilities, "the calculation of the relevant numbers is not restricted to existing school boundaries (although the redrawing of school boundaries will often involve a certain cost which must be taken into account)."

[477] In *Arsenault-Cameron*, the Court observed that "the determination of the appropriate area ... is something that has to be decided in each case with due consideration to the numbers involved as well as all of the important factors specific to the case" (at para. 57). I also note that in *Arsenault-Cameron*, the context was such that the minority board was owed some deference with respect to its decisions concerning catchment area boundaries, as that issue related to the language and culture of the minority and was within the minority's exclusive jurisdiction.

[478] There is no question that when assessing numbers, the geographic distribution of the programme's target population must be taken into account. The extent to which it is relevant will once again depend on the context. In many instances, a minority language community might be concentrated within a clear geographic area. In those instances, the geographic boundaries for the purposes of the numbers will be straightforward. However, in other instances, a catchment area may be drawn so large that it encompasses some children who could not reasonably be expected to take advantage of a programme or service. In such an instance, the Court must take that into account when determining what number of students within the range would reasonably be expected to take advantage of a programme.

c) Summary

[479] To summarize, there are three categories of rightsholders that are entitled to have their children attend minority language schools: those who are rightsholders because of their mother tongue, their education or their children's education. The relevant number for s. 23 is the number of children of rightsholders who could reasonably be expected to take advantage of a service, which will fall somewhere between the known demand and the total number of rightsholders in an area.

[480] The total population of students eligible for the service can be difficult to estimate. Since the Court is concerned with arriving at a rough estimate of the number of children likely to attend a programme, the outer boundaries of the range need not be precise; they may be estimated based on the best available evidence. The number likely to take advantage of the service should also be estimated based on all the contextual evidence, which may include drawing inferences based on the experiences in other nearby communities, demographic and community-specific information like the density and distribution of the population in the school's catchment area. A court should also ensure that schools are built for whatever growth is reasonably foreseeable based on the evidence, with the knowledge that the numbers may warrant different facilities and programmes at different times.

[481] Given the nature of the test for calculating the numbers, the question is one of enrolment projections. The court requires some evidence that allows it to estimate or forecast future enrolment based on the present situation, the total population of rightsholders (as best it can be estimated) and broad contextual factors. The court's task is to anticipate what proportion of the total number of potential children are likely to enrol in the programme: a participation rate.

2. Enrolment Projections and Capital Project Planning

[482] Enrolment projections are also essential to the Province's capital planning process. As I explain in Chapter III, Introduction to the Capital Planning Process, the Province decides which capital projects to fund based on relative need across all 60 school districts. School boards use enrolment forecasts to justify the need for a

project to the Ministry. The Ministry then uses the Space Rank Formula to assess the extent to which enrolment in an area exceeds capacity, and the need for an Expansion Project or Building Condition Project.

[483] One of the defendants' experts, Mr. William Wood, described the role that enrolment projections play in the Province's Capital Planning Cycles. Mr. Wood is a professional facilities planning consultant. He holds a Bachelor of Architecture from the University of British Columbia ("UBC"), as well as a Bachelor of Arts from the University of Edmonton, where he completed a pre-architecture programme. Since 1988, he has been immersed in planning for the British Columbia's Kindergarten to Grade 12 ("K-12") education system. He was qualified as an expert in facilities planning in the K-12 school system in British Columbia, including regarding: (1) needs assessment, (2) strategic planning, (3) facilities programming and (4) project evaluation, as well as the comparative merits and drawbacks of various grade configurations in K-12 education.

[484] The defendants asked Mr. Wood to opine on five topics: the capital planning process for BC school districts; the main challenges facing BC school districts in general and the CSF in particular in the planning of school facilities; the CSF's submissions for capital funding since 2000; the plaintiffs' claims for additional projects and the rationale for them as presented in the reports of Dr. Landry, Dr. Martel and Mr. Don McRae; and the relative merits and drawbacks of grade configurations.

[485] Mr. Wood opined on the importance of enrolment forecasting for all districts generally, and the CSF in particular. He explained that a number of factors can influence future enrolments at individual schools. They include: anticipated future residential development, the number of school-age children that will live in any new housing, birth rates, the demographic profile of adults in an area (particularly the number of women of childbearing age), net migration of school-age children, the graduation rate (for secondary schools), and the participation rate for the school district and the school when compared with other options available to parents for

educating their children (home schooling, independent schools and other public schools).

[486] While Mr. Wood was of the view that all school boards will be interested in each of these factors, for the CSF, “the central question of participation rate completely dominates all other factors when estimating future enrolment.”

[487] Mr. Wood suggested that participation rate can be conceptualized as “market share”. To calculate the market share, one begins by determining the size of the market. For the CSF, that begins with an estimate of the number of rightsholders’ children in a catchment area. As with the s. 23 analysis of the number of children, once the total potential market is estimated, CSF planners must make educated guesses concerning how various factors will influence parents to decide to send their children to CSF schools. Mr. Wood opined that the challenge for the CSF is to quantify how a new school, in particular, will influence enrolment.

B. Calculating the Participation Rate

[488] The jurisprudence on s. 23 and Mr. Wood’s evidence on capital planning mirror one another. In both analyses, two numbers must be calculated: the total universe of eligible children in the area and the number of persons that can reasonably be expected to avail themselves of a particular education programme.

[489] The plaintiffs engaged Dr. Landry to calculate the total universe of eligible students based on census data. They also provided expert evidence from Mr. McRae to show how those numbers could be expected to grow or change through 2023. Because the census does not calculate the total number of children of rightsholders, the plaintiffs also led supplemental evidence to attempt to show that the total universe of rightsholders is larger than appears based on the census.

[490] The plaintiffs did not lead substantial evidence on the uptake rate. They tendered the evidence of Dr. Martel to attempt to show that enrolment is likely to increase if new schools are built. The defendants point the Court to a number of factors that they say are relevant to the calculation of the uptake rate.

[491] I begin by explaining in general terms the work done by Dr. Landry and Mr. McRae. Then, I address the evidence and argument concerning how courts should go about estimating the entire universe of s. 23 rightsholders. In the process, I resolve issues about whether that universe should include any allowance for children of non-rightsholders. From there, I move to the uptake rate: both generally and in connection with the impact of newly constructed school facilities.

1. The Universe of Eligible Students

[492] The plaintiffs submit that, of the three categories of persons with the right to enrol their children in a minority language school outside Québec, only one is counted by the census: Mother-Tongue Rightsholders. The census does not count Education Rightsholders or Sibling Rightsholders. This is borne out by the expert evidence.

[493] The plaintiffs present evidence and argument to suggest that there are many rightsholders that are not counted by the census. The defendants disagree with the plaintiffs' method for calculating the total universe of children. In their submission, the Court does not need to arrive at the theoretical maximum total universe of students to determine the actual number of students that could be expected to participate in minority language education.

[494] Below, I set out in general terms the work performed by Dr. Landry and Mr. McRae. Then, I move into the evidence and argument concerning the universe of s. 23(1)(a), s. 23(1)(b) and s. 23(2) rightsholders.

a) Dr. Landry

[495] Dr. Landry performed extensive analysis of 2011 census data concerning the potential number of children of rightsholders in 27 current and potential school catchment areas. He presents these data in tables appended at Exhibit E to his expert report (the "Catchment Area Tables").

[496] For each catchment area, Dr. Landry prepared two Catchment Area Tables. Dr. Landry used identical table formats for every catchment area. Since he relied on

data from the 2011 census, which polled 100% of the population, the tables are very reliable.

[497] Each table contains 5 lines or “categories” of potential eligibility. The first category (line 1) of both tables calculates the number of children who live with a “Francophone” parent: those who responded on the census that any one of their first languages learned and still understood is French. This includes separated Francophone parents who have custody of their children. That category corresponds with children of s. 23(1)(a) rights holders.

[498] The second category (line 2) in both tables identifies the number of children who live with a non-Francophone single parent who are nevertheless eligible because their non-custodial parent is a Francophone. This category completes the picture of children of Mother-Tongue Rights holders in the area.

[499] The third and fourth categories (lines 3 and 4) of both Catchment Area Tables would include the children of a parent who either received their primary school instruction in Canada in French, or a parent that has a child who has received primary education in French. Such children would be eligible to attend a Conseil school pursuant to ss. 23(1)(b) and 23(2) of the *Charter*, respectively. In the lines of his tables corresponding to those categories, Dr. Landry notes that he cannot estimate the number of children because the census does not collect that data.

[500] The two Catchment Area Tables differ only in respect of the fifth row of the tables. Line 5 of the first table calculates the number of children of non-Francophones who nevertheless have knowledge of English and French or just French. Line 5 of the second table calculates the number of children of non-Francophones who speak French only or French and another language at least regularly at home. Dr. Landry agreed that he calculated the number of children in these categories to attempt to “fill the gap” left by a lack of data concerning children born to Education and Sibling Rights holders.

b) Mr. McRae

[501] Mr. Don McRae has a Bachelor of Science in statistics and a master's degree in public administration, both from the University of Victoria. Now retired, Mr. McRae was Provincial Statistician and Executive Director of BC Stats, British Columbia's central statistical agency, from 1996 to 2011. He has more than 30 years' experience in applied statistical research and analysis, including 15 years managing and directing BC Stats' population estimation and projection programme.

[502] Mr. McRae was asked to address the following questions:

How are the regional population projections published by BC Stats used by British Columbia government departments and agencies for planning purposes?

Can the regional population projections published by BC Stats be used in conjunction with census data regarding the number of children who may attend a school of the Conseil, and who will reside in specific geographical areas, in order to project what those numbers will be in future years?

If so, please project from 2011 Census data, for the geographic areas specified, the number of children who may attend a school of the Conseil in 2013 and in 2023.

[503] Mr. McRae explained that BC Stats makes population estimates using the component/cohort-survival population model. This involves promoting each age group to the next highest age group, and separately projecting and taking into account anticipated fertility, mortality and migration in each age group. Government agencies use these population projections for facility planning and resource allocation.

[504] Mr. McRae opined that regional population projections published by BC Stats can be used in conjunction with 2011 Census data to project what those numbers could be in future years. Using Dr. Landry's Catchment Area Tables and the component/cohort-survival population model, he projected forward Dr. Landry's counts of children to 2013 and 2023. Mr. McRae provided those projections in an exhibit to his expert report.

[505] Mr. McRae acknowledged the limitations of his opinion. He explained that, as with all projections, the size and characteristics of future populations cannot be predicted with certainty. He also noted that the accuracy of the population projections depends on the accuracy of the 2011 census population counts, as well as the reporting of those counts by Dr. Landry. Mr. McRae also assumed that the growth or decline in the number of school-aged children for CSF catchment areas is representative of that of children with linguistic characteristics of the target group population. He acknowledged that changes to the availability and quality of French-language education at the school level could affect the relative attraction or exodus of French speaking families to a region. However, in light of the absence of information indicating either an increase or decrease in French language education services and infrastructure, he considered his approach to be prudent.

c) The Universe of s. 23(1)(a) Rightsholders

i. Dr. Landry's Counts of Children of Francophones

[506] The first category of children counted by Dr. Landry includes every child born to and living with a “Francophone” parent. Dr. Landry identified as “Francophone” all those persons who responded that French was one of their first languages learned in childhood and still understood in response to the Mother Tongue question. On the 2011 census, this was Question 9, and was posed as follows:

What is the language that this person first learned at home in childhood and still understands?

1: English

2: French

3: Other - Specify

[507] On cross-examination, Dr. Landry was pressed with respect to the persons he classified as Francophone. He agreed that his definition of Francophone includes all those persons who have as their first language either (a) French only, (b) French and English, (c) French and another language, or (d) French, English and

another language. Dr. Landry's data therefore includes persons who reported both French and English or French and some other language in response to the Mother Tongue question on the census. While Dr. Castonguay was critical of that approach when calculating the assimilation rate, it seems wholly appropriate to include persons with a double mother tongue in the universe of British Columbia's s. 23(1)(a) rightsholders. Persons with French as one of their mother tongues are s. 23 rightsholders.

[508] In the second line of his Catchment Area Tables, Dr. Landry estimated the number of children of Francophones whose parents are separated, and who do not live with their Francophone parent. Dr. Landry extrapolated the number of such children by making two assumptions: First, he assumed that the rate of divorce of Exogamous and Endogamous couples is the same. Second, he assumed that custody rates are not related to language, so the rate of custody between Francophone and non-Francophone parents would be 50%. On cross-examination, he maintained that his assumptions were reasonable and standard practice, and I accept that is the case.

ii. Other Evidence

[509] The plaintiffs' view is that the census data underreports the number of children of s. 23(1)(a) rightsholders in BC. They suggest many Franco-Columbians have multiple mother tongues, but only report English in response to the Mother Tongue question.

[510] Several parents who testified at trial reported having two mother tongues. Those witnesses and affiants include Ms. Celina Roy, Ms. Susan Haworth, Ms. Jennifer Eberts, Mr. Mike Richman, Ms. Shelley Quinn and Mr. Bruce Thibeault.

[511] The evidence suggests that Mr. Richman, Ms. Quinn and Ms. Eberts all reported English as their sole mother tongue. There is also some evidence to show that Anglophone spouses of Francophones may see English is their spouse's sole

mother tongue, as was done by Ms. Yuko Thibeault (the spouse of Mr. Thibeault) and Mr. Damien Joly (the spouse of Ms. Roy).

[512] The evidence confirms that Mr. Joly, whose children attended a minority language school, responded to the census as though his children had some knowledge of French. There is no evidence concerning how the other parents responded to the 2011 census on behalf of their children. The plaintiffs argue that since their children attended a CSF school, they most likely responded that their children had at least some knowledge of French.

[513] Finally, the affidavits provided by the plaintiffs note two instances of Francophone families that were not included in the census because they were out of the country at the time: the family of Ms. Francy Baron and the family of Ms. Nancy Brotherton. The plaintiffs acknowledge that the undercounting of persons out of the country during the census is not particular to Francophones.

iii. Discussion

[514] The plaintiffs submit that census data concerning persons whose first language learned and still understood is French is underinclusive. Thus, they say that Dr. Landry underreports the real number of those children.

[515] The plaintiffs urge the Court to conclude that the Mother Tongue question on the census discourages double responses, as it refers to “the language” learned and still understood, in the singular. They note that on the 2011 census and the 2006 long-form census, the question regarding knowledge of French explicitly provided for a double answer of “both English and French”.

[516] The plaintiffs say that since English is dominant and Exogamy is common in British Columbia, persons are more likely to report English as their first language than French. In that connection, they rely on the evidence from parents of children attending CSF schools. The plaintiffs also point to Dr. Landry’s opinion that persons who speak the minority language in BC are likely to experience linguistic insecurity. When linguistic insecurity couples with the phenomenon of deep assimilation, the

plaintiffs suggest that many persons in BC might lack confidence in their ability to speak French and report English as their sole mother tongue.

[517] In my view, there is some evidence to suggest that the census data compiled by Dr. Landry underreports the total universe of s. 23(1)(a) rightsholders' children. Given the high rate of Exogamy in British Columbia, the dominance of English and the wording used in the Mother Tongue question on the census, some Mother-Tongue rightsholders likely report English as their sole mother tongue. It is impossible to quantify the extent of this underreporting.

[518] The underreporting has the effect of artificially reducing the overall universe of s. 23 rightsholders' children. The court must bear in mind and take account of the fact that the total universe is under inclusive when attempting to arrive at the total number of children likely to attend a programme. However, since the court's task is to project the total number of students that will actually attend a CSF school, it is unnecessary to precisely quantify the full extent of the underreporting. It would place an undue burden on the plaintiffs to require that type of precision.

d) The Universe of s. 23(1)(b) and (2) Rightsholders

[519] The universe of children of s. 23(1)(b) and (2) rightsholders is more challenging to estimate. Since the census does not count children born to those parents, as a proxy, Dr. Landry counted all children not born to a Francophone parent that had some knowledge of French or that spoke French at least regularly at home. In Dr. Landry's view, those groups likely include some children born to s. 23(1)(b) and (2) rightsholders.

[520] The plaintiffs also led some lay witness evidence to support their argument that there are a number of section 23(2) and 23(1)(b) rightsholders in British Columbia. They urge the Court to conclude that number is significant and ever-increasing due to immigration from Quebec and the effects of CSF schools.

i. Dr. Landry

[521] The fifth line of Dr. Landry's Catchment Area Tables count children of non-Francophones with knowledge of French or who speak French at least regularly at home. Since these children are born to non-Francophones, their parents' mother tongues are either: (a) English only, (b) English and a non-official language, or (c) a non-official language. Their parents are not Mother-Tongue Rightsholders.

[522] The plaintiffs asked Dr. Landry a series of questions relating to whether children of non-Francophone parents who either had knowledge of French (Category 5, Catchment Area Table 1) or spoke French regularly at home (Category 5, Catchment Area Table 2) might be eligible to attend a CSF school. He opined that a number of them might be, particularly because some of them might have a non-Francophones parent who nevertheless had French as their first official language spoken, or FOLS. However, Dr. Landry agreed while under cross-examination that it cannot be said how many of them are children of a s. 23 rightsholder, particularly in communities where he found only a small number of children with knowledge of French or who spoke French regularly at home.

[523] With connection to children with non-Francophone parents that have some knowledge of French (the "Knowledge Category"), Dr. Landry opined that "[i]t is possible and most likely probable" that some of the children in the Knowledge Category might have at least one parent who is an Education Rightsholder. He also suggested that if parents are Education Rightsholders, they might also have children that are educated in French, and be Sibling Rightsholders. He could not say how many of those children have Education or Sibling Rightsholder parents.

[524] Dr. Landry confirmed while under cross-examination that most children in the Knowledge Category in BC are French immersion students, not children of rightsholders. He conceded he does not believe that the Knowledge Category is a reliable proxy for children of Education and Sibling Rightsholders.

[525] Dr. Landry's view is that Regular Home Use is a better indicator of community affiliation than knowledge of the language. In his second Catchment Area Table, he calculated the number of children living in the catchment areas that spoke French "at least regularly" at home despite being born to non-Francophone parents. Of course, he also agreed that the majority of children who are bilingual know French because of their schooling rather than because their parents identify with the French language and culture.

[526] Dr. Landry was asked to consider whether the children in the Regular Home Use category might have parents that are Education or Sibling Rightsholders. He opined that children in that category likely have a parent whose FOLS is French. In Dr. Landry's view, such parents, if they were schooled in Canada, probably attended a French-language school if it was available to them, making them Education Rightsholders. He stated there was a definite possibility those children have a Sibling Rightsholder parent if French is their parent's FOLS. Dr. Landry stated that he could not quantify the number of children in the Regular Home Use category.

[527] Dr. Landry's analysis relies on the concept of "First Official Language Spoken" by a resident. The census does not explicitly collect information on FOLS. It is derived from census responses to three other questions: Mother Tongue, Knowledge of English and Main Home Use.

[528] During his cross-examination of Dr. Landry, Mr. Doust illustrated, and Dr. Landry agreed, that to derive FOLS persons who know and have a mother tongue that is both French and English, or neither French nor English, are screened by whether they speak English or French regularly at home. If a person speaks either language regularly at home, that becomes their FOLS. Those who speak neither English nor French regularly at home have no FOLS. Those who speak both French and English regularly at home have a dual or double FOLS. Those persons with a dual or double FOLS fall into two categories: (a) those who have main home languages of both English and French, and (b) those who can speak both languages but speak neither of them at home.

[529] Since this calculation of the number of Francophones is more inclusive, it tends to contribute to the number of French speakers in British Columbia. Relying on 2006 census data, Dr. Landry observed that close to 7,000 residents of BC born outside Canada who did not have French as a Mother Tongue but nevertheless spoke French as their FOLS. Dr. Landry explained that he reached the number 7,000 by including all persons with a double FOLS, as Statistics Canada did in the post-census survey.

[530] Dr. Castonguay's view is that Dr. Landry's use of FOLS is misleading. Dr. Castonguay noted that FOLS is based on knowledge of language and ability to speak it. It does not speak to actual language behaviour. Thus, in his view the FOLS data likely includes a number of persons who are able to speak French but do not use it to any significant degree, such as those who know French or English but speak a different language at home.

[531] The proportion of non-Francophone British Columbians with French as their only FOLS is relatively small. Mr. Doust put to Dr. Landry, and Dr. Landry agreed, that in BC, 86% of non-Francophones have an FOLS of English, and 0.001% have an FOLS of French. Mr. Doust went further, and illustrated that the number of non-Francophone persons with FOLS French aged 20-44 (and would be most likely to have school-age children) was very small. He found, and Dr. Landry agreed, there were only 560 of those people in BC. Dr. Landry agreed that if each of those persons formed an Exogamous couple and had 2 children, that would only amount to just over 1,000 children of non-Francophone parents with a French FOLS.

[532] Mr. Doust also sought custom tabulations from Statistics Canada that show that of the persons who had a double FOLS (both French and English), the vast majority (almost 95%) persisted in speaking their non-official mother tongue as their main home language, and spoke neither official language at home.

[533] Dr. Landry agreed with Mr. Doust's calculations, but took issue with whether they were appropriate for calculating the potential number of children eligible to attend CSF schools because they did not include all persons with a double FOLS.

ii. Lay Witness Evidence

[534] The plaintiffs tendered affidavit evidence to support their argument that a number of children of rightsholders are included in Dr. Landry's counts of children in the Knowledge and Regular Home Use categories.

[535] The plaintiffs led affidavit evidence from parents of CSF students who do not have French as their Mother Tongue but are nevertheless Education Rightsholders. This group includes Mr. Jason Pospisil and Ms. Andrea Blaikie, Ms. Elisabeth Brownlie, Mr. Thomas Laviolette, Ms. Margot Beatrice Murdoch, Mr. Paul Auger, Mr. Derek Kotkanen, and Ms. Ione Smith. All parents are Education Rightsholders whose first language learned and still understood was a language other than French. All of them have children that attended CSF schools. There is no evidence about how these parents responded to the census, nor is there evidence about their children's language competence or behaviours in 2011.

[536] The plaintiffs urge the Court to consider that the children of all these Education Rightsholders were likely included in the children in the Knowledge and Regular Home Use categories. They urge the Court to infer that children enrolled in a CSF school would likely know French and might also speak it at home.

[537] The plaintiffs also point to evidence of Sibling Rightsholders that do not have French as their mother tongue, and are not otherwise Education Rightsholders. Mr. Carl Montgomery and his spouse, Ms. Katherine Hume, have one child who attends École Élémentaire du Pacifique in Sechelt. Their youngest child was not of school age when they tendered their affidavits. Neither Ms. Hume nor Mr. Montgomery has French as a mother tongue, and neither received their primary instruction in French. Mr. Montgomery deposed that he became a rightsholder when his child from a previous relationship received primary instruction in French. There is no evidence about how Mr. Montgomery or Ms. Hume responded to census questions concerning their children's language competence or behaviour, although Ms. Hume deposed that she speaks both English and French at home with her

children, and that her oldest child has both English and French as his mother tongues.

[538] The plaintiffs' position is that the Court should infer that the children of Mr. Montgomery and Ms. Hume could be included in Dr. Landry's counts of children in the Knowledge and Regular Home Use categories.

[539] The plaintiffs also note that the Court has evidence from a number of spouses of Mother-Tongue and Education Rightsholders who have become Sibling Rightsholders because their children attend a CSF school. They suggest that if any of those couples were to separate and form new families, the Sibling Rightsholder parents might enrol children from a subsequent marriage in a CSF school.

iii. Immigration

[540] Both Dr. Castonguay and Dr. Landry found that immigration contributes to the French-language minority in BC. The plaintiffs therefore point to interprovincial migration as a source of Education and Sibling Rightsholders.

[541] The plaintiffs' position is that a significant pool of Anglophones and Allophones receive their primary school education in French in Quebec. They reach this conclusion based on a report by the Quebec Ministry of Education, Recreation and Sport, *Indicateurs Linguistiques: Secteur de l'éducation* (Linguistic indicators: Education Sector) (Quebec City: Government of Quebec, 2014) [Linguistic Indicators Report]. The Linguistic Indicators Report presents data on the distribution of the preschool, elementary and secondary school population in Quebec by mother tongue, language of instruction and language used at home in 2013. The *Linguistic Indicators Report* was accompanied by a certification that the copy of the report came from the Quebec Ministry of Education, Recreation and Sport and is a true copy of the original.

[542] The *Linguistic Indicators Report* provides data on the absolute number of Anglophone and Allophone students that attended school in French in Quebec from 1971 through 2013. The proportion of Anglophones receiving their education in

French has grown from 9.5% of Anglophones in 1971/72 to 26.4% of Anglophone students in 2012/13. A growing proportion of Allophones, too, have received their education in French, growing from 14.6%% of Allophones in 1971/72 to 84.1% of Allophones in 2012/13. In 2012/13, there were some 22,366 Anglophones and 129,099 Allophones in the Francophone education system in Quebec. Overall, the absolute number of Anglophone and Allophone students in the Francophone system has grown since the 1970s.

[543] The plaintiffs suggest that if any of these persons were to migrate to British Columbia, they would be Education Rightsholders. Further, if any of their parents were Anglophones or Allophones and immigrated to British Columbia and had other children, their parents would be Sibling Rightsholders.

[544] To connect the dots, the plaintiffs point to evidence purporting to show high rates of Francophones migrating from Ontario and Quebec to British Columbia: *Official-language Minorities in Canada*. Pursuant to the Document Agreement reached by the parties, all Statistics Canada reports are admissible for the truth of their contents.

[545] According to Statistics Canada, in 2006, scarcely more than 12% of Franco-Colombians with a French mother tongue and 11% of Franco-Colombians with a French FOLS were born in British Columbia. Nearly 75% of persons born with French as their mother tongue living in British Columbia were born in another province or territory of Canada, and nearly 64% of those with a French FOLS were born in another province or territory of Canada. More than one-third of persons in British Columbia with French as a mother tongue or French FOLS were born in Quebec. About half of all Franco-Colombians were born in Quebec and Ontario together.

[546] Statistics Canada also provides data on the overall net provincial migration between British Columbia and other provinces and territories. Between 1981 and 1986, net migration to British Columbia from other provinces (arrivals less departures) was 9,500 persons: 1,835 persons had French as their FOLS, and 7,635

had English as their FOLS. Net migration was higher between 1986 and 1991 (125,875 persons total; 3,360 had French FOLS and 121,850 had English FOLS) and between 1991 and 1996 (149,950 persons; 6,655 had French FOLS and 141,540 had English FOLS). Then, net migration from other provinces dipped into the negative, with British Columbia seeing a net loss of 23,615 persons between 1996 and 2001. That represented a loss of 25,355 persons with English FOLS, with a corresponding gain of 1,405 persons with French FOLS. Between 2001 and 2006, net migration moved into positive territory once more, with net migration of 22,140 persons. However, only 420 of those persons had French FOLS. The remaining 21,710 persons coming to British Columbia had English FOLS.

[547] Those Francophones who migrate interprovincially to and from British Columbia tend to come and go predominantly from Quebec and Ontario. Half of all Francophone migrants coming to British Columbia come from Quebec. About 21% or 22% of Francophones coming to and going from British Columbia immigrate to or from Ontario. Of course, this evidence does not address the number of persons with an English FOLS or mother tongue and what provinces they tend to immigrate to or from. That evidence would have been helpful for testing the plaintiffs' proposition that there is equally significant migration of non-Francophones from Ontario and Quebec to British Columbia, which would reflect on the number of Sibling and Education Rightsholders that are not Mother-Tongue Rightsholders migrating to British Columbia.

iv. Former CSF Students

[548] The evidence reveals that the Exogamy rate in British Columbia is very high: about 78%. Dr. Landry's evidence is that in 2006, on average, parents with French as a mother tongue were able to transfer the language to their children as a mother tongue only 26% of the time.

[549] Students who do not have the French language transferred to them at birth, but who learn French at a CSF school, become s. 23(1)(b) (Education) Rightsholders. The plaintiffs take the position that the evidence shows that due to

the growing enrolment in CSF schools, the population of s. 23 rightsholders and their children in BC will grow due to the number of Education rightsholders being created by CSF schools.

[550] It is difficult to quantify the number of rightsholders being created by CSF schools. Enrolment in CSF schools was, at its highest, 5,382 children across all grade levels and schools in 2014/15. The evidence does not appear to establish the total number of children that have participated in CSF schools, overall, since its inception. This number cannot be derived from graduation rates due to the significant attrition from CSF programmes at the secondary level. Further, the evidence does not establish the number of children attending CSF schools that do not have French as their Mother Tongue, and would thus become rightsholders pursuant to s. 23(1)(b).

v. Discussion

[551] The plaintiffs urge that s. 23(1)(b) and s. 23(2) rightsholders are crucially important to language programming. They note that Dr. Landry opined that having previously attended a Francophone school is one of the best predictors of a decision to have one's own children attend a Francophone school. Further, they suggest that having already decided to send a child to a Francophone school demonstrates an interest in French-language education that one might follow when making education choices for other children.

[552] The plaintiffs point to the lay witness evidence, which they say confirms there is a significant number of Education and Sibling Rightsholders in British Columbia.

[553] The plaintiffs suggest that the Court should find as a fact that many Education and Sibling Rightsholders move to British Columbia, thus significantly increasing the number of rightsholders in BC. In their view, there are many immigrants to British Columbia from Quebec who have English or another language as their mother tongue who are nevertheless Education or Sibling Rightsholders.

The plaintiffs suggest that having French as a mother tongue would not predispose a person to migrate to British Columbia. They point to the *Linguistic Indicators Report*, which they say establishes that a significant and growing proportion of Anglophones who move from Quebec to British Columbia will have been schooled in French.

[554] In connection with Ontario, the plaintiffs point to the evidence of Dr. Martel and a number of affidavits in support of her evidence, which together suggest that 70 new French-language school facilities have been built in Ontario since 1982. The plaintiffs urge that students enrolled in those schools who move to British Columbia would be entitled to have their children educated in French in British Columbia. They also rely on the evidence of Ms. Bradley Robichaud, an educator from Ontario, who confirmed that many students in the Ontario Catholic Francophone district where she worked were admitted through admissions committees, making them solely Education Rightsholders.

[555] The plaintiffs also argue that many students enrolled in CSF schools do not have French as their mother tongue, then become rightsholders by virtue of their education at the CSF school. In the plaintiffs' view, a CSF education indoctrinates those children into the French language and culture, making it likely that they will choose to enrol their children in a French-language school.

[556] The plaintiffs suggest that the Court ought to also conclude that these growing pools of rightsholders are not counted by the census despite being very likely to send their children to a minority language school.

[557] In the plaintiffs' view, it is reasonable to estimate the number of children of Education and Sibling Rightsholders in British Columbia using Dr. Landry's counts of the number of children with knowledge of French or who speak French at least regularly at home. They note that Dr. Landry confirmed it was possible that many children of rightsholders are included in those groups. While Dr. Landry could not quantify the proportions, the plaintiffs suggest it was clear there were likely many rightsholders with French as a FOLS in that group. The plaintiffs therefore urge the Court to "give full weight to the presence of children" of Mother-Tongue, Education

and Sibling Rightsholders included in Dr. Landry's counts of children with knowledge of French or who speak French regularly at home.

[558] The defendants' view is that the lay witness evidence does not go as far as the plaintiffs suggest. They note that although the plaintiffs tendered about 32 parent affidavits, there were very few families and communities represented within them: five families from Pemberton, five from Whistler, three from Sechelt; three from Kelowna; two from Nanaimo; three from Vancouver and three from Richmond. In the defendants' submission, that evidence is insufficient to allow the Court to infer a general demographic trend.

[559] This is particularly so, the defendants say, because the plaintiffs have withheld the results of a survey that was done of parents in some areas to determine the number of s. 23(2) and s. 23(1)(b) rightsholders. As I describe in more detail in connection with the CSF's projection practices in Chapter XVI, Introduction to Part 3: The Community Claims, the plaintiffs surveyed 100% of children attending CSF schools in a few communities to determine what proportion of them attended on the basis of the Sibling and Education Rightsholder categories. Although the plaintiffs now seem to have resiled from that position, at one point they argued the Court should look to the survey and mark up the universe of s. 23(1)(a) eligible children by 20% to account for children of Sibling and Education Rightsholders. Later, the plaintiffs started to argue for a 10-20% markup. Now, they typically argue for inclusion of all children in the Regular Home Use category in the universe of eligible students.

[560] The defendants note that the survey was not disclosed to or discussed by the plaintiffs' expert witnesses. It was never mentioned to the Province in the CSF's PIRs, was not tendered as evidence at trial and indeed was not disclosed as part of the discovery process for this litigation. In the defendants' submission, the plaintiffs seem to have withheld some local knowledge from the defendants. Thus, they ask the Court to draw an adverse inference against the plaintiffs.

[561] Dr. Landry's data provides no insight into the universe of s. 23(2) and s. 23(1)(b) rightsholders except to the extent they are already included among the children of Mother-Tongue Rightsholders. The parent affidavit evidence shows that there are at least a few Education Rightsholders and Sibling Rightsholders that are not also Mother-Tongue Rightsholders. However, the number of such rightsholders across the province cannot be quantified or inferred based on the affidavit evidence, which provides details about a small number of CSF families in a limited number of communities. As the defendants suggest, the evidence is insufficient to allow me to infer a general demographic trend.

[562] As a proxy for Sibling and Education Rightsholders, Dr. Landry looked to children in the Knowledge category, but later admitted it was not a valuable proxy. Indeed, given the high incidence of French immersion and core French courses in BC, the Knowledge Category counts a much more expansive universe of children than s. 23(1)(b) and s. 23(2) rightsholders. In my view, the Knowledge Category is not helpful for extrapolating the number of children of Sibling and Education Rightsholders that are not also Mother-Tongue Rightsholders.

[563] Dr. Landry also used, as a proxy, children in the Regular Home Use category. He suggested some of those children might be born to Sibling or Education Rightsholders because their parents have French as their FOLS. However, in my view, the number of persons in British Columbia whose FOLS is French is very small. Further, the evidence shows that those with a double FOLS typically persist in speaking a non-official language at home. Thus, I find that although children in the Regular Home Use Category is a closer proxy than the Knowledge Category, the majority of children in the Regular Home Use Category will not be the children of rightsholders.

[564] The evidence of immigration of Francophones to British Columbia is, unfortunately, flawed, and does not assist me to determine the number of Education or Sibling Rightsholders that are not also Mother-Tongue Rightsholders that migrate from Quebec and Ontario to British Columbia.

[565] The immigration evidence tells me a number of things about Francophones (and the small proportion who are not Francophones who have French FOLS) who migrate to British Columbia: that they represent a small proportion of overall net migration to British Columbia from other provinces; that they tend to come from Ontario and Quebec; and that the vast majority of Francophones who live in British Columbia are immigrants from other provinces. Because it includes all persons who have French as their FOLS, it is primarily relevant to the number of Mother-Tongue Rightsholders, which is already well-established by the census data. It does show that some small number of non-Francophones who immigrate to British Columbia might be Education or Sibling Rightsholders, but the proportions are unclear.

[566] The data do not tell me anything about Anglophones and Allophones who migrate to British Columbia that might be rightsholders pursuant to the Sibling and Education criteria. The data do not show the number of Allophones and Anglophones that come to British Columbia from Quebec, or even Ontario. That is the data that would be required to connect the dots between Anglophones and Allophones educated in French and the presence of Education and Sibling Rightsholders in British Columbia who are not captured by the census. Without evidence about Allophones and Anglophones immigrating to British Columbia from Quebec, I cannot infer that a significant proportion of those persons migrating to British Columbia from Quebec have an English FOLS but are otherwise Education or Sibling rightsholders.

[567] With respect to British Columbia's "home-grown" Education Rightsholders being created by CSF schools, the evidence does not quantify how many such rightsholders are being created.

[568] It is troubling that the plaintiffs chose not to disclose the results of a survey of students attending CSF schools concerning the basis on which they attend the school. In my view, the results of that survey were clearly relevant and ought to have been disclosed. The plaintiffs did not point me to any legal justification for withholding it. The plaintiffs are the first to point out that the census underreports the

number of rightsholders in BC. What evidence they did produce to establish the number of Education and Sibling Rightsholders in BC is limited and only marginally helpful. Thus, in my view, the only reason why the plaintiffs would choose to withhold the results of the survey would be that it hurt their position. I therefore infer that the plaintiffs conducted a survey that tended to show the number of children of Education and Sibling Rightsholders attending CSF schools was limited.

[569] Overall, I conclude that although there are likely some Sibling and Education Rightsholders in the province that are not also mother tongue rightsholders, that number is unquantifiable. It cannot be extrapolated from the number of children in the Knowledge or Regular Home Use categories of Dr. Landry's evidence. Furthermore, the evidence concerning the experience of parents of CSF students, immigration from Quebec and Ontario to British Columbia, and of the creation of home-grown rightsholders falls short of showing that there are a significant number of such rightsholders in the province. I also infer that the plaintiffs withheld relevant evidence concerning the number of children of Education and Sibling Rightsholders attending CSF schools that tended to show a limited number of such students in CSF schools. I therefore conclude that the number of s. 23(1)(b) and s. 23(2) rightsholders in BC that do not have French as their mother tongue is very small.

e) Children of Immigrant Rightsholders

[570] Section 23 affords minority language education rights to "citizens of Canada". All of Dr. Landry's data is based on the 2011 census, which did not ask a citizenship question. Thus, Dr. Landry's data will tend to include persons that are not strictly rightsholders because they are not citizens. However, based on his research, Dr. Landry estimated that about 93% to 97% of the persons included in his tallies are the children of Canadian citizens.

[571] The plaintiffs urge that in B.C., the relevant number of rightsholders in any event includes children of immigrant parents that would be rightsholders if they were citizens ("Immigrant Rightsholders"), as they are entitled under the *School Act* to enrol their children in a CSF school. Thus, the plaintiffs say that the "numbers" that

“warrant” must include both the number of children whose parents have rights under s. 23 of the *Charter* and the number of children of Immigrant Rightsholders who will eventually take advantage of the contemplated programme or facility.

[572] The defendants urge that the analysis should not include Immigrant Rightsholders. In the defendants’ submission, the mere fact that the *School Act* permits the CSF to admit children of Immigrant Rightsholders does not mean that the Province is constitutionally obligated to provide facilities for them. In their submission, the mere fact of conferring that discretion does not change the wording of the *Charter* and the obligation on government, which is more restrictive. They note that the Court in *NWT- CA* concluded at paras. 41-45 that the trial judge erred by concluding that some persons who do not have rights under s. 23 could be included in the numbers warrant analysis.

[573] Pursuant to s. 166.24(1) of the *School Act*, the CSF is required to admit “eligible children” to its programmes. “Eligible child” is defined in s. 1 to mean “a child who has an eligible parent”. Eligible parent is defined to mean an individual who has the right to have his or her children receive primary and secondary instruction in French in British Columbia pursuant to s. 23: that is, Mother-Tongue, Education and Sibling Rightsholders. Thus, the CSF has a mandatory duty to admit children of s. 23 rightsholders to its programmes.

[574] The CSF also has a discretion to admit immigrant children to its programme pursuant to s. 166.24. An immigrant child is defined in s. 1 of the *School Act* to mean a child who has an immigrant parent. Immigrant parent is defined as “an immigrant” who would be a s. 23 rightsholder “if the person were a citizen of Canada”.

[575] The parties pointed me to a single case that considered whether the categories of rightsholders ought to include non-citizens that would otherwise be rightsholders: *NWT- CA*. There, as here, the minority language board had the discretion to admit students that did not fall strictly within the limits of ss. 23(1) and (2), including Francophone immigrants. The Court held (at para. 41) that “[t]he trial

judge erred in law in concluding that some persons who do not have rights under s. 23 could be included in the ‘numbers warrant’ analysis.” The Court concluded that since s. 23 represents a “constitutional compromise” and was drafted with precision, the words of the text had to be respected, and children of immigrants could not be included in the numbers warrant analysis (at paras. 43-44):

As has been pointed out, s. 23 represents a constitutional compromise. It is drafted with some precision. Section 23 does not create a universal *Charter* right to francization, it does not grant the courts a generic power to cure all past inadequacies in promoting minority language communities, and it does not mandate generic policies to reverse or prevent assimilation. As a compromise, the version of s. 23 eventually adopted was clearly not the only policy option that was available to the drafters of the *Charter*. The *Charter* could have been drafted on a “free choice” model. It could have declared that every child in Canada was entitled to select his or her language of education. At the other extreme, the *Charter* could have been drafted on a “vested rights” basis. It could have extended minority language rights only to those students who were then enrolled in a minority language school. Neither option was selected: *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para. 35, [2009] 3 SCR 208. Rather s. 23 was drafted somewhere between these two extremes; obviously numerous other models were conceptually available.

[44] The trial judge accepted the argument that non-rights holders could attend the school, and be counted in the “numbers warrant” analysis. That was an error of law, as explained in the companion decision of *Northwest Territories (Attorney General) v Commission Scolaire Francophone, Territoires du Nord-Ouest*, 2015 NWT- CA 1, and in *Commission Scolaire Francophone du Yukon no 23 v Yukon (Procureure Générale)*, 2014 YKCA 4 at paras. 214-29. The reference in s. 23 to “Canadian citizens” excludes the inclusion of immigrants. The precise “first language learned and still understood” wording of s. 23(1)(a) excludes “lost generations” with Francophone roots. Section 23 cannot be interpreted in a way that ignores its fundamental scope: *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at paras. 9, 29-30, [2005] 1 SCR 238. The approach adopted in the trial reasons would “. . . read out of the Constitution the carefully crafted compromise contained in s. 23 of the *Canadian Charter of Rights and Freedoms*. This is impermissible.”: *Gosselin* at para. 2. *Nguyen v Quebec* at para. 29 repeated the warning against “. . . artificial educational pathways designed to circumvent the purposes of s. 23 and create new categories of rights holders at the sole discretion of the parents”.

[Emphasis added.]

[576] Section 23 is aimed at preserving and promoting French and English in those areas of the country where it is the minority language. It aims to achieve

those ends by offering the children of certain classes of Canadian citizens the right to have their children educated in the minority language.

[577] Section 23 differs from other *Charter* rights, which offer their protection to “everyone”, regardless of citizenship: see for example, s. 7 of the *Charter*, which guarantees “everyone” the right to be free from the deprivation of life, liberty and security of the person except when the deprivation is in accordance with the principles of fundamental justice. This makes it a comprehensive right that embraces both citizens and non-citizens alike: *United States of America v. Ferras* (2004), 184 O.A.C. 306, 237 D.L.R. (4th) 645 (Ont. C.A.) at para. 8; aff’d 2006 SCC 33.

[578] I agree with the Court of Appeal for the Northwest Territories that the words chosen by the drafters of the *Charter* ought to be given some meaning. While courts do generally take a purposive approach to interpreting all *Charter* rights, including s. 23, this approach cannot change the precise words of the *Charter* concerning to whom its protection is offered. Like all interpretive principles, the purposive approach should be used to enhance our understanding of inherently malleable rights. In this case, there is no ambiguity about to whom the malleable right of minority language education is afforded. Section 23 clearly only extends minority language education rights to Canadian citizens.

[579] Section 23(3) gives Mother-Tongue, Education and Sibling Rightsholders the right to have their children receive instruction in French where the numbers so warrant. Similarly, the right to have them receive that instruction in minority language educational facilities is given “where the number of those children so warrants”, referring to children of citizen rightsholders. Citizenship is a necessary condition for a person to be a rightsholder. Thus, the children of Immigrant Rightsholders are not to be included among the children that can reasonably be expected to attend the programme.

[580] Section 166.24 *School Act* gives the CSF the discretionary power to admit the children of Immigrant Rightsholders. By granting that discretion to the CSF, the

Ministry does not elevate those students to the category of children of rightsholders. The *School Act* is not a constitutional instrument. While, as a matter of practice, it might be advisable for the Ministry to build sufficient space for the CSF to admit the full range of students that it is both entitled and required to admit, the Constitution does not technically require the Ministry to provide services out of public funds for those students.

[581] But in any event, we must be practical. As mentioned previously, since the focus of the analysis is on the number of children that are actually likely to attend a given programme, it is not essential that the outer bounds of the number of rightsholders are stated with total precision. In this case, the vast majority of children included in Dr. Landry's tallies are rightsholders: about 97% of the children of Mother-Tongue Rightsholders. Thus, the number of children of Immigrant Rightsholders included in his data is very small. It would also be unduly onerous for the CSF to be expected to parse out those students from the total populations of children identified by Dr. Landry. It is sufficient for the Court to bear in mind that the total universe of children included in the evidence likely includes some persons that are not strictly rightsholders due to the inclusion of some non-citizens.

f) Conclusion: Calculating the Appropriate Universe of Rightsholders' Children

[582] The parties differ in their views of how the Court should account for the total universe of rightsholders.

[583] The plaintiffs suggest the Court should count as the entire universe of children of rightsholders all children that Dr. Landry identifies as falling in the Mother Tongue or Regular Home Use categories. They ask the court to conclude:

- a. that the number of children of rightsholders in a geographic area for which Dr. Landry reported numbers of children includes at least the number of children that is the total of lines 1, 2 and 5 of Dr. Landry's Table 2 [children in the Mother Tongue and Regular Home Use categories.]
- b. that, in fact, due to the non-transfer of French to children in British Columbia, and the difficulty of speaking French at least regularly at home in exogamous households, in the assimilatory context of British Columbia, the number of children of rightsholders in a geographic area for which Dr. Landry

reported numbers of children must actually include a number of children that is between the total of lines 1, 2, and 5 of Dr. Landry's Table 2 and the total of lines 1, 2, and 5 of Dr. Landry's Table 1. The Plaintiffs recognize that not all children included in line 5 of Table 1 are children of rights-holders, but it is also clear that not all children of rightsholders are included in lines 1, 2, or 5 of Table 1, since not all children of rightsholders are able to carry on a conversation in French, and that French-language schools exist, among other reasons, to remedy that unfortunate situation; and

c. that it is, however, necessary to use extreme caution with the numbers in line 5 for the age category "0-4 years", as discussed above, since line 5 reports linguistic ability and behaviour, which many children in that category would not have developed, due to their age, and which many more will not have yet developed due to the sociolinguistic context in which they live. For these reasons, the numbers reported in line 5 of Tables 1 and 2 should be considered to allow an approximation of the total number of children of rightsholders starting with the age categories "5-12 years" or "5-13 years" (depending on which Schedule to Dr. Landry's expert report one is examining), but excluding the category "0-4 years". For that youngest age category, line 5 should be taken to be an extreme underestimation of the number of children of rightsholders who are not counted by the Census.

[All underline and bold emphasis in original]

[584] In the plaintiffs' submission, since the Province made no effort to present evidence of the potential demand for minority language schools, the Court should hold that "it is not possible for minority rightsholders to obtain more accurate and complete information with regard to enrolment projections than what was made available here, nor is it reasonable to impose more on them", citing *Arsenault-Cameron* at para. 34.

[585] In the defendants' view, it is not reasonable to do as the plaintiffs suggest, by expanding the total universe to its farthest end to find as many potentially eligible students as could be found. In the defendants' submission, Dr. Landry's evidence provides no basis for including children in the Regular Home Use category, as the evidence shows that the number of persons with French as their FOLS is very small.

[586] In the defendants' submission, the numbers need not be as "complicated" or "unwieldy" as the plaintiffs would have it. In their view, the real legal test is who is likely to attend a CSF school. They submit that the Court can arrive at that number by looking to a more limited universe.

[587] The defendants propose assigning a “participation rate” to the number of children born to Francophone parents as reflected in Dr. Landry’s data, projected forward by Mr. McRae. The defendants’ position is that since the number of children of s. 23(2) and s. 23(1)(b) rightsholders is unknown, it is reasonable to look as a proxy to only the children of s. 23(1)(a) rightsholders counted by the census. In their submission, so long as one arrives at the same number of children likely to participate in the programme, the size of the total universe is not important. They note this is the way that Statistics Canada went about calculating the participation rate in Statistics Canada, *Minorities Speak Up: Results of the Survey on the Vitality of the Official-Language Minorities* by J-P. Corbeil, C. Grenier and S. Lafrenière (Ottawa: StatCan, 2006) [*Minorities Speak Up*], and the way that Mr. Stewart and Mr. Palmer went about calculating enrolment projections for the CSF in 2011 and 2012.

[588] As I see it, the census data tabulated by Dr. Landry provides a reasonable estimate of the total universe of s. 23(1)(a) (Mother-Tongue) rightsholders in each community included in the claim. Of course, it is not completely accurate, and likely omits some Mother-Tongue Rightsholders’ children, while inappropriately including some non-citizen rightsholders’ children.

[589] Dr. Landry’s data likewise do not provide a reasonable estimate of the number of Education and Sibling Rightsholders that are not also Mother-Tongue Rightsholders. While there are certainly some such rightsholders in the Province, there is no way of knowing how many based on Dr. Landry’s data. What evidence does exist suggests that the number is small.

[590] Since the number of Education and Sibling Rightsholders in the province cannot be quantified, it is reasonable to do as the defendants suggest and use as a proxy the total number of Mother-Tongue Rightsholders calculated by Dr. Landry. This is how Statistics Canada calculated the participation rate in *Minorities Speak Up*. Taking this approach avoids placing an undue burden on the plaintiffs to

quantify the total number of Education and Sibling Rightsholders in the province, which would be unfair and impractical.

[591] The plaintiffs' proposal goes too far. The plaintiffs would include as children of rightsholders all those in the Regular Home Use category and a proportion of children in the Knowledge category. The evidence establishes that only a small proportion of children in the Regular Home Use category might have parents with an FOLS of French and might be rightsholders. The vast majority of those in the Knowledge Category are not children of rightsholders. If I were to accept the plaintiffs' proposal, the total universe of rightsholders' children would be severely distorted, and lack a concrete, rational connection to the evidence.

[592] As I see it, it is not necessary to capture every single child of a rightsholder in the universe of rightsholders' children. It would certainly impose too high a burden on the plaintiffs to require them to account for every such child. Moreover, the total universe of rightsholders' children is only one part of the analysis. The Court must also consider current enrolment and evidence of the broader context. Among those contextual factors, I will consider that the total universe reported by Dr. Landry underreports the number of rightsholders. Bearing that in mind, I can estimate the total number of children likely to participate in a minority language education programme.

2. The Uptake Rate

[593] After estimating the total population of students, the court's task is to determine the number of eligible children that could be reasonably expected to avail themselves of a minority language education: the uptake rate. The number of students will typically fall somewhere between the known demand or enrolment and the total universe of eligible students.

[594] As the defendants suggest, the uptake rate will be highly fact and region specific. The uptake rate in a small community with a large Francophone presence and no competing French immersion programme will differ from that in a large

community with a low concentration of Francophones and robust French immersion and other educational options on offer by majority school boards.

[595] However, it is possible to make some findings about some common factors that ought to be taken into account when assessing the uptake rate for each community in the claim. These include cultural factors, and factors specific to the educational programme and facilities, including the impact of new schools on enrolment.

a) Cultural Factors and the Uptake Rate

[596] Dr. Landry spoke to some of the cultural factors that influence the uptake rate.

[597] Dr. Landry acknowledged that there were a number of reasons why rightsholder parents may choose not to enrol their children in a minority language school. The strongest is the strength of the parent's Francophone identity. The uptake rate will also be influenced by parents' beliefs that a majority language education is required to prepare children to succeed at university in English, or that bilingualism is better achieved through French immersion. Dr. Landry's view is that both of those premises are pervasive, even though they are false. Additionally, Dr. Landry commented that the views and preferences of the child are important, as well as the greater variety of sports, and programme offerings at majority schools.

[598] Dr. Landry also acknowledged a correlation between participation rate and factors associated with linguistic Vitality. For example, there is a correlation between participation rates and subjective identification as a Francophone, geographic concentration of the French minority and Exogamy rates.

[599] In his cross-examination of Dr. Landry, Mr. Doust attempted to show that a myriad of factors other than school facilities operate in BC to ensure that the participation rate will always be very low.

[600] Dr. Landry agreed that *Minorities Speak Up* shows that identification with Francophone culture is strongly correlated with school choice. He also agreed that *Minorities Speak Up* shows that a strong identification with Francophone culture is correlated with a high concentration of French-speakers. He conceded the concentration factors in BC are not very strong. Indeed, *Official-language Minorities in Canada* demonstrates that 98% of the Franco-Columbian population is weakly concentrated, and 2% are averagely concentrated. 99.9% of Franco-Columbians live in a municipality where they form less than 10% of the population.

[601] Mr. Doust also put to Dr. Landry a link between Francophone community participation and geographic proximity or concentration. Dr. Landry agreed that geographic proximity is the foundation of community participation. He also agreed that people who do not live the language and culture in their private lives will not normally actively participate in the institutions managed by the group.

[602] Dr. Landry also agreed on cross-examination that parents of children in Exogamous couples might find it difficult to have their children attend a French minority school. Mr. Doust put to Dr. Landry his statement in a new book (R. Landry, R. Allard and K. Deveau, *Schooling and Cultural Autonomy* (Ottawa: Canadian Institute for Research on Linguistic Minorities, 2013) that “many couples labelled as exogamous are exogamous in name only”, as the French-speaking parent may have been socialized in English.

[603] Mr. Doust suggested to Dr. Landry that the tendency to transmit a language is correlated with family structure, such that Exogamy is associated with low levels of minority language transmission. Dr. Landry agreed that the same four provinces with the highest levels of Exogamy (Newfoundland, British Columbia, Saskatchewan and Alberta) are the same four provinces with the lowest participation rates in minority language schools. Dr. Landry agreed that almost 90% of Endogamous couples already send their children to Francophone schools.

[604] In conclusion, Mr. Doust pointed Dr. Landry to low levels of Francophone identification in British Columbia relative to other provinces, the low concentration of

the Francophone community, the high rate of Exogamy, the distance between British Columbia and provinces with large Francophone population, and the similarities in participation rates in British Columbia and provinces with similar demographics (Alberta and Saskatchewan). He put it to Dr. Landry that in light of those factors, it is unrealistic to expect participation rates in British Columbia will come close to matching those in provinces without the same demographic characteristics. Dr. Landry agreed that would be so unless there is an intervention such as a government-sponsored campaign promoting the merits of minority language education and the transmission of the French language to children.

[605] I conclude that the nature of the French community in British Columbia is such that in most instances, the CSF should not expect significant enrolment increases over and above the current anticipated demand, even with the construction of new, homogeneous school facilities. Dr. Landry's evidence is that a lack of connection to the French language makes a parent less likely to enrol their children in a minority language school. The extremely high assimilation rate in British Columbia and the evidence that many Francophones do not identify with the French language and culture lead me to conclude that many Francophones in BC are losing this connection. This is compounded by the very high rate of Exogamy, low rate of transmission of the French language, and high dispersion of the Francophone population in British Columbia, all of which can be expected to have a depressive effect on enrolment in BC's minority language schools.

b) Historic and Projected Uptake Rates

[606] The defendants suggest that it is reasonable to consider historic and projected uptake rates for minority language education in the Province: what proportion of students attend the programme today; what proportion could be reasonably expected to attend if the identified problem were fixed; and what proportion would be required to attend to justify the facilities sought in the claim. The court, in their view, should also take into account whether parents are actually

being dissuaded from enrolling children in minority language schools based on the deficiencies in the school.

[607] There are a few sources of evidence concerning the CSF's historic enrolment patterns. Dr. Landry offered an opinion on what uptake rates the CSF could reasonably expect. The evidence also establishes what proxy participation rates the CSF has been able to achieve in the communities in the claim and at some newly-built homogeneous schools outside the claim. The Court also had the benefit of enrolment projections from Mr. Wood based on a computer programme, "Baragar". I also consider the evidence of how CSF programmes have historically grown based on enrolment statistics provided by Ms. Françoise Mathieu, the CSF's coordinator for the British Columbia enterprise Student Information System.

[608] Dr. Landry offered an opinion on the participation rate that the CSF could reasonably expect. He agreed that a reasonable estimate of the participation rate that could be achieved in BC, assuming adequate facilities and distances, would be about 45% or 50% of all rightsholders' children (not only those of Mother-Tongue Rightsholders), or "somewhere" between 22% and 60% of all eligible students.

[609] The Court received evidence on three aspects of education and facilities factors that could influence participation rate: the historical participation rates achieved by the CSF, and projected increases to the participation rates.

[610] The defendants prepared tables showing the current participation rate in areas inside and outside the claim. They base their calculation of the participation rate only on the proxy universe of children of s. 23(1)(a) rightsholders.

[611] The defendants' tables show that in the communities included in the claim, the average proxy participation rate is about 70%. The proxy participation rates fall in a large range: from a low of 24% at École L'Anse-au-Sable (Kelowna), to a high of 179% of eligible Mother-Tongue Rightsholders at École Élémentaire de la Vallée de Pemberton (Pemberton). Enrolment in six of fourteen schools falls between 40% and 60%. Enrolment at three schools falls below 40%, while enrolment at five

surpasses 60%. (At four of those five, the proxy participation rate is greater than 100%.) The defendants' view is that a number of non-rightsholders were likely admitted to CSF schools, causing the exceptionally high participation rates.

[612] The defendants also prepared evidence concerning the participation rates that have been achieved in CSF schools in communities that are not included in the claim. They base these tables on work performed by Dr. Castonguay. These show that the average proxy participation rate for four homogeneous schools outside the claim is 61%. The participation rates range from a low of 28% at École Gabrielle-Roy in Surrey to a high of 121% at École Élémentaire Mer et Montagne in Campbell River. Enrolment at École André-Piolat and École Au-coeur-de-l'île in Comox is just below 50%.

[613] Mr. Wood's evidence addresses the CSF's historic performance attracting and retaining secondary students. He noted that the CSF generally has low cohort retention in secondary grades. In his view, it is likely that the CSF will experience lower participation rates for secondary than elementary grades going forward. This perspective was echoed by some CSF educators and the historic enrolment data, which shows significant attrition as a cohort ages, and particularly once it reaches the secondary grades.

[614] In addition to the evidence concerning participation rates, the defendants also provided evidence of projected increases to participation rates based on a computer programme, Baragar, and calculations performed by Mr. Wood. Mr. Wood explained that Baragar provides computer-based tools for school boards to adjust forecasts based on local factors. The programme is used by many districts, including the CSF.

[615] Baragar projects that the CSF can expect a substantial increase to the participation rates of children of all ages between 2012 and 2027, resulting in an increase in enrolment of about 1,800 students, or 38%. Mr. Wood stated that Baragar assumes increasing participation rates based on the CSF's past performance, as well as speculation that there is considerable room for participation

rates to increase, especially for secondary students. The data also assumes decreasing participation rates as grade levels increase, with consistently lower rates for secondary students than for elementary students. In Mr. Wood's view, Baragar has made a good first attempt to reflect the prospect of growth at CSF schools, although they may prove to be too low on further examination by the CSF.

[616] The plaintiffs prepared tables that compared Baragar's projections to actual enrolment increases in the CSF's new schools, which they put to Mr. Wood. That data show that Baragar projections have historically been lower than what the CSF has actually achieved.

[617] In the defendants' view, the evidence of the CSF's historic participation rates, the Baragar projections and Dr. Landry's hypothesis together suggest that in many instances the CSF can expect to achieve about a 50% proxy participation rate.

[618] Overall, I find it difficult to draw many conclusions about the CSF's future performance across the system based on its historic system-wide performance and the Baragar projections. The CSF's historic participation rates vary considerably from community to community. Given the different programme structures and communities in the claim and the importance of context to the question of the number of children likely to take advantage of a programme, it would be dangerous to assume the CSF can expect a certain maximum participation rate in every community across the Province. The appropriate participation rate must be determined on a case-by-case basis for each community.

[619] However, the evidence is clear that the CSF cannot expect to achieve the same participation rates for secondary programmes as it can for elementary programmes. The CSF has always experienced attrition as a given cohort ages and moves through the system. This is likely influenced by a belief among parents, even if it is a false one, that a majority-language education is necessary to prepare students for post-secondary education. It is likely also the product of the greater variety of programmes available at majority secondary schools, and students' own desires to move to a larger school. Given the low density of Francophones in British

Columbia, CSF secondary programmes do not have the population to support the range of enrichment and extra-curricular programmes as the majority boards can offer at their regional secondary schools.

[620] I also find it relevant that enrolment at a CSF school-- and thus its participation rate-- tends to evolve along with a new programme. For example, the CSF's enrolment data show that when the CSF started École Élémentaire des Navigateurs (Richmond) in 2001/02, it had 10 students in Kindergarten through Grade 1. Its enrolment grew to 26 students in Kindergarten through Grade 2 in 2002/03, and to around 50 students in Kindergarten through Grade 4 in 2005/06. Enrolment had doubled and grown to 100 students in Kindergarten to Grade 6 by 2010/11. In 2014/15, École Élémentaire des Navigateurs had 127 students enrolled in Kindergarten through Grade 7.

[621] The CSF's Nelson programme showed a similar pattern. École Élémentaire des Sentiers-Alpins opened in 2006/07 with eight students in Kindergarten through Grade 2. The following year, it had 14 students and one additional grade level, and in 2009/10 it had 30 students in Kindergarten to Grade 4. In 2014/15, its enrolment had grown to 84 students in Kindergarten through Grade 8.

[622] This pattern is not surprising. Many parents would hesitate before switching their child's educational programme, particularly if that child was being educated in English and would be moving to a minority language school.

[623] Thus, when the CSF starts new elementary programmes, it typically begins with a small programme with a few primary grade levels. As the cohorts age, the CSF adds new grade levels and begins enrolling larger cohorts. The CSF proposed this approach when it examined opening a programme in Burnaby in about 2012 and 2013. Similarly, when the CSF transitions secondary programmes from heterogeneous to homogeneous schools, it tends to add one grade level at a time to allow secondary students to graduate with their majority-school peers.

[624] The exception to this rule appears to be École Élémentaire de la Vallée de Pemberton (Pemberton), which the CSF opened in 2004/05. CSF students from Pemberton attended École Élémentaire La Passerelle (Whistler) before the CSF opened its new school. The CSF began its programme by immediately offering Kindergarten to Grade 7. Even still, its enrolment showed an increase over time, with enrolment growing to 48 students in 2014/15.

[625] As I see it, the evidence concerning the CSF's historic enrolment patterns show that CSF programmes start small, then grow. Thus, the number of children- and the participation rate- tend to change with time. The number of children is lower in a CSF school's early years, then expands over the course of at least 5 to 10 years.

c) Impact of New Schools on Enrolment

[626] Newly constructed schools may also have an impact on the uptake rate. The defendants concede that when a new school is built, enrolment can be expected to increase slightly, citing expert evidence from Mr. Wood. The plaintiffs want to go further, and tendered extensive expert evidence from Dr. Martel and supporting affidavits to attempt to quantify the impact that new schools will have on enrolment.

i. Mr. Wood

[627] Mr. Wood took the view that the "aura" of a new school can result in some enrolment increases following its construction. However, he typically advises school boards that the impact is likely to be small.

[628] Mr. Wood studied enrolment trends at five newly-built CSF schools with a view to assessing how a new school influences CSF enrolment. Those schools are: École Gabrielle-Roy (Surrey), École André-Piolat (North Vancouver), École Victor-Brodeur (Victoria), École Secondaire Jules-Verne (Vancouver), École Élémentaire Mer et Montagne (Campbell River) and École Au-coeur-de-l'île (Comox).

[629] Mr. Wood's analysis shows that enrolment at École Gabrielle-Roy increased in each of the initial three years after it was built, then stabilized for the next six

years around fifty students below the capacity for which it was built. Mr. Wood suggested the plateau might suggest the CSF has neared the highest participation rate it could expect in the area.

[630] École André-Piolat shows a similar trend. There, enrolment increased for the first few years after the new school opened, then plateaued. Enrolment there was about 50 to 100 students below capacity in 2012, leading Mr. Wood to suggest that CSF planners overestimated demand in North Vancouver.

[631] The trend at École Victor-Brodeur is different. Mr. Wood observed that enrolment at École Victor-Brodeur began to increase well before the new school opened, and has continued to increase since. Enrolment surpassed capacity in about 2009 and was about 100 students above capacity as of 2012. Mr. Wood formed the view that CSF planners misjudged the potential demand. He suggested that enrolment would continue to increase, but may reach a plateau. In his view, the large number of students from families employed by Canadian Forces Base Esquimalt may be responsible for the increase in enrolment at École Victor-Brodeur.

[632] Mr. Wood was less able to discern a clear pattern of enrolment growth for École Secondaire Jules-Verne in Vancouver. He observed that enrolment jumped the year the school opened, then stabilized before increasing for two years and stabilizing again for 2012. Mr. Wood also noted that the school was built to a capacity of 250 and had enrolment below 250 students in 2012, leading him to conclude that CSF planners might have overestimated demand at École Secondaire Jules-Verne. I note, however, that Mr. Wood did not mention that some of École Secondaire Jules-Verne is being used to relieve overcrowding at École Élémentaire Rose-des-Vents (Vancouver (West)) and how that might have influenced enrolment.

[633] With respect to École Élémentaire Mer et Montagne, Mr. Wood observed that enrolment increased once the school opened, and that the school “may be poised to achieve close to full utilization soon”.

[634] For École Au-cœur-de-l'île, however, the opening of the new school resulted in only modest enrolment increases. He also noted that the school was operating substantially under capacity: what appeared to be about 150 students below capacity in 2012. He observed that planners appeared to have substantially overestimated the demand at that school. However, he conceded that his analysis was based on only one year of data, so his analysis of enrolment at École Au-cœur-de-l'île is of limited utility.

ii. Professor Martel

[635] The plaintiffs engaged Dr. Martel opine on the impact that newly built homogeneous schools have on enrolment at minority language schools across Canada. Dr. Martel collected and compiled data on enrolment at minority language schools across the country, and made some general observations about the impact new facilities have on enrolment and Vitality. She provided all of this evidence in an expert report (the "Martel Report").

[636] The defendants cross-examined Dr. Martel extensively. The effect of that cross-examination was to discredit the vast majority of her conclusions and opinions. The plaintiffs then attempted to remedy some of the deficiencies by tendering affidavit evidence to corroborate the Martel Report. Those affidavits did not have the desired effect.

(1) Methodology

[637] To answer the questions posed to her, Dr. Martel researched and compiled a list of the new, homogeneous school facilities built for a minority French-language community in Canadian provinces and territories (except Québec) since 1982 ("New Homogeneous Schools"). She defined New Homogeneous Schools as including new secondary pavilions constructed adjacent to existing French-language elementary school facilities and renovations and reconstructions where more than about 75% of the former facilities were demolished. She excluded reconstructions of former majority schools, schools built out of portable and modular buildings, and heterogeneous minority language schools. She found 132 such facilities.

[638] On cross-examination, Dr. Martel acknowledged that because of her definition of New Homogeneous Schools, there are hundreds of minority language schools not included in her report. She admitted that in many communities, there are more minority language schools excluded from her report than there are schools included.

[639] To prepare her report, Dr. Martel analyzed documentary evidence concerning the construction of New Homogeneous Schools, as well as information concerning school enrolment and community Vitality. Additionally, Dr. Martel applied her expertise in discourse analysis to extract facts from the messaging in the primary sources.

[640] Dr. Martel found most of her sources on the internet. She relied on a number of primary sources: scientific literature; documentation from government departments, school boards and individual schools; and documentation from French-language associations, clubs and organizations. From time to time, Dr. Martel also relied on data from secondary sources, but she sought to ensure it was corroborated by a primary source.

[641] Dr. Martel also engaged the assistance of the Fédération Nationale des Conseils Scolaires Francophones (“Fédération Nationale”) to provide a complete list of all French-language school boards and missing enrolment data from 28 of 29 school boards.

(2) Overall Observations on New Construction by Community-Type

[642] Dr. Martel suggested that more New Homogeneous Schools were built in provinces with more populous minority language communities. Seventy of the 132 schools were built in Ontario. She also observed that the construction of New Homogeneous Schools accelerated after 2000, with 96 of 132 schools being occupied since the year 2000. Dr. Martel also observed that of the 132 New Homogeneous Schools, 61 were elementary schools; 39 were secondary schools and 32 were elementary/secondary schools. About 82 of 132 school facilities (62%)

were built to house existing schools. The remaining 50 were built to house newly created or amalgamated schools.

[643] Based on her research, Dr. Martel observed six reasons for building a new, homogeneous French-language school facility:

- (a) To revitalize a historic institution and/or French-language community;
- (b) To accommodate a school that has never been located in an adequate facility;
- (c) To provide a homogeneous French-language school environment;
- (d) To offer services where none existed, or to provide greater accessibility in an area where services existed by bringing these services to the area;
- (e) To relieve overpopulation at an existing homogeneous, French-language school facility; and
- (f) To relieve overcrowding in a newly-built school facility.

[644] Based on the data she collected, Dr. Martel discerned that New Homogeneous Schools grow differently in different communities. She created a model showing the different growth patterns in large urban population centres, medium population centres, small population centres and capital cities.

[645] Dr. Martel stated that she generally applied Statistics Canada's definitions of large, medium and small population centres. Large urban population centres have a population of 100,000 or more; medium population centres have a population between 30,000 and 99,999; and small population centres have a population less than 29,999. Dr. Martel also added a separate category for capital cities.

[646] Dr. Martel described the growth patterns in each of the four categories of communities in her report.

[647] Dr. Martel noted that 39 (30%) of the New Homogeneous Schools in her report were built in capital cities, and that all capital cities except Regina have constructed such facilities. She opined that the construction of such facilities in capital cities “serves as landmarks of the importance the French-language minority is afforded” as “a capital city is, by definition, the leader and exemplar of administrative and political decision-making”.

[648] Turning to the other population centres, Prof Martel observed that 23 (17%) of the New Homogeneous Schools were located in 13 urban population centres. Sixteen (12%) of schools were built in 12 medium population centres. Fifty-four (41%) were built in 51 small population centres.

[649] Based on her analysis of the enrolment trends in the four population centres, Dr. Martel observed that the trend of New Homogeneous Schools is the norm in all four categories of centres. She also observed that in all categories of cities, secondary facilities are eventually built, although in small and medium centres they tend to be smaller, in a secondary wing of a Kindergarten to Grade 12 school facility, or in a larger regional secondary facility. She also noted that in capital cities and large, urban population centres, distinct secondary school facilities are built to serve several homogeneous French-language feeder elementary schools.

[650] However, it was shown on cross-examination that Dr. Martel could not properly reach many of these conclusions. Dr. Martel’s methodology only examined communities in which New Homogeneous Schools are built. Since she did not examine communities where no New Homogeneous Schools were built, she cannot extrapolate to show trends across all community types across Canada. The most she can say is that some New Homogeneous Schools of certain types were built in each of the four categories of communities in Canada.

(3) Dr. Martel’s Tables

[651] Dr. Martel tabulated her research concerning growth patterns and community Vitality in tables appended to her report. In Table 1 to her report, “New,

homogeneous French-language school facilities built for a minority community; Canadian provinces and territories (except Québec); 1982-2012”, she sets out each school, its location, and enrolment data at three reference points: the date of the school’s creation, the date of occupation, and the most recent available enrolment data. In Table 2, “Enrolment histories: New, homogeneous French-language school facilities; Canadian provinces and territories (except Québec), 1982-2012”, Dr. Martel provides longitudinal enrolment data for every school in Table 1.

[652] Dr. Martel obtained enrolment data from various Ministry of Education and school board websites, and supplemented missing enrolment data for 28 of 29 school boards with information provided by the schools themselves through the Fédération Nationale as an intermediary. While Dr. Martel distinguished between enrolment data from primary and secondary sources, she did not indicate what data she found on school district websites, and what came from the Fédération Nationale or a government source.

[653] Dr. Martel shifted her data source for all Ontario schools from 2007/08 forward. The years prior to 2007/08 use full-time equivalent (“FTE”) data. After 2007/08, the data is headcount data. The data from before 2007/08 therefore counts students in junior and senior Kindergarten as half-time students, even though minority language schools offered full-day Kindergarten. Dr. Martel explained that the data therefore undercounted enrolment in New Homogeneous Schools.

[654] As a result, the reported number of Kindergarten students in the data increased after 2007/08. Moreover, on cross-examination, Dr. Martel confirmed that children who are homeschooled and attend school part-time would also be counted differently, and show greater numbers, in the data from after 2007/08.

[655] Notably, several schools in Ontario in Dr. Martel’s report show an upward jump in enrolment in 2007/08. Dr. Martel was unable to say to what extent those jumps could be attributed to the change in her input data. She agreed that all Ontario schools-- a majority of schools in her data-- are subject to this problem.

[656] In Table 1, Dr. Martel also provided a column setting out information about the school's early conditions, construction, current status and special features. Unfortunately, the information in this column is not properly cited to Dr. Martel's references. While Dr. Martel listed the documents she relied on for each school in Table 1, she did not indicate from what references the various data are drawn.

[657] The problems with this became evident when Dr. Martel was being cross-examined. In the entry for School #41 (Welland, Ont.), Dr. Martel stated that enrolment quickly grew to more than 500 students. That information was not corroborated by the enrolment evidence in Dr. Martel's second table. Dr. Martel did not specify from where she drew that information. On her first day of cross-examination, Dr. Martel speculated that the data came from one of three sources. On the second day of cross-examination, it was shown that the information did not come from those sources. On the third day of cross-examination, after checking her research notes and references, Dr. Martel explained that the statement had been drawn from a secondary source listed for Welland, Ont., and corroborated by a primary source concerning a different school (which was a secondary source with respect to School #41).

[658] I acknowledge that, as Dr. Martel maintained, it would have been a large undertaking to cite every statement in her tables. I also acknowledge that Dr. Martel indicated that her references were consistent with the academic standards in her field of research. Nevertheless, the lack of citations makes it difficult to test and rely on Dr. Martel's descriptions of the school histories and events in Table 1.

[659] In any event, much of the information in the final column in Table 1 is too general and vague to be of much use. For example, Dr. Martel does not state and could not recall if a preschool located in School #7 (Calgary, Alta.) pre-dated the construction of the New Homogeneous School. For both that school and School #13 (Bellegarde, Sask.), she does not provide detail with respect to the cultural animator she said worked in the schools, including whether he or she worked in the area before the facility was constructed. For School #80 (Ottawa, Ont.), Dr. Martel

referred to overpopulation, but did not state what caused the overpopulation and admitted that she inferred overpopulation based on the construction of new classrooms. There are similar problems with respect to School #124 (St. John's, Nfld.) and School #129 (Yellowknife, YK), and more likely than not with other schools in Table 1.

(4) Impact of New Facilities on Enrolment

[660] To discern enrolment trends, Dr. Martel looked at three points in time: the earliest school year for which enrolment data was available; the school year in which the school moved into the new facility; and the most recent school year for which enrolment data was available. Dr. Martel chose to focus on those three dates so she could see overall trends, rather than focus on the minutiae of year-to-year variability.

[661] Dr. Martel was careful to indicate that she could not draw inferences about causation; the most she could say is that there is a correlation between the enrolment trend and the new facility.

[662] With respect to the impact of a New Homogeneous School on enrolment, Dr. Martel observed that none of the schools in her report had closed.

[663] Dr. Martel related that 116 of the 132 facilities in her report showed growing or stable enrolment. She defined "growing enrolment" to include all those with constant enrolment increases (80 facilities), newly built schools (since 2010) that had either an increase in or stable enrolment (22 schools), schools with stable enrolment at each of her three reference points in time (8 schools), and schools with a decrease in enrolment where there is an overall increase in enrolment in the larger geographic area (6 schools). Dr. Martel counted among those schools with "stable" enrolment those that showed no change, or have a decrease between zero and twenty students, which she inferred to be the size of one classroom. Thus, a school only counted as having declining enrolment if it lost more than twenty students.

[664] Dr. Martel was cross-examined with respect to the schools she classified as showing “growing or stable” enrolment. She confirmed that if a school’s enrolment grew by even one student, she classified it as an enrolment increase. However, a school was only said to show declining enrolment if it lost more than 20 students.

[665] Dr. Martel also confirmed that she categorized enrolment based on the absolute number of students gained or lost rather than percentage. It was put to her that if a school of 40 students lost 19 or 20 students, it would nevertheless have been counted among the schools with stable enrolment. Dr. Martel maintained that no schools showed such large decreases in enrolment.

[666] There are also problems with Dr. Martel’s point in time analysis. It was shown on cross-examination that some schools Dr. Martel defined as showing stable enrolment had experienced significant declines in enrolment. For example, School #14 (Gravelbourg, Sask.) had peak enrolment of 85 students in 2003/04, but only 25 students in 2012/13. Despite this decrease by approximately 70%, due to her point-in-time analysis, Dr. Martel reported that the school had stable enrolment. Dr. Martel maintained that the peak enrolment was anomalous and could be attributed to contextual factors. Dr. Martel likewise classified School #15 (Bellevue, Sask.) as having stable enrolment because of her point-in-time choices. However, this school, too, saw a substantial decrease in enrolment from its peak to the present day: from 156 in 2002/03 to 109 in 2012/13.

[667] Similarly, some of the schools Dr. Martel classified as having growing enrolment have in fact shown declines in enrolment. School #48 (Carleton Place, Ont.) was said to have shown an overall growth in enrolment since the new facility was occupied in 1999/00. However, the data showed that enrolment in that school peaked at 205 in 2002/03, and had declined to 155 by 2012/13. While Dr. Martel indicated that it was misleading to look at peaks and valleys without understanding the overall context, she admitted that a trend line with respect to all the data would not show a constant increase in enrolment.

[668] There are also some errors in Dr. Martel's classifications. In particular, both School 19 (Zenon Park, Sask.) and School 20 (Winnipeg, Man.) showed enrolment declines prior to the occupation of the new schools. Dr. Martel admitted those schools should have been classified as having stable enrolment, but she did not include them in that category. She suggested the decreases in enrolment might have been attributable to some contextual factors, leading her to disregard those decreases. However, she did not say that in her report.

[669] It also became clear on cross-examination that Dr. Martel stated that some schools show growing enrolment with very little longitudinal data. Dr. Martel classified three schools as having stable or growing enrolment despite having only one year of data. She stated that she did so because she had no basis to presume that enrolment would decrease. This shows that Dr. Martel operated from a presumption of growth and stability.

[670] Another 16 of the 132 schools showed decreases in enrolment for what Dr. Martel called "contextual reasons". Dr. Martel included in that category all schools that have shown a negative fluctuation of 20 or more students from their beginning, the first available enrolment data, or the time of construction, as compared to the most recent data.

[671] Dr. Martel commented that all of these schools are found in New Brunswick and Ontario. She noted that New Brunswick had homogeneous French-language school facilities since before the *Charter* and primarily built new schools to replace existing facilities. Dr. Martel also observed that Ontario had four competing school systems, including both Catholic and secular French-language school districts operating in the same communities. Thus, in her opinion, enrolment in some Ontario minority language schools might be explained by the division of the population between school boards.

[672] While being cross-examined, Dr. Martel confirmed that she did not take into account all of the schools within a region. She only considered New Homogeneous Schools. Accordingly, her methodology would not allow her to determine whether

homogeneous minority language schools that were not new had increasing or decreasing enrolment. Thus, Dr. Martel could not say whether there was an overall increase or decrease in enrolment in homogeneous French-language schools in different regions of Ontario.

[673] Dr. Martel went on to point to some contextual factors that she said could explain decreases in enrolment: a decrease in overall population, employment possibilities, natural disasters, migration fluxes, and industrial development. On cross-examination, Dr. Martel acknowledged those factors could also explain enrolment increases, but that she did not take them into account when analyzing enrolment increases. She also did not actually research the links between enrolment decreases and the contextual factors. She merely inferred contextual factors must be at play because the school saw decreasing enrolment.

(5) Implications for Language Planning in British Columbia

[674] Dr. Martel selected several schools with similar characteristics to the language planning situation in British Columbia for further study. Those schools were all built between 2000 and 2010, excluding those schools built to permit the amalgamation of existing French-language schools, to replace historic facilities, or those built as separate stand-alone French-language secondary schools, as she understood that those types of schools would not be built in BC. She identified 40 such facilities, which she called the “more relevant reference points for the purposes of French-language planning through education in British Columbia”.

[675] Dr. Martel was cross-examined with respect to how she chose the most relevant reference points for British Columbia. It was shown that Dr. Martel had previously expressed views that French-language school districts should target a certain participation rate based on the proportion of Francophones in an area. Nevertheless, her choice of reference points did not take into account the vastly different proportions of Francophones in many of the communities chosen as reference points as compared to the communities in BC. For example, some of the

reference communities were more than 60% and 70% Francophone; there is a much lower concentration of Francophones in all the communities in this claim.

[676] Twenty-six of the reference points were built to accommodate existing French-language schools. Dr. Martel observed that all of them had enrolment that she defined as increasing or stable, with the sole exception of School #41 (Welland, Ont.). Dr. Martel opined that the decrease in enrolment in that school masked an overall increase in enrolment in the entire area, but she could not have reached that conclusion without data on all of the schools in that region. Dr. Martel also observed that the announcement of the construction of a New Homogeneous School was accompanied by an increase in enrolment in all but two cases. However, it was shown on cross-examination that Dr. Martel was not always aware of the date the new facility was built, and inferred the date of an announcement from the known date of the start of construction, and her observation of an increase in enrolment.

[677] The remaining 14 reference points were built to accommodate newly-created French-language schools. She noted that enrolment increased in all the areas with the sole exception of School #76 (Casselman, Ont.). Dr. Martel indicated that the decrease in enrolment in Casselman should be attributed to contextual factors, including a change to the school's catchment area. However, she did not specifically research the contextual factors to reach that conclusion.

[678] Dr. Martel went on to state her view of the likely effects of construction of New Homogeneous Schools in the communities in this claim. For each community, she summarized the planned facilities and the reasons for the proposed construction. She went on to state that, based on her research (particularly the most relevant reference points), she anticipated increased enrolment and Vitality. She then set out what effect the new school would be likely to have on enrolment, accessibility, community partnerships, community pride, and community development.

[679] Notably, Dr. Martel admitted that she could not predict with certainty whether the communities would in fact see similar results to what she observed in other

provinces. She conceded that the result would depend on proper planning, and the demographics in each community, including the number of school aged children, migration, birth rate, existence of new residential developments and other factors.

iii. Supplemental Martel Evidence

[680] In an effort to respond to instances of hearsay in Dr. Martel's data and to improve its accuracy, the plaintiffs adduced a number of affidavits, supposedly from more direct sources, following the conclusion of their case.

[681] A number of the affidavits tendered by the plaintiffs sought to confirm the "opening date" of a new school as stated in the Martel Report. Some of those affidavits came from employees or elected officials of the relevant school board. However, it is not always clear how those individuals came to have firsthand knowledge of the opening date. For example, several of the officials were employed elsewhere in the school district, or employed at the relevant school in a different time period than the purported opening date.

[682] Several of the affidavits identified a different opening date than the one suggested by Dr. Martel. Often, the difference is by just one year. However, a single year can have a significant impact. To take one example, Professor Martel stated that School #55 (Brampton, Ont.) opened in 2004/05, yielding an apparent enrolment increase of 142%. The affidavit evidence suggested the school opened in 2005/06, reducing the enrolment increase upon opening to 118%.

[683] There were also many discrepancies between the enrolment data reported by Dr. Martel and those reported in the affidavits. Of the 132 schools described in the Martel Report, the enrolment data in the affidavits matched that of Dr. Martel for only 18 schools. In many instances, the discrepancies amounted to less than a 10% difference or otherwise did not impact on Dr. Martel's analysis. However, for some schools, correcting the discrepancies between the data in the affidavits and the Martel Report would change the classification of the schools' enrolment from "increasing" to "decreasing" or "stable". For at least nine schools, the affidavit

evidence suggests that the rate of increase in enrolment reported by Dr. Martel would be reduced by more than 10%. For at least four schools, the affidavit data suggests that the rate of decrease in enrolment was even greater than was reported by Dr. Martel.

iv. Discussion

[684] The plaintiffs rely extensively on the Martel Report for the general proposition that newly-built schools tend to attract increased enrolment and enhance Vitality. The plaintiffs repeatedly urged the Court to infer, based on the Martel Report, that the CSF should expect increases in enrolment and improvements to Vitality if the new schools the CSF seeks were built.

[685] In the defendants' view, the Martel Report was discredited in cross-examination and provides little, if any, assistance to the Court. In their submission, much of it rests on unreliable hearsay, while what is left was admitted to be subject to a proper planning analysis (such as that performed by Mr. Wood), an area in which Dr. Martel acknowledged she is not qualified.

[686] The defendants suggest that Dr. Martel's analysis cannot be used to show that New Homogeneous Schools will result in increased enrolment. In their submission, Dr. Martel admitted that her methodology does not identify any causal relationship between the opening of a new school and the "indicators of vitality" that her report purports to document.

[687] The defendants also submit that even if Dr. Martel had not herself qualified the value of her predictions, it would be dangerous to rely on them because of a number of methodological flaws. Finally, the defendants say that Dr. Martel's conclusions rest on unreliable hearsay. In the defendants' view, the affidavits do not succeed in filling the hearsay gap and tended to present inconsistent, not confirming data.

[688] The plaintiffs responded to the defendants' submission on their affidavits by preparing charts showing that for many schools, the enrolment data prepared by

Dr. Martel only differs marginally from the data provided by the affiants. In some, however, the differences are significant.

[689] Dr. Martel acknowledged while under cross-examination that if there were errors in her data, it would be unsafe to rely on some of her conclusions. Unfortunately, her expert report is rife with methodological problems. The data she used were not always reliable, and the reliability problems were not corrected by the plaintiffs' affidavit evidence. Her shift from using FTE counts for Ontario schools prior to 2007/08, and headcount data for the years thereafter, results in an inflation of enrolment counts over time for all Ontario schools: the majority of schools in her report. She only examined the trends at New Homogeneous Schools, making it impossible to generalize about construction trends outside the communities where those schools were built. She likewise did not control for the impact that the construction of the new school would have on other minority language schools in the same community. As a result, it would be unsafe for me to rely on many of Dr. Martel's conclusions.

[690] There are also reasons to question Dr. Martel's objectivity. The definitions Dr. Martel chose for schools with growing, stable and declining enrolment show an inclination to search for signs of enrolment growth, and reluctance to accept enrolment decline. It is particularly troubling that Dr. Martel was quick to point to context as an explanation for enrolment decline, but not for increases in enrolment. She pointed to context even though she did not research it to determine what could explain enrolment decline.

[691] Her analysis of the most relevant reference points is likewise unhelpful. Dr. Martel failed to take into account what she herself acknowledged to be a very important factor related to the uptake rate: the concentration of the French-language population. Dr. Martel drew inferences about possible outcomes in British Columbia based on the experiences in communities that are simply not comparable for language planning purposes. In truth, as Dr. Martel acknowledged on cross-examination, the precise effect that the new school would have on enrolment would

depend on a wide range of factors, including detailed demographics in each community, the number of school-age children, migration, birth rates, the existence of new residential developments, and other factors.

[692] As a result of these and other problems, I do not find Dr. Martel's opinion to be of any assistance to quantifying the extent to which enrolment could be expected to increase in British Columbia's schools. That question is highly fact and community specific. While the experience in other schools may be illuminating, in my view, it is far more useful to have reference to the experience in other British Columbia schools with similar demographic characteristics and in similar regions.

d) Conclusion: Calculating the Appropriate Uptake Rate

[693] To summarize, the calculation of the appropriate uptake rate will be highly fact and context specific for each community in the claim. It will depend on a number of factors, including but not limited to the size and concentration of the minority language community, other educational programmes available and the historic uptake rate, as well as the experience at schools with similar characteristics.

[694] After examining the expert evidence, I am not able to draw many conclusions about the uptake rate that the CSF can generally expect to achieve in most communities in the Province. Nor am I able to draw conclusions about the magnitude of any enrolment increases that the CSF could expect upon the construction of a New Homogeneous School.

[695] However, it is possible to resolve several common issues that will be relevant to all communities in the claim.

[696] I am prepared to accept, as Mr. Wood did, that the CSF can generally expect some modest enrolment increases on construction of a New Homogeneous School. The extent of these enrolment increases will vary depending on the particular context of the community at issue.

[697] However, due to the high rate of assimilation and Exogamy in British Columbia, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above the current anticipated demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with the programmes offered at majority secondary schools, and will experience significant attrition as a cohort moves to the secondary school grades. I also find based on the CSF's historic enrolment patterns that its new educational programmes will usually start small and grow over the course of several years.

3. Admission of Children of Non-Rightsholders

[698] The plaintiffs argue that in addition to admitting Mother-Tongue, Education and Sibling Rightsholders, s. 23 affords it a right to admit non-rightsholders to redress past wrongs and remedy assimilation. For several years, the CSF admitted non-rightsholders to its schools pursuant to an Expanded Admissions Policy. Below, I discuss the evidence concerning that policy, before outlining the policies used elsewhere in Canada and the Plaintiffs' argument that the children of non-rightsholders ought to be included in the calculation of eligible children.

a) The School Act and the Integrity of Minority Schools

[699] The integrity of minority schools is essential to their operation. Minority language education is meant to take place in the language of the minority. It is not intended to teach outsiders the language of the minority.

[700] Dr. Landry alluded to this issue in his evidence concerning Exogamy. He agreed that even the admission of children of Exogamous couples, whose language skills are underdeveloped, runs the risk of "watering down" minority language schools or turning them into French immersion schools. (Of course, many children living in Exogamous households have the right to attend Francophone schools no matter their proficiency in the French language.)

[701] The question whether non-rightsholders should nevertheless be admitted to minority language schools was considered in 1991 by the Minority Language Education Task Force, which recommended that some children who were not strictly eligible to attend minority language schools pursuant to the *Charter* should be allowed to attend CSF schools. The Task Force thought that minority language school boards should have the flexibility to allow such students through the use of an admissions committee.

[702] In particular, the Task Force Report identified the children of French-speaking immigrants as persons who might be admitted. The Province ultimately enacted Part 8.1 of the *School Act*, which contained provisions permitting the CSF to admit the children of Immigrant Rightsholders. As discussed previously, the effect of ss. 166.25, 166.24 and 1 of the *School Act* is that only children of rightsholders, or the children of Immigrant Rightsholders, are eligible to attend CSF schools.

b) The CSF's Expanded Admissions Policy

[703] In April 2013, the CSF promulgated an admissions policy that would admit children of non-rightsholders above and beyond the children of Immigrant Rightsholders (the "Expanded Admissions Policy").

[704] Pursuant to the Expanded Admission Policy, all school-age children with a parent that is a rightsholder under s. 23 of the *Charter* could be automatically admitted to CSF schools (s. 1). Additionally, the CSF granted itself the discretion to admit children of non-rightsholder parents in three categories: if one of the parents was an Immigrant Rightsholder; one of the parents was a Canadian citizen or immigrant who understood and spoke French fluently ("Francophile Clause"); or one of the child's Canadian or Canadian-resident grandparents had French as a first language or received primary or secondary level instruction in Canada in French as a first language (the "Descendant Clause")(together, "Eligible Non-Rightsholders") (s.2).

[705] Notably, the second category referenced Immigrant Rightsholders, and was consistent with the *School Act*. Children in the two other categories of Eligible Non-Rightsholders were not strictly admissible pursuant to the *School Act*.

[706] The Expanded Admissions Policy allowed admission of children of Eligible Non-Rightsholders provided it was consistent with the mission and vision of the CSF; the admission would promote the growth and development of the Francophone community serviced by the CSF; the admission would maintain the distinctive character of a French-language school; and the parent or student had demonstrated a commitment to integrating into the Francophone community (s. 4).

[707] To determine whether the conditions for admission were met, the CSF relied on an admissions committee. The admissions committee for each school was made up of a member of the Board of Trustees, an executive from the CSF board office, and the principal, a teacher and a parent from the school (s. 6).

[708] When deciding whether the conditions for enrolment were met, the admissions committee was required to take into account the best interests of the child, the school and the Francophone community (s. 5). The Expanded Admissions Policy set out a non-exhaustive list of factors relevant to the question whether the child should be admitted:

- 5.1 the ability of the child and one of the child's parents to communicate in French;
- 5.2 the well-being of the child;
- 5.3 the impact on the child and on the child's siblings of not being able to attend the Conseil's school;
- 5.4 the commitment of the parents and the child to the Francophone community and to French-language instruction;
- 5.5 the growth and development of the Francophone community and the teaching of French as a first language;
- 5.6 the francization and cultural integration resources available;
- 5.7 the linguistic and cultural challenges already confronting the class and the school;
- 5.8 the space available in the class and in the school.

[709] The Expanded Admissions Policy did not apply to École Élémentaire Anne-Hébert (Vancouver (East)) or École Élémentaire Rose-des-Vents (Vancouver (West)) because those schools were overcrowded. In the summer of 2014, the policy likewise became inapplicable to École Victor-Brodeur (Victoria) due to overcrowding.

[710] The CSF promulgated the Expanded Admissions Policy following a period of consultation with its educators and administrators, and the Francophone community. The FPFCEB, for example, suggested adding the Descendant Clause. The FPFCEB also suggested that the CSF consider whether there was sufficient space in the school to allow non-rightsholders.

[711] On May 22, 2015, the CSF's Board of Trustees suspended the operation of ss. 2.2 and 2.3 of the admissions policy, bringing it back in line with s. 166.25(9) of the *School Act*. However, in the 25 months that the Expanded Admissions Policy was in effect, a number of non-rightsholder were admitted to CSF schools.

c) Application of the Admissions Policy

[712] The Court was provided with evidence of the number of students who were admitted pursuant to s. 2 of the Expanded Admissions Policy, which allowed admission of Eligible Non-Rightsholders. In 25 months, the CSF admitted 83 students pursuant to the Francophile Clause, and a further 73 students pursuant to the Grandparent Clause. In the same period, the CSF rejected 73 requests for admission.

[713] The Expanded Admissions Policy has not been without its critics. Mr. Gignac's view was that by admitting non-rightsholders, the CSF would jeopardize the culture of CSF schools. He was concerned that the Vitality of CSF schools was already very weak. Ms. Nicole Chagnon, the current principal of École Élémentaire Rose-des-Vents (Vancouver (West)) received feedback that parents were strongly opposed to the policy, particularly as it impacted space requirements and could dilute the language.

[714] Most educators who gave evidence at trial spoke about their experiences implementing the Expanded Admissions Policy and sitting on Admissions Committees.

[715] Mr. Allison explained that he sat on admissions committees for the CSF's Vancouver Island schools. In that capacity, he sat on about 30 Admissions Committees and deliberated on about 50 cases. For Mr. Allison, the most important concerns were whether the CSF had sufficient space in the school and the quality of French spoken by the student and the student's parents.

[716] Mr. Réjean Gosselin, the current principal at École Élémentaire des Navigateurs (Richmond), testified that the one student admitted to his school pursuant to the Descendant Clause spoke French well, as though it was her first language. A second student was rejected. In 2013/14, he recalled that four students were admitted, ranging from one student with a Francophone grandparent, to a student with a parent who taught and lived in French, but was not a rightsholder.

[717] Ms. Pascale Bernier, the current principal at École Victor-Brodeur (Victoria), participated in admissions committees as a teacher, vice principal (as a substitute) and now a principal. At those committee meetings, the most important consideration to her was whether there was enough room in a given division to admit the children of non-rightsholders, while leaving some room for rightsholders to join a cohort mid-year if necessary. In the summer of 2014, Ms. Bernier refused some non-rightsholders admission because there was insufficient space in the Grade 6 divisions at École Victor-Brodeur.

[718] Ms. Bernier also considered it important that the student speak French to ensure that both the student and the community would benefit. She administered a reading and writing comprehension examination to non-rightsholders' children, and met with parents to ensure they were invested in French life and culture. Ms. Bernier refused to admit some students who did not pass the French competency exam. On the other hand, two children of non-rightsholders were accepted where the students and parents clearly spoke French and it was believed

that their presence would enrich the level of French at the school. Even then, those students were admitted on the understanding that their admission would be re-evaluated in one year.

[719] Mr. Michel Tardif sat on admissions committees for both École Élémentaire La Passerelle (Whistler) and École Élémentaire de la Vallée de Pemberton (Pemberton), where he is currently the principal. To his recollection, some children were accepted: the Francophone child of a family of trilingual immigrants, and a child who spoke some French and whose parent was active in the Francophone community. Other children were not admitted, typically because the parent spoke very little or no French. Further, Mr. Tardif advised that he dissuaded some parents from formally applying when it was clear to him that the parents would not meet the requirements.

[720] Ms. Catherine Drapeau sat as a member of the École Élémentaire Les Aiglons (Squamish) admissions committee, where she is principal. Children from two families were admitted where parents were often seen at Francophone community events, and spoke French with the children. Some students were admitted pursuant to the Descendant Clause. On the other hand, one family with four children was not admitted because the parents did not speak French with the children, and the parents were not proven to be active in the Francophone community.

[721] Mr. Daniel Blais, the principal for École L'Anse-au-Sable (Kelowna), recalled sitting on two admission committees. One student was admitted because it was evident to Mr. Blais that the student's parent spoke French, and the child had attended Francophone preschool.

[722] Several children of non-rightsholders have been admitted to École Élémentaire du Pacifique (Sechelt). Ms. Caroline Picard, that school's principal, testified that one child was admitted pursuant to the Descendant Clause, as her step-grandmother and father were Francophone, the child had attended Francophone preschool in Vancouver and the child's mother was committed to

participating in the Francophone community. It appears that this child might have actually been the child of a rightsholder. Another child was admitted where the parent's mother was a Francophile who had taught courses on Quebecois culture. On the other hand, one child was not accepted where the parent spoke no French and little English, and only wanted her child to be educated in French.

[723] Ms. Marie-Christine Bellerose gave evidence about several students who were admitted to École Élémentaire des Sentiers-Alpins (Nelson), where she is vice principal, through an admissions committee. One student admitted in 2013/14 spoke French better than many of his peers by the end of the school year. Other children of non-rightsholders were speaking French at about the same level as their peers despite speaking no French whatsoever when starting Kindergarten.

d) Admissions Policies and Practices across Canada

[724] The CSF is not alone in its admission of non-rightsholders. The plaintiffs tendered as evidence the admissions policies from 25 Canadian minority language school boards by way of the third affidavit of Ms. Anne-Marie Dessureault. Ms. Dessureault is the Executive Assistant to the Executive Director of the Fédération Nationale. There was no objection to these policies being tendered through Ms. Dessureault.

[725] Almost all policies make an explicit reference to expediting or otherwise admitting immigrants that would otherwise be rightsholders, and in many cases Allophones that want to assimilate into the French language and culture. In most of the few that do not, there is a broader discretion that might otherwise allow those children to be admitted.

[726] Similarly, almost all policies make explicit reference to expediting or otherwise facilitating the admission of non-rightsholders that have some Francophone heritage, such as a grandparent.

[727] Almost all give some discretion to admit non-rightsholders that do not fall in the immigrant or ancestry provisions. Sometimes that discretion is very limited. For

instance, La Commission Scolaire Nord-Ouest (Alta.) and the Conseil Scolaire Centre-Est (Alta.) only allow admission outside the rightsholder, immigrant and descendant categories for children that were registered in an immersion programme that is no longer offered in the community of the school. I note that British Columbia previously allowed admission of that category of student to the Programme Cadre-- something Dr. Ardanaz and Ms. Galibois-Barss both complained about. The Commission Scolaire Acadien Provincial (NS) limits the discretion to admitting children of a biological parent living with a rightsholder (tantamount to a step-parent clause), and Francophone students participating in an international student exchange programme. For the Commission Scolaire Francophone Territoires de Nord-Ouest (NWT), while there is discretion to admit Anglophones that choose to integrate into the Francophone community, the number of students admitted pursuant to that category must not exceed 10% of the total school population.

[728] Many policies contain a discussion of the factors to be considered when deciding whether to admit non-rightsholders. The factors noted in the CSF's policy are generally consistent with the factors noted in the extra-provincial policies.

[729] For example, the policy for the Conseil Scolaire Fransaskois (Sask.) allows admission of non-rightsholders for the following reasons:

1. the admission supports the mission of *fransaskoise* schools (French-language schools in Saskatchewan);
2. the admission supports the vitality and growth of the Francophone community and the parent's commitment to the Francophone community;
3. the admission does not threaten the survival of the province's linguistic majority; and
4. the admission serves the best interests of the family and child.

[Emphasis in original]

[730] The Conseil scolaire public du Nord-Est de l'Ontario (Ont.) provides that the following criteria are to be considered and given equal weight in processing an application for admission:

- The student's level of competence in French;

- The student's interest in learning French;
- The extent of the use of French and/or the presence of aspects of French culture in the family home;
- The level of importance that the student's parent(s) attribute to the French-speaking community's language and culture;
- The commitment of the parent(s) to supporting the student's academic development in French within a board and a school where the language of operation and administration is French.

[731] Additionally, the policy requires consideration of the number of students and level of French in the classroom in which the student is to be registered.

[732] The Policy for the Commission Scolaire Francophone du Yukon (YK), as it stood in 2010, required consideration of a number of factors before granting permission for admission to those falling under the immigrant, ancestor or Francophile categories:

- a) The child's well-being;
- b) His/her residential status in Canada;
- c) His/her proficiency in French-language communication;
- d) The parents' proficiency in French-language communication;
- e) The impact on the child and his siblings if they cannot attend the French-language school;
- f) The home support for linguistic and cultural education;
- g) The engagement of the parents toward French-language education;
- h) The engagement of the parents and child toward the Francophone community;
- i) The pedagogical, cultural and linguistic impact on the class and the school;
- j) The growth and development of the Francophone community;
- k) The advancement of French-language education;
- l) The available resources for *francisation* and cultural integration;
- m) The linguistic and cultural challenges already present in the class and school;
- n) The percentage of exogamous couples whose children already attend the school;
- o) The historical issues linked to obtaining a French-language school in the community;

- p) The demographics of the Francophone community;
- q) Principles of equity, transparency and objectivity.

[733] Of course, these policies were set by the pertinent school boards. They may or may not be consistent with the school board's enabling legislation. I have not considered the *vires* of any of the policies. For example, the policy of the for Commission Scolaire Francophone du Yukon, as it stood in 2010, may be *ultra vires* in light of *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [*Yukon-SCC*].

[734] Ms. Dessureault also provided evidence about the proportion of students admitted to minority schools across Canada that are non-rightsholders. She was responsible for contacting minority school districts to collect that data starting in March 2013, and collected data that was backdated to the 2010/11 school year. While there was no objection to this data, I note that it is all hearsay.

[735] The data in Ms. Dessureault's affidavit reveal that, generally, a low proportion (about 6%) of the students that are admitted to the first two years of minority school programmes do not have rightsholder parents.

[736] In many districts, in many years, zero or very few children of non-rightsholders were admitted pursuant to expanded admission policies. However, some districts are anomalous, and routinely admit many non-rightsholders. The Commission scolaire Francophone des Territoires du Nord-Ouest (NWT), for example, admitted 38% to 52% of its students pursuant to its exceptional admissions categories. The Conseil Scolaire de District des Écoles Catholiques du Sud-Ouest (Ont.) also routinely admitted more than 20% of its students as non-rightsholders.

e) Does Section 23 Protect an Expanded Admissions Policy?

i. Submissions

[737] The defendants argue that the *School Act* validly restricts admission to rightsholders and Immigrant Rightsholders. Pointing to *Yukon- SCC*, the defendants

say that the plaintiffs are required to comply with that provision. In the defendants' submission, the CSF took the law into its own hands and promulgated a policy that was *ultra vires* the *School Act* while the issue was contested before the Court.

[738] The plaintiffs take the position that the Province violated s. 23 of the *Charter* by failing to explicitly authorize and sanction the CSF's policy of admitting, on a case-by-case basis, students who are not children of s. 23 rightsholders or Immigrant Rightsholders. They say that the Province's approach to admissions has insufficiently ensured compliance with s. 23, and prevented the realization of s. 23's purpose.

[739] The plaintiffs say that the ability to admit students on a case-by-case basis is necessary to achieve s. 23's purpose. They point to Dr. Castonguay's conclusion that the Francophone minority is totally dependent on immigration to keep its numbers up. Given that conclusion, they say the CSF must be able to admit children of non-rightsholders with a strong connection to French language.

[740] In support of its argument, the plaintiffs point to the adage in *Arsenault-Cameron* at para. 26 that requires provincial governments do whatever is practically possible to preserve and promote minority language education. They say such a mandate "plainly encompasses allowing the Conseil to admit appropriate students on a case-by-case basis, while applying the Conseil's judgment as to what is required to best preserve and promote minority language education in British Columbia."

[741] The plaintiffs also cite *Manitoba Schools Reference*, where the Court held that s. 23 should be construed remedially, in recognition of previous injustices that have gone unredressed. They also point to *Solski*, where it was noted that "in previous cases, this Court has insisted that s. 23 must be interpreted so as to facilitate the reintegration of children who have been isolated from the cultural community the minority school is designed to protect and develop" (at para. 33). The plaintiffs suggest these principles militate in favour of a broader provision

allowing the admission of non-rightsholders as a means of repairing the damage caused by the forces of assimilation.

[742] Additionally, the plaintiffs suggest that an Expanded Admissions Policy is incidental to the CSF's right to management and control. They say the CSF has superior knowledge of the needs and concerns of the minority French-language community, and has concluded that some flexibility to admissions is required to counter assimilative pressures. They say the Province should defer to the flexible, case-by-case approach to admissions that the CSF prefers.

[743] The defendants disagree. They emphasize that the purpose of s. 23 and the rights it confers are two different things. In the defendants' submission, the Court cannot extend the reach of s. 23 beyond the clearly delineated categories of rightsholders in the guise of interpreting what s. 23 means. They take the position that the interpretation proposed by the plaintiffs would gut s. 23 of its meaning and skew the balance it strikes between competing interests.

[744] The defendants urge that allowing the CSF to admit non-rightsholder is particularly problematic because children admitted pursuant to an expanded policy would be counted among the numbers warranting particular programmes or facilities. The defendants press the additional cost associated with minority language education, and stress the legitimate interest governments have in controlling enrolment. They also note the evidence showing that some educators feared the potential dilutive impact of expanded admissions.

[745] In the defendants' submission, the *Charter* expressly enumerates the three categories of rightsholders whose children are eligible to attend minority schools. The Province relies on *Commission scolaire Francophone du Yukon no. 23 v. Yukon (Procureure générale)*, 2014 YKCA 4 [Yukon- CA] at para. 221, where Mr. Justice Groberman concluded that the specificity of the language in s. 23 "indicates a deliberate drawing of the line between constitutionally protected rights and continuing Provincial legislative jurisdiction" over education. They also point to *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15, at para. 2, where

the Court rejected an equality argument by non-rightsholders looking to enrol their children in a minority school on the basis that their admission would impermissibly “read out of the Constitution the carefully crafted compromise contained in s. 23”.

ii. Discussion

[746] There is no doubt that the CSF acted in breach of the *School Act* by admitting children to its programmes whose parents were not rightsholders or Immigrant Rightsholders. The plaintiffs do not appear to contest that this is the case. While many other provinces have enacted legislation that explicitly allows minority school boards to admit the children of non-rightsholders, British Columbia has done so in a limited way, allowing only the admission of children of Immigrant Rightsholders. By admitting children pursuant to the Descendant and Francophile Clauses, the CSF acted in breach of the *School Act*.

[747] The evidence establishes that the CSF admitted at least 83 students pursuant to the Francophile clause and 73 students pursuant to the Descendant Clause of its Expanded Admissions Policy. The CSF was not shy about rejecting admissions requests where members of an admissions committee were not persuaded the admission would be appropriate for the school or child.

[748] The evidence shows that expanded admissions policies are common, but controversial. Dr. Landry acknowledged a risk to admitting children without adequate French skills to minority language schools. The CSF’s community of rightsholder parents also expressed concern about the possible effects of an Expanded Admissions Policy.

[749] On the other hand, none of the educators pointed to any negative impact of admitting children of Eligible Non-Rightsholders. Several educators, like Ms. Picard and Mr. Gosselin, testified that the admission of non-rightsholders had a positive impact on the school community and the level of French spoken in the school. The only evidence on the subject suggests that children admitted pursuant to Admissions Committees did not fall behind their peers.

[750] In my view, there is no evidence that admitting non-rightsholders to CSF schools pursuant to the Expanded Admissions Policy harmed CSF schools. However, it also falls short of establishing that admitting non-rightsholders had a positive impact on the level of French spoken and the Francophone language and culture.

[751] The primary issue to be decided is whether the remedial nature of s. 23 requires the Province to enact legislation allowing the CSF the discretion to admit non-rightsholders. I conclude that this question was decided in the negative in *Yukon- SCC*.

[752] In *Yukon- SCC*, the Court considered an appeal to a claim by the Yukon Francophone School Board (the “Yukon School Board”) against the Yukon government in connection with what it said were deficiencies in minority language education. By the time the matter reached the SCC, the primary issue was whether there was a reasonable apprehension of bias on the part of the trial judge. A secondary issue concerned whether the Yukon School Board could unilaterally decide to admit the children of non-rightsholders.

[753] In *La Commission Scolaire Francophone du Yukon No. 23 c. Procureure Générale du Territoire du Yukon*, 2011 YKSC 57, the trial judge considered whether the right to manage admissions to minority schools flows from s. 23 of the *Charter*, and particularly the minority’s right to control matters that impact the culture and language of a school. He explained that the Yukon School Board had been delegated the authority to admit only the children of rightsholders and Immigrant Rightsholders (at paras. 741-743). The Yukon School Board implemented a policy that allowed admission of students with a Francophone ancestor, those with an Immigrant Rightsholder parent or a parent that speaks neither French nor English, and Francophiles (at para. 748).

[754] The trial judge considered that s. 23 modified the Territory’s jurisdiction over education, making ministerial power subordinate to the decision-making power of a

Francophone school board (at para. 759). He determined that the three categories of rightsholders noted in s. 23 were not meant to be exhaustive (at para. 760).

[755] Given the minority's right to management and control over matters going to language and culture, and the remedial purpose of s. 23, the trial judge held "that the control and management of admission of rightsholders and non rightsholders falls to the [Yukon School Board]" (at para. 762). He concluded that the Yukon government was only able to intervene where the official minority threatened to assimilate the majority, or where the minority school no longer fulfilled its mandate under s. 23 of the *Charter* (at para. 763). He therefore found that any limitation to the Yukon School Board's right to manage and control admissions was unconstitutional (at para. 764).

[756] The issue was considered on appeal, in *Yukon- CA*. There, Mr. Justice Groberman, writing for the Court, rejected the conclusion that s. 23 gives the minority a right to recruit non-rightsholders into their schools. The Court considered that the Territory's jurisdiction over education extended to imposing the language of instruction upon non-rightsholders attending publicly-funded schools (at para. 218). While he acknowledged that courts have moved away from the position that language rights must be interpreted narrowly because they are the product of political compromise (at para. 220), he observed that in *Gosselin*, the Court concluded that the specificity in s. 23 drew a firm line between the rights of the minority and the Province's jurisdiction over education (at para. 221):

The language of s. 23 does not support the proposition that the linguistic minority is to have the right to admit whatever students it wishes. Section 23 sets out very specific categories of students who are entitled to education in minority language schools. On its face, the specificity indicates a deliberate drawing of the line between constitutionally protected rights and continuing Provincial legislative jurisdiction.

[757] Mr. Justice Groberman went on to observe that a purposive interpretation of s. 23 would not go so far as to allow the admission of non-rightsholders. He expressed the view that allowing non-rightsholders to attend minority language schools could jeopardize the language and culture of the minority (at para. 224-226),

and concluded that s. 23 does not give the minority the right to unilaterally set admission criteria so as to accept children of non-rightsholders (at para. 228).

[758] Despite this conclusion, Mr. Justice Groberman made it clear that he was focused on the question of whether s. 23 unconditionally granted the minority the right to manage and control the admission of non-rightsholders. He left it open to the minority to argue for a relaxed admissions policy to ensure the programme's ongoing viability as a school (at para. 229).

[759] When the issue arose again in *Yukon- SCC*, the Court framed the issue as “whether s. 23 grants the [Yukon School Board] the unilateral power to admit students other than those who are ‘eligible’ ... This raises questions about the allocation of constitutional powers.” (at para. 66).

[760] The Court considered that s. 23 establishes the general framework for the provision of minority language education, and, where the numbers warrant, gives certain Canadian citizens the right to have their children receive a minority language education (at para. 67). They also noted that language rights must be balanced against the constitutional powers of the provinces, including the power over education (at para. 68).

[761] The Court noted that provinces and territories have the power to delegate the function of setting admission criteria to school boards, including the discretion to admit non-rightsholders (at para. 69). The provinces also have the authority to offer a higher level of rights protection than is envisioned by s. 23 (at para. 70). Madam Justice Abella, for the Court, reviewed the extent to which Canada's provinces and territories had done so (at paras. 71-73). Ultimately, the Court concluded that since the Yukon government had not delegated the authority to set admission criteria to the Yukon School Board, it did not have the authority to unilaterally set admission criteria. The Court left it open to the Yukon School Board to claim “that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose: see *Mahe*, at pp. 362-65” (at para. 74).

[762] On first look, *Yukon- SCC* appears at odds with the decisions below. Both of the decisions below considered the extent to which the right to management and control includes the right to set admissions policies. The trial judge held that the right to management and control necessarily includes all matters concerning language and culture, including admissions policy. The Yukon Court of Appeal took the view that the classes of rightsholders noted in s. 23 demarcate the line between the linguistic minority and the territory's respective jurisdictions.

[763] The decision of the Supreme Court of Canada coincides with that of the Yukon Court of Appeal. Madam Justice Abella made it clear that the Court was deciding the extent to which s. 23 gives school boards the unilateral power to admit non-rightsholders. That, she said, was a matter of the respective jurisdiction of the minority school board and the territorial government (at para. 66). In reaching the conclusion that the Yukon School Board had no jurisdiction to admit non-rightsholders absent delegation, the SCC implicitly held that the question of admissions fell within the territory's jurisdiction over education, and was not overtaken by the minority's rights pursuant to s. 23 unless it was delegated to the linguistic minority. This is consistent with the decision by the Yukon Court of Appeal.

[764] Confusion seems to arise out of the fact that the SCC left it open for the Yukon School Board to challenge the regulation on the basis that "the Yukon has insufficiently ensured compliance with s. 23", or "prevents the realization of s. 23's purpose" (at para. 74). I do not take this to mean that the Court did not resolve the s. 23 issue that was before it. Rather, in that case, there was a real issue that low enrolment might threaten the viability of Yukon's only minority language school. Thus, the Court was likely doing as the Yukon Court of Appeal did, and leaving it open to the Board to argue that non-rightsholders ought to be admitted to ensure that the school continues to exist going forward, lest the objects of s. 23 not be achieved in the Yukon.

[765] Thus, in my view, the question whether a minority school board has the unilateral ability to admit non-rightsholders was decided in *Yukon-SCC*. The line

between the minority's rights to management and control and the Province's jurisdiction over education is demarcated by the three classes of rightsholders noted in s. 23. Unless the Province delegates greater authority to the minority to admit non-rightsholders, the question of who is admissible to those schools remains in the Province's jurisdiction. Since the Province only allows the admission of rightsholders and Immigrant Rightsholders, the CSF is not entitled to admit students falling into the Francophile and Grandparent categories unless they would otherwise be the children of rightsholders.

[766] I acknowledge that the plaintiffs argued that an Expanded Admissions Policy is vital to ensuring the continued success and viability of British Columbia's minority schools. This is inconsistent with their argument in the rest of the case, where they urge that the CSF can expect great increases in enrolment. In my view, based on the totality of the evidence in this case, there is no threat to the continued viability of any CSF programmes that would require the admission of non-rightsholders to CSF schools.

[767] Although the defendants plead an injunction in connection with the admission of non-rightsholders, they agree that given that the CSF has discontinued its Expanded Admission Policy, an injunction is no longer necessary. A declaration that the legislative provision is valid would suffice as a remedy from the defendants' perspective. I therefore declare that s. 166.25(9) of the *School Act* is a valid exercise of the Province's constitutional jurisdiction over education.

f) The Effect of the CSF's Having Admitted Non-Rightsholders

[768] The final question is what should be done about the non-rightsholders that have already been admitted to CSF programmes. The defendants argue that the Province should not be required to build facilities on the basis of students who were admitted in contravention of the *School Act*. They say that non-rightsholders ought to be excluded from the calculation of the number of students likely to enrol in a programme.

[769] The evidence establishes that about 150 children of non-rightsholders were admitted to CSF programmes. There is a higher incremental cost to educating them in a minority rather than a majority school. In my view, given that the non-rightsholders were improperly admitted, when I calculate the current enrolment at CSF schools, I will take into account any non-rightsholders that were admitted. Sometimes the number of non-rightsholders admitted to the programme is insignificant. However, in those instances where non-rightsholders make up a significant proportion of the current enrolment, I will take that into account when determining how many children of rightsholders are likely to attend the programme going into the future.

[770] As well, the children of non-rightsholders attending CSF schools could become rightsholders themselves for their children, and could also create sibling rights within their families. There is a multiplying effect to their improper admission. It exceeds the role of the Court to decide whether those persons should have their rights limited into the future. I leave it to the legislature to decide whether it is worthwhile to enact legislation to restrict the admission of these persons and their children going forward.

4. Summary of Conclusions on the Approach to Calculating the Number of Students

[771] Based on the foregoing, it is possible to arrive at an overall approach to calculating the number of children that can be expected to enrol in a CSF school.

[772] To summarize, three categories of rightsholders are entitled to have their children attend minority language schools: those who are rightsholders because of their mother tongue, their education or their children's education. The relevant number for s. 23 is the number of children of rightsholders who could reasonably be expected to take advantage of a service, which will fall somewhere between the known demand and the total number of rightsholders in an area.

[773] The known demand is simple to calculate. It can be taken from the evidence of enrolment at the CSF school. From that total I will deduct any non-

rightsholders admitted pursuant to the CSF's Expanded Admissions Policy where such children make up a significant proportion of students enrolled at the school.

[774] The total population of students eligible for the service is more challenging to estimate. The 2011 census only counted the number of Mother-Tongue Rightsholders' children. That number includes non-citizens that would be rightsholders; their children should not be included in the universe of eligible children. It also likely undercounts the number of Mother-Tongue Rightsholders' children to a limited extent.

[775] The census provides no insight into the number of Education and Sibling Rightsholders' children in the Province. The Knowledge and Regular Home Use categories are not a reliable proxy for the children of Education and Sibling Rightsholders. Overall, I conclude that it is impossible to quantify the number of children of Sibling and Education Rightsholders in the province, although the evidence suggests that number is quite small.

[776] However, since the Court is concerned with calculating the number of children that are likely to attend a programme, the outer boundaries of the range need not be established with precision; they may be estimated based on the best available evidence. To require the plaintiffs to attempt to quantify the entire universe of rightsholders would impose an undue burden on them. Instead, the appropriate approach is to take into account the total universe of s. 23(1)(a) (Mother-Tongue) rightsholders in each community based on the census data, while bearing in mind the limitations to that universe.

[777] From there, the Court can attempt to calculate a proxy participation or uptake rate. The number likely to take advantage of the service should be estimated based on all the contextual evidence, which may include drawing inferences based on the experiences in communities with similar characteristics, demographic and community-specific information like the density and distribution of the population in the school's catchment area. A court should also ensure that schools are built for whatever growth is reasonably foreseeable based on the evidence.

[778] The CSF will usually see some modest enrolment increases upon the construction of a new, homogeneous French-language school. The extent of those enrolment increases will vary based on the context of the given community. However, since British Columbia has very high rates of Exogamy and assimilation, low rates of transmission of the French language to children and because Francophones in British Columbia are highly dispersed, in most instances the increases in enrolment will not be significant. Further, the evidence is clear that the CSF can always expect much lower participation rate in secondary grades as compared to elementary grades, and will see some attrition as a cohort moves through their school years. Its programmes will also tend to start small, and grow with time.

VIII. ENTITLEMENT

[779] Once a court determines the appropriate number of children, the analysis shifts to what the programmes and services the minority language group is entitled to based on those numbers. In *Mahe*, it was established that what services the numbers will warrant falls along a sliding scale. The court must situate the number of children on the sliding scale to determine to what facilities and services that number is entitled. Then, the question becomes whether those children are receiving appropriate facilities and services.

[780] I begin this chapter by explaining the approach that I will take to the law on the sliding scale of entitlement. Then, I consider the evidence concerning the importance of physical facilities to enrolment decisions and the role that they should play in the entitlement analysis.

A. The Sliding Scale of Entitlement

[781] In *Mahe*, the Court held that s. 23(3) of the *Charter* invokes a sliding scale of rights. Chief Justice Dickson explained the sliding scale as follows (at 365 to 368):

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).

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

...

The only way to avoid the weaknesses of the separate rights approach would be to lower the numbers requirement -- with the result that it would be impractical to require governments to provide more than the minimum level of minority language educational services. In my view, it is more sensible, and consistent with the purpose of s. 23, to interpret s. 23 as requiring whatever minority language educational protection the number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education.

There are outer limits to the sliding scale of s. 23. In general, s. 23 may not require that anything be done in situations where there are a small number of minority language students. There is little that governments can be required to do, for instance, in the case of a solitary, isolated minority language student. Section 23 requires, at a minimum, that "instruction" take place in the minority language: if there are too few students to justify a programme which qualifies as "minority language instruction", then s. 23 will not require any programmes be put in place. However, the question of what is the "minimum" programme which could constitute "instruction", and the further question of how many students might be required in order to warrant such a programme, are not at issue in this appeal and I will not be addressing them. The question at issue here concerns only the "upper level" of the possible range of requirements under s. 23 -- that is, the requirements where there are a relatively large number of s. 23 students.

[Emphasis added.]

[782] According to Dickson C.J.C. in *Mahe*, s. 23 generally affords a right to instruction that varies depending on the number of students in a given region. At the low end, numbers may justify only instruction. At the upper end, the numbers may warrant instruction in minority language educational facilities provided out of public

funds. The sliding scale guarantees whatever type and level of services is appropriate for the particular number of students involved.

[783] Chief Justice Dickson also made reference to the outer limits of s. 23 (at 366). He explained that, at the lower end, where there is a small number of minority language students (such as an isolated minority language student), there is little that governments can be required to do. If there are too few students to justify a programme, then s. 23 will not require any programmes. However, since it was not before him, he did not go on to consider how many students might be required to justify instruction at the lower end of the scale.

[784] At the upper end, the Chief Justice explained, the quality of education provided to the minority should in principle be on a basis of equality to the majority (at 378).

[785] Against that backdrop, I turn to how the numbers should be situated on the sliding scale, before addressing the threshold for warranting instruction, the high-end right to substantively equivalent facilities, and the service warranted in between those two extremities.

1. Situating the Numbers on the Sliding Scale

[786] Once a court has estimated the number of children likely to attend a proposed programme, the court must place the number of children on the sliding scale. When deciding where along the sliding scale a group should fall, the Court should be concerned with two factors: the services appropriate for the numbers of students involved, and the cost of the contemplated services: *Mahe* at 384-385.

[787] The parties agree that these two considerations should not be given equal weight. Pedagogical considerations are given more weight than cost. In relation to pedagogical concerns, the plaintiffs urge that the requirements must be tailored to the needs of minority students to recognize that pedagogical standards established for the majority should not trump the cultural and linguistic concerns of the minority: *Arsenault-Cameron* at para. 38.

[788] The defendants agree that pedagogical concerns are given the most weight, but they emphasize the importance of cost considerations. They argue citing *Mahe* at 384 that cost considerations are important to s. 23 because the right is not absolute, and it will be financially impractical to give all minority students the same services given to a large majority group. They also stress the importance of context, and that the analysis must consider what is appropriate given the particular community and situation, citing *Mahe* at 386.

[789] As the parties stated, the Court in *Mahe* explained that the numbers must be situated on the sliding scale with reference to two factors: first, the services appropriate, in pedagogical terms, for the number of students involved; and second, the cost of the contemplated services. The pedagogical factor relates to student welfare, and does not require governments to provide programmes and facilities inappropriate for the number of students. The cost factor recognizes that it is impractical to afford to every group of minority language students the same services that a large group of s. 23 students is afforded. Since the pedagogical factor will usually prevent the imposition of unrealistic financial demands on the state, the pedagogical factor is given more weight than the cost factor. This also protects the remediation goals of s. 23 (at 384-385).

[790] Chief Justice Dickson's focus on pedagogy and costs suggests that the analysis must be a practical one. The same concern is reflected in his comment that the question is "whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved" (at 366). Similarly, when discussing why a sliding scale is preferable to a separate rights approach, Dickson C.J.C. emphasized that s. 23 "simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education" [Emphasis added] (at 367).

[791] To determine what is practical for governments to provide in terms of pedagogy and cost, it makes sense to look to what government would provide for a similar number of majority students in the same community. The minority language

community should, however, be given some leeway in deciding what is pedagogically appropriate because it is most in tune with what is pedagogically appropriate according to the minority's linguistic and cultural context. Within reason, it may be pedagogically appropriate for the minority to operate smaller schools than the majority would in the same area.

[792] To pass the low-end threshold such that the numbers warrant instruction, the CSF must show that it would be practical, pedagogically and in terms of cost, to instruct that number of students. Given its right to management and control over matters going to language and culture, it falls within the CSF's jurisdiction to decide when it is pedagogically appropriate and cost-effective to instruct that number of children. It is entitled to some deference in its assessment. It makes sense that instruction is warranted wherever the CSF determines that it is pedagogically and cost-appropriate to instruct that number of students in a class, even a split class.

[793] The entitlement passes the upper threshold when the programme has numbers that are comparable to the number of students in typical majority-language programme in the same geographic area. If school populations are comparable, and schools in that area are typically built to a similar capacity as the proposed minority programmes, there is no question that it is pedagogically appropriate and cost-effective for minority language schools to offer equivalent spaces and facilities to those offered at majority language schools.

[794] That leaves the middle of the sliding scale, where the numbers are sufficient to form a class, and thus warrant instruction, but insufficient to form a school of a comparable size to other schools in the community, such that fully equivalent facilities are not warranted. In those circumstances, the minority is entitled to something greater than instruction, but less than fully equivalent homogeneous school facilities. What exactly the minority is entitled to will fall to be determined based on considerations of pedagogy and cost, and the particular context surrounding the community at issue.

[795] I also note that there is a temporal aspect to the question of where the numbers fall on the sliding scale. The numbers will warrant different facilities at different times. When a CSF programme begins, it may have only 10 to 20 students. In that instance, the numbers will fall toward the lower end of the sliding scale, warranting instruction. As the programme grows, it may come to warrant more. As its enrolment approaches that of comparable majority schools in the same area, the numbers may come to warrant homogeneous facilities equivalent to those provided to the majority.

2. S. 23(3)(a): The Instruction Threshold

[796] The plaintiffs acknowledge that there is a minimum threshold to trigger the lower-extremity right to instruction. In their submission, though, that threshold is very low. They note that in *Mahe*, the Court suggested (at 367) that a solitary, isolated minority language student might not warrant instruction.

[797] I do not take the defendants to argue that any of the programmes in the claim fall below the threshold for warranting basic instruction in the minority language. Further, the CSF has the jurisdiction to determine whether the numbers are sufficient to establish a programme at first instance, as envisioned in *Mahe*.

3. S. 23(3)(b): The Equivalence Threshold

[798] There is a second threshold at the upper extremity of s. 23. Where the numbers surpass that threshold, rightsholders are entitled to full educational facilities distinct from, and equivalent to, those found in majority schools. In *Mahe*, Dickson C.J.C. explained that at the upper end of the sliding scale, s. 23 includes a right to minority language education facilities (at 365). Madam Justice Karatatsanis elaborated on what is warranted at the upper end of the sliding scale in *Association des Parents- SCC* at para. 29. Citing *Mahe*, the *Manitoba Schools Reference* and *Arsenault-Cameron*, she explained that the upper limit of the sliding scale entitles the community to “full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group”, which are “accessible and, where possible, located in the community where the children reside”.

[799] When determining whether minority facilities are equivalent to those found in the schools of the majority, the question 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?” (*Association des Parents- SCC* at para. 35, see also para. 77). As the plaintiffs suggest, the test looks at substantive equivalence, from the perspective of a reasonable rightsholder, based on a local comparison, with a view to the global educational experience. I discuss each element in turn.

a) Substantive Equivalence

[800] The plaintiffs and defendants both emphasize the importance of substantive rather than formal equivalence. The plaintiffs also urge that courts should avoid undue focus on markers of formal equivalence, such as *per capita* funding, which they say would distort rather than enlighten the inquiry. They emphasize the importance of treating the CSF differently to achieve true equivalence.

[801] Section 23 does not specifically refer to the quality of education the provinces must provide for s. 23 students. However, from the earliest s. 23 jurisprudence, courts have stated that the quality of education should be provided on the basis of equality with the majority. In *Mahe*, Chief Justice Dickson opined that where a minority language community has a right to management and control at the upper extremity of the sliding scale, “the quality of education provided to the minority should in principle be on a basis of equality with the majority”. He went on to observe that this does not require identical education systems, as “the demands of minority language education itself, make such a requirement impractical and undesirable.” Thus, the Court required that funds allocated for minority language schools be at least equivalent to the funds allocated to majority schools on a per student basis, while noting that special circumstances may warrant allocation of funds exceeding the *per capita* allocation to the majority (*Mahe* at 378).

[802] In *Arsenault-Cameron*, the Court opined that s. 23 is premised on substantive equality, which “requires that official language minorities be treated

differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.” The Court opined that because of the importance of substantive equality, the Minister and the Court of Appeal had inappropriately emphasized the impact of three elements of equality between the two linguistic groups: size of schools, duration of bus rides and quality of education (at para. 31).

[803] Most recently, Madam Justice Karakatsanis addressed the meaning of substantive equality at the upper end of the sliding scale in *Association des Parents-SCC* at para. 33. After citing *Arsenault-Cameron* and *Mahe*, she confirmed that when giving effect to s. 23 rights, the focus should be on substantive equivalence. What is paramount, she wrote, “is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students” (at para. 33).

[804] Madam Justice Karakatsanis’s comments also confirm the importance of context to the substantive equivalence analysis. She explained that, given economies of scale, it should not be unexpected that a minority board may experience higher *per capita* costs. She advised that there would be no particular amount that would satisfy the requirements of s. 23 in any given instance. Thus, she cautioned against focusing on *per capita* costs and other markers of formal equivalence, as official language minorities might need to be treated differently to ensure that the education they provide is equivalent to that of the official language community (at para. 33).

[805] I note that Karakatsanis J. stated that, in giving effect to s. 23 rights, the courts should not focus on *per capita* costs as a marker of formal equivalence. I do not take her as saying that *per capita* costs and funding are irrelevant to the equivalence analysis. Read in its entire context, the comments must be understood as suggesting that governments are not likely to meet their duty by providing the same amount of funding, *per capita*, to minority boards as those of the majority. To ensure substantive equivalence, *per capita* funding may need to be higher for

minority boards. What *per capita* funding a government provides to the majority and the minority, and what *per capita* costs a minority board incurs to provide minority language education, are relevant factors that are important to the overall contextual analysis of whether a minority board has adequate resources to offer a meaningfully similar educational experience and address the remedial objectives of s. 23. Indeed, *per capita* allotments can also serve as a marker of substantive equality as well.

b) The Reasonable Rightsholder Parent

[806] The plaintiffs urge that courts must assess substantive equivalence from the perspective of rightsholder parents. Given that perspective, the plaintiffs submit that the actual perspectives of parents of CSF students are critically important. They say that the Court should give particular weight to the testimony of parents living in the communities at issue about how the facilities and accessibility of minority language schools have affected their evaluation of the educational experience at CSF schools.

[807] The defendants agree that the perspective is that of a rightsholder parent. But, they say that perspective has an objective element. The reasonable rightsholder, they say, should be a reasonably well-informed parent with knowledge of the full spectrum of issues that ought to govern the decision about where to enroll a student. The perspective must not, they say, be that of a parent looking to gather evidence helpful for this case.

[808] In *Association des Parents- SCC*, Karakatsanis J. explained that the purposive approach to interpreting s. 23 requires courts to approach their analysis from the perspective of a rightsholder. The test is formulated from the perspective of a “reasonable rights-holder” (at par. 35). Indeed, in *Association des Parents- SCC*, the Court frequently avers to the “reasonable rights-holder parent” and “reasonable rights holders” (at paras. 35, 40 and 77) and reasonable parents (at para. 38, 40).

[809] The question then becomes whether the perspective of a reasonable rightsholder is an objective or a subjective standard. By urging the Court to give particular weight to the views of rightsholder parents, the plaintiffs suggest a subjective standard. The defendants propose an objective standard.

[810] The “reasonable rightsholder parent” standard invokes the language and perspective of the “reasonable person” standard that informs the law of negligence. That standard was discussed in *Arland and Arland v. Taylor*, [1955] O.R. 131 (Ont. C.A.), where Laidlaw J.A., for the court, presented the following, admittedly not comprehensive, definition of the reasonable person (at 141-143):

The learned trial judge was in error in those instructions to the jury, and this manner of leaving the case to the jury was the subject of disapproval in *Kralj v. Murray*, [[1954] O.W.N. 58, [1954] 1 D.L.R. 781]. The standard of care by which a jury is to judge the conduct of parties in a case of the kind under consideration is the care that would have been taken in the circumstances by “a reasonable and prudent man”. I shall not attempt to formulate a comprehensive definition of “a reasonable man” of whom we speak so frequently in negligence cases. I simply say he is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence.”

See *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781, 156 E.R. 1047, and Mazengarb, *Negligence on the Highway*, 2nd ed. 1952, p. 15.

In *Glasgow Corporation v. Muir et al.*, [1943] A.C. 448, [1943] 2 All E.R. 414, Lord Macmillan at p. 457 said: “The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view . . . What to one judge may seem far-fetched may seem to another both natural and probable.”

[Emphasis added.]

[811] From *Arland*, I draw several observations about the nature of a reasonable person that, in my view, should apply equally to the reasonable rightsholder parent. The reasonable rightsholder parent must be considered to be a parent of normal intelligence, who makes prudent decisions concerning where to enrol his or her child in school. He or she makes the decisions based on considerations that ordinarily regulate decisions concerning one's children. In the case of school enrolment decisions, concepts like the best interests of one's child, and pragmatic and cultural considerations concerning one's family are likely to be paramount.

[812] Like the reasonable person standard, the reasonable rightsholder parent standard must be considered to have both objective and subjective elements. The analysis must be an impersonal test, such that the reasonable rightsholder parent is presumed to be "free from both over-apprehension and from over-confidence". At the same time, the test must be subjective in the sense that the court must decide what, in the circumstances, a reasonable rightsholder might have considered and foreseen when making school choices for their families.

[813] Since the reasonable person test is partly objective, courts must be cautious not to place undue weight on the personal views of any individuals. As alluded to in *Arland*, the purpose of the reasonable person test is to do away with individual idiosyncrasies and judge conduct based on an objective standard. In A. Linden and B. Feldthusen, *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015), the authors explain that the process is designed to remove from the equation the personal judgments of judge and jury to reach a value judgment based on community standards rather than personal biases and whims (at ss. 5.53-5.54):

Trial judges are in error if they ask juries to answer the question, "Did he do what you would have done?" or "What would I have done?", because the standard is not that of "any individual jurymen" but of what a "reasonable and prudent man would do or refrain from doing in the circumstances of the particular case" [*Kralj v. Murray*, [1954] O.W.N. 58, [1954] 1 D.L.R. 781 at 58-59]. So, too, it is not permissible for trial judges to suggest that jurors put themselves in the driver's seat of a defendant's car and ask "Would I have done that?", for "it is improper for jurymen to judge the conduct of a person in given circumstances by considering, after the event, what he would or would not have done in the circumstances" [*Arland* at 143].

The reasonable person test is employed by our courts to evaluate the conduct of the actors that come before them. The exercise is a unique process in which a value judgment based on community standards is reached. In such pursuits it is imperative to control as much as possible the personal biases and whims of the judge and the jury. The reasonable person test is meant to assist in this task. ... [I]t does inject an aura of objectivity into the deliberations of the tribunal. At the same time it permits a large degree of individualized judgment. It provides us with both certainty and flexibility.

[814] Following from that, evidence concerning the actual views of rightsholder parents must be treated with some care, particularly when those parents have become involved in assisting one side in litigation. Asking individual rightsholder parents for their views on whether schools meet the appropriate standard is similar to asking a jury or judge for their views on what ought to have been done. Thus, where a rightsholder parent provides evidence about her own views of the quality of school facilities, it gives rise to a concern that the individual idiosyncrasies of the individual could taint the evidence, running afoul of the purpose of adopting an objective standard. The reasonable rightsholder parent analysis must not be based on personal biases and whims; to fulfill the purpose of the reasonable parent standard it must be based on community standards.

[815] On the other hand, in many instances judges will not form part of the minority group and might not be well suited to understanding if facilities deter parents from sending their children to a minority language school. Certainly, then, the views of rightsholder parents could assist the court to understand the particular needs and views of the linguistic minority.

[816] Given the purpose of the reasonable parent standard, though, it is essential that evidence from rightsholder parents displays some hallmarks of reasonableness. The views of rightsholder parents lose value when a parent does not display the characteristics of a reasonably prudent parent, or where the evidence suggests a level of bias or lack of objectivity on the part of the parent.

c) Local Comparison

[817] The question of equivalence evokes the idea of comparison. The plaintiffs say that the comparison should be local, and compare the minority school to the neighbouring majority schools that represent realistic alternatives for rightsholder parents.

[818] The defendants agree that, as a general rule, the appropriate comparator group is the neighbouring schools that are a realistic alternative for rightsholders. However, they note that the precise geographic scope and the usefulness of the comparison will tend to vary with the circumstances. The defendants point to *NWT-CA* at para. 72 in support of the proposition that sometimes it may not be appropriate to look exclusively to local comparator schools. The defendants acknowledge that in *Association des Parents-SCC*, the Court suggested that local comparators are generally appropriate. However, they note that the reference to a local comparison was qualified by the word “generally”, which they say admits of other circumstances and allows *NWT-CA* to stand.

[819] In *Association des Parents-SCC*, the Court held that because s. 23 speaks “wherever in the province” the numbers warrant services, “it is necessary to think locally, as the linguistic and cultural benefits of minority language education accrue to the local community” (at para. 36). In light of that, Karakatsanis J. stressed that the question of equivalence must be determined with reference to local comparator schools, as those are the ones that members of the minority community are likely to examine as realistic alternatives (at para. 37):

If rights holders consider which school their child should attend, or whether to withdraw their child from a minority language school, they will look to nearby majority language schools as alternatives. It follows that the comparator group that will generally be appropriate for the assessment of substantive equivalence of a minority language school will be the neighbouring majority language schools that represent a realistic alternative for rights holders. To compare the facilities of a minority language school to facilities outside the area would not realistically capture the choice available to rights holders, who cannot send their children to a school located across the province. Of course, the precise geographic scope of the comparator group, and the relative usefulness of this sort of comparison, will vary with the circumstances (*Arsenault-Cameron*, at para. 57).

[820] The decision in *NWT- CA* is at odds with this decision. There, the Court concluded that the local schools considered by the trial judge were too large to be meaningful comparators, while the smaller schools were too far away to be realistic options for parents. Thus, the Court held that there were no comparators that served as a helpful point of reference. In the appellate court's view, "the sliding scale test had to be applied without over-emphasizing the 'comparatives', although they were still a part of the body of evidence" (at para. 72).

[821] In my view, the lack of meaningful comparatives in a local community does not mean that the Court should consider schools elsewhere in the province. The focus should still be a local one, as rightsholder parents do not have the option of sending their children to other, smaller schools elsewhere in the province. The relevant comparators are still those in the community.

[822] However, the fact that there is no meaningful comparison likely means that rightsholder parents cannot reasonably expect equivalent facilities. More likely than not, the numbers do not fall at the upper extremity of the sliding scale. As I develop in the next subsection, the question should be whether the minority facilities are proportionate to what the majority has in the same community.

[823] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[824] However, in some instances, a deeper analysis will be required. For example, where a minority language school's catchment area is so large as to encompass a number of communities, the distances may be so great that no reasonable rightsholder parent would enrol their children in the schools in those communities. In those cases, it is appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

d) Global Focus and Weighing of Factors

[825] The question then becomes what, exactly, must be equivalent. What should the court assess when determining whether the majority and minority have equivalent facilities?

[826] The plaintiffs' view is that the comparison looks at the global educational experience. In their submission, the perspective must be a holistic one that takes into account the full range of educational factors that reasonable parents use to assess equivalence. This, they say, includes the quality of instruction and facilities, in addition to travel times, extracurricular activities and other factors. The plaintiffs say that the global assessment must not place undue focus on factors like academic outcomes, which is not a proxy for overall substantive equivalence of the educational experience.

[827] The plaintiffs say that schools offer an equivalent experience where "there is no meaningful difference between the overall appeal" of the majority and minority schools. Thus, the appeal of the facilities would no longer be a factor relevant to the reasonable parent's choice between the majority and minority school. They say that "facilities are equivalent" if a reasonable parent would not be influenced by the overall physical condition, appearance, functionality, amenities and accessibility of the available school facilities, but rather only by a preference for homogeneous French-language instruction or for English-language instruction. In the plaintiffs' submission, factors like accessibility and facility condition cease to be equivalent when they tip the balance of a parent's assessment of the overall appeal of the minority school.

[828] The defendants also emphasize overall educational experience. However, they point to comments by Karakatsanis J. in *Association des Parents- SCC* to the effect that there is no expectation that the minority should have the very best of all aspects of the educational experience. The defendants disagree with the plaintiffs' suggestion that meaningfully similar educational experience requires that the quality of facilities has no impact on the reasonable parent's analysis. They suggest that

the quality of instruction and facilities ought properly be considered together, because they are both important elements of comparison. The defendants also suggest the plaintiffs must show that any lack of equivalence is not trivial or insubstantial, citing *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*] at 759.

[829] As the parties agree, when a court is considering whether minority education facilities are equivalent to those of the majority, the focus is on the global educational experience. The comparative exercise is intended to be “contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times,” as well as other factors (*Association des Parents- SCC* at para. 39). Parents might also take into account other compelling considerations: “the quality of the teachers, the curriculum, and the cultural opportunities offered by a minority language school are all relevant” (*Association des Parents- SCC* at para. 40). The analysis will be contextual, and the extent to which any given factor is a live issue will depend on the circumstances of the case (*Association des Parents- SCC* at para. 39).

[830] As a comparative and holistic exercise, the intent is to ensure substantive equivalence, not that the minority has “the ‘very best’ of every aspect of the educational experience” (*Association des Parents- SCC* at para. 40). I agree with the Court in *NWT- CA*, which emphasized that “[t]he *Charter* does not create a right to perfect schools, only equality” (at para. 77). I hasten to add that even equality is only guaranteed as the numbers approach the upper end of the sliding scale.

[831] As suggested in *Association des Parents- SCC*, all factors must be weighed together, the positive and the negative, to determine whether there is a meaningful difference in the overall educational experience that would deter reasonable rightsholders from sending their children to the minority language school. In that way, the standard requires that any lack of equivalence not be trivial or insubstantial - the difference must be a meaningful one (at paras. 35 and 77). The differences in

the educational experience must be sufficiently significant that, taken together, all the factors have an impact on parents' enrolment decisions.

[832] Although they pay heed to the global perspective established in *Association des Parents- SCC*, the plaintiffs suggest an approach that would consider physical facilities in its own silo. The plaintiffs propose that if a parent's decision is animated by factors concerning the physical amenities of a school, then facilities are not equivalent. To them, equivalence means that those factors must be neutral such that the only animating factor in a parent's decision would be preference for minority language education.

[833] The plaintiffs' approach is flawed because it does not take the global approach urged by the SCC. They ask the Court to assess physical amenities separately from other factors, while removing from the equation the benefits of attending a minority language school. Those factors must be considered together, and as against all other factors, when determining whether the overall educational experience is equivalent: *Association des Parents- SCC* at para. 39. In *Association des Parents- SCC*, the Court was explicit that the quality of a school's physical facilities are just one factor among many, and will not normally deter a parent from enrolling in the school, particularly if other aspects of the educational programme are strong (at para. 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. ...[Emphasis added.]

[834] In support of their theory, the plaintiffs cite *Association des Parents- BCSC* at para. 157. There, Mr. Justice Willcock concluded that long travel times were not offset by beneficial aspects of a minority language education (at para. 57):

I am prepared . . . given the evidence with respect to the facilities afforded to students at Rose-des-vents, to say that long travel times in this case are clearly not offset by superior facilities or programs, and that together with inadequate facilities, long travel times act as a disincentive to enrolment, preserve the *status quo*, and defeat the purposes of s. 23 of the *Charter*. . . . What can be said on the evidence is that, collectively, the facilities, including transportation facilities, afforded to the children of rights-holders in the City of Vancouver west of Main Street are presently inadequate to meet the standard of equivalence required to satisfy the constitutional guarantee established by s. 23.

[835] This conclusion was expressly upheld by the Court in *Association des Parents- SCC*, which concluded at para. 57 that they could see no error in the trial judge’s approach, as he “comprehensively and holistically assessed the relevant factors.”

[836] In my view, nothing in *Association des Parents- SCC* or *Association des Parents- BCSC* suggests that the Court approved an approach that would consider physical amenities separately from other aspects of the educational experience. Nor did the Court uphold a conclusion that physical amenities ought to play no deterrent role whatsoever. Rather, the Supreme Court of Canada concluded that the trial judge had appropriately weighed the positive aspects of École Élémentaire Rose-des-Vents (Vancouver (West)) (high quality instruction and positive academic outcomes) against the negatives (overcrowding, inadequate physical amenities and travel times), and reached an appropriate conclusion based on all of the factors. If the negative factors had related to the quality of instruction, and the positives to physical amenities, the Court might well have reached the same conclusion.

[837] What is important is that the Court be alive to all the factors that reasonable parents use to make school choice decisions. This will include both deficiencies and advantages of a given school. As the Court observed in *Association des Parents- SCC* at para. 38, “[t]he fact that a given school is deficient in one area does not mean that it lacks equivalence in an overall sense.” Those factors must be considered together, as “[t]he quality of instruction and the quality of facilities may both be strong indicators of equivalence, and are properly considered together” (at para. 38).

4. The Middle Range of the Sliding Scale

[838] While courts have commented on the thresholds at the lower extremity of the sliding scale (beyond which no instruction is warranted) and the higher extremity of the scale (past which rightsholders are entitled to distinct, homogeneous, facilities that offer a global educational experience equivalent to that in minority schools), there are few decisions concerning what a given community is entitled to between the two thresholds. In many ways, this is a case of first impression on those issues.

[839] The parties made minimal submissions about what is warranted in the middle of the sliding scale. That is problematic given that many of the programmes and facilities in the claim fall in this mid-range, warranting at least instruction, but something less than distinct homogeneous facilities equivalent to those of the majority. When is it practical for a programme to warrant more than instruction in a single classroom? And what are rightsholders entitled to when their numbers are not comparable to those in majority schools in the same geographic area?

[840] Given the importance of context to the s. 23 analysis, the answer to these questions must be found with reference to the particular situation of the group of students, as well as pedagogical and cost considerations. The CSF must be entitled to some deference concerning what is pedagogically appropriate for that group of children given the linguistic and cultural background of the community. However, the deference does not go so far as to place an impractical obligation on government to incur disproportionate costs to provide extravagant services for a relatively small number of children.

[841] As I conceive the range, immediately past the instruction threshold, the number of children may be entitled to instruction in a classroom or through electronic services. What is pedagogically appropriate falls to be determined based on what is linguistically and culturally appropriate in the view of the minority school board, as well as what is cost-effective. From there, as the number of children grows, the services can expand to a series of classrooms, and then to a stand-alone school,

depending on what is practical, both in terms of pedagogy and cost, for that number of students.

[842] There are many factors that might prove relevant to the assessment of what is practical in terms of pedagogy and cost. For example, the size of small schools elsewhere in the province might provide some evidence of when it is practical and cost-effective to operate a stand-alone school. To give effect to the remedial purpose of s. 23, the Court must also take into account the specific background and needs of the minority language community at issue. What facilities are already available in the community for the linguistic minority's use might also prove relevant.

[843] The plaintiffs take issue with this approach, and suggest that the CSF should not have to start its programmes in leased or heterogeneous space. In my view, that overlooks the temporal aspect of the sliding scale. Few of the CSF's programmes have immediately warranted homogeneous facilities distinct from, and equivalent to those afforded to the majority. When CSF schools first begin, they may warrant something less than homogeneous schools. In my view, it is logical and practical that the number of children be provided with growing levels of services as the numbers move higher on the sliding scale.

[844] The plaintiffs suggest that in the middle of the sliding scale, instruction must be provided on the basis of equivalence to the majority. In that connection, they cite *Association des Parents- SCC* at para. 29. There, Karakatsanis J. wrote that at the upper end of the sliding scale, "rights holders are entitled to full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group". I do not take her comments to say that equivalent, homogeneous facilities are also warranted where the number has not passed the equivalence threshold at the upper end of the sliding scale.

[845] The plaintiffs also cite *DesRochers v. Canada (Industry)*, 2009 SCC 8, a case concerning the content of s. 20(1) of the *Charter*, which places on governments a duty to provide services in both official languages. In the course of discussing that

right, Madam Justice Charron made some general observations about the importance of substantive equality to language rights (at para. 31):

Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras. 22, 24 and 25; [*Arsenault-Cameron*] at para. 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation. ..

[846] There is no doubt that, as stated in *DesRochers*, the concept of equality in language rights matters must be given its true meaning, and that the relevant standard is substantive equality.

[847] However, it would be impractical to conclude that where a number of children is only entitled to instruction, it must be equivalent to the instruction provided to the majority. Where the numbers of children are small, the numbers may have to be accommodated in split classes. There may be insufficient students to provide the full extent of course offerings available in majority schools. Requiring that the minimum level of instruction provided to the minimum number of minority students be equivalent to what is provided to the majority would run counter to Dickson C.J.C.'s comment in *Mahe* that it is not practical to afford to a small minority the same services that would be provided to a large majority.

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

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

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

[851] I acknowledge that the test for proportionality is not entirely *ad idem* with the concept of substantive equality. With the shift to analyzing proportionality, the question is no longer whether facilities are substantively equal. However, the substantive equality perspective is of great value when comparing minority facilities to the majority. Thus, the proportionality analysis must be approached with a view to recognizing that the minority will need special consideration and resources to achieve a standard that is proportionate to the facilities provided to the majority.

[852] Similarly, the question of proportionality does not square perfectly with the question of whether a reasonable rightsholder would be deterred by meaningful differences between majority and minority schools. A reasonable rightsholder parent would undoubtedly look at a small minority school and see meaningful differences from large majority schools. Those differences might well deter the parent from choosing the minority school. Where the numbers are small, though, the fact that a

parent will be deterred would not make it practical in terms of pedagogy and cost to provide equivalent facilities to prevent those rightsholders from being deterred.

[853] However, the perspective of the reasonable rightsholder parent is a valuable one, too. Taking that perspective ensures that the Court is focused on the global educational experience as it would appeal to the persons that will eventually take advantage of the service. As such, in my view, when examining the question of proportionality, the question is whether a reasonable rightsholder would find a minority school to be meaningfully disproportionate to the facilities offered to the majority, based on a local comparison of the global educational experience.

5. Conclusion

[854] When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost. This can be discerned with reference to what government provides in other circumstances, and what the minority believes to be appropriate based on the linguistic and cultural context.

[855] As I see it, the sliding scale begins with a threshold, below which no minority language education services are warranted. For the numbers to warrant the minimum level of instruction, the CSF must show that it is practical to instruct that number of students in terms of both pedagogy and cost, such as when that group can form a class. It is entitled to some deference when making that assessment.

[856] The numbers pass the upper threshold and require equivalence when the number of students is comparable to the number of students in majority programmes in the same geographic area. Without comparable populations, it is not practical or cost-effective for the minority programme to offer equivalent spaces and facilities. At the upper end, the minority is entitled to full educational facilities distinct from, and equivalent to, majority schools. Thus, enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of

comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region.

[857] At the upper extremity of the sliding scale, rightsholders are entitled to “full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group”, which are “accessible, and, where possible, located in the community where the children reside” (*Association des parents- SCC* at para. 29). When determining whether minority facilities are equivalent to those found in the schools of the majority, the question is “would reasonable rights holders be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority school?” (*Association des Parents- SCC* at paras. 35 and 77).

[858] The test looks at substantive equivalence, which may require that the minority is treated differently from the majority. It takes the perspective of a reasonable rightsholder, an objective standard with subjective elements. This requires that the views of actual rightsholder parents be treated with some caution, particularly where they have special knowledge or experience going beyond what a reasonable rightsholder parent would have. The comparison is a local one, which considers how the minority system compares to the other schools that rightsholder parents would consider when making enrolment decisions. Finally, it compares the global educational experience, which requires the Court to weigh and balance all the factors that a reasonable parent might have in mind when making enrolment decisions for their children. The question is whether there is a meaningful difference between the global educational experience at majority and minority schools that would deter reasonable rightsholders from enrolling their children in the minority programme.

[859] In the middle of the range, what exactly the minority is entitled to will fall to be determined based on whatever is practical given considerations of pedagogy and cost. The numbers are entitled to instruction, at the least. As the number of children grows, the entitlement grows, too, to include progressively more elements of the

programmes and services offered in majority schools. What, exactly, the group is entitled to depends entirely on what is practical in terms of pedagogy and cost, with some deference owed to the CSF in its assessment of what is pedagogically appropriate.

[860] Before the minority reaches the equivalence threshold, the minority is not entitled to fully equivalent programmes, amenities and services. That would not be practical. Instead, the minority is entitled to proportionate programmes, amenities and services. The proportionality analysis should mirror the perspective used in the equivalence analysis: it should adopt a substantive equivalence analysis, from the perspective of the reasonable rightsholder, while making a local comparison of the global educational experience.

B. Costs and Practicalities

[861] The parties agree that once the court situates a group of students on the sliding scale, considerations of pedagogy and cost are no longer relevant. However, the defendants take the position that costs and practicalities are relevant when determining what amenities the numbers warrant, and again when assessing s. 1 justifications and remedies. In the defendants' submission, the sliding scale is "ever speaking". They suggest the sliding scale applies not only to the threshold question of whether the numbers warrant a programme or facility, but also to the question of whether the particular facilities sought in the case are warranted. The plaintiffs reject the defendants' assertion.

[862] The question arises out of some tension between what was said in *Association des Parents- SCC* and *NWT- CA*. In *NWT- CA*, the Court suggested that the "numbers warrant" standard is not merely a threshold test. Rather, the Court suggested that the standard "is ever-speaking, and it must be applied at every level in determining if particular facilities or programs are 'warranted'" (at para. 101).

[863] In *Association des Parents- SCC*, the Court considered what role costs and practicalities ought to play within the equivalence test at the upper end of the sliding scale (at paras. 46, 49-50):

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

...

It may be that costs and practicalities again become relevant if a responsible party seeks to justify a violation of s. 23 under s. 1 of the *Charter*. As well, costs and practicalities may be relevant where a court seeks to fashion a remedy that is "appropriate and just" in the circumstances, pursuant to s. 24(1) of the *Charter*. Thus, it does not automatically follow from a finding of a s. 23 breach that rights holders will receive a new school. There is a perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse. In fashioning a remedy, the court will take into account the costs and practicalities that form part of the provision of all educational services — for both majority and minority language schools. However, this issue is not before us on this appeal.

To summarize, issues of costs and practicalities are considered in determining where a minority language community falls on the sliding scale of rights guaranteed under s. 23. Where the community is entitled to the highest level of educational services, on an equal footing with the majority language community, costs and practicalities will not be relevant to a determination of whether the rights holders are receiving the services to which they are entitled. It may be, however, that costs and practicalities will be relevant in attempts to justify a breach of s. 23, and in attempts to fashion an appropriate and just remedy for a breach.

[Emphasis added.]

[864] I take from these comments a number of principles: Once considerations of cost and pedagogy or decisions in prior litigation establish entitlement to the highest level of services -- equivalence-- costs and practicalities are irrelevant to the equivalence analysis. Costs and practicalities are relevant to determining what services a given number of students is entitled to; in other words, they are relevant when the Court is situating the number on the sliding scale. They may also be

relevant if a party seeks to justify a violation of s. 23 under s. 1 of the *Charter*. They may prove relevant again when a court seeks to fashion an “appropriate and just” remedy, as “it does not automatically follow from a finding of a s. 23 breach that rights holders will receive a new school.”

[865] However, the defendants note that the Court in *Association des Parents-SCC* was dealing with *École Élémentaire Rose-des-Vents (Vancouver (West))*, a school where the defendants concede the numbers pass the equivalence threshold of the sliding scale. In the defendants’ view, in communities that do not pass that threshold, the sliding scale ought to be thought of as speaking at least when deciding what comparator schools are appropriate. In the alternative, they say the sliding scale and the question of costs and practicalities ought to be taken into account at the s. 1 stage. The defendants caution that if the sliding scale no longer applies, the references in *Mahe* to doing whatever is practical and reasonable will have no application past the minimum threshold of a minimum number of children.

[866] The Court in *Association des Parents- SCC* did not address to what extent costs and practicalities are relevant at the middle of the sliding scale. In my view, costs and practicalities might well prove relevant to the questions of what are essential to the question of what services a group in the middle of the sliding scale is entitled to. Beyond that, though, they could also prove relevant to the proportionality analysis. Unlike entitlement at the high end of the sliding scale, it is impossible to delineate with precision what a small number of rightsholders’ children is entitled to. The government could meet the appropriate standard of entitlement by funding any range of amenities and services. Thus, the overall context of what is pedagogically and financially realistic for a given group will inform the question whether the amenities and services the minority is receiving are proportionate. In that way, it differs from a group at the high end of the sliding scale, where the only question is whether facilities are equivalent.

C. The Importance of Facilities to Rightsholder Enrolment Decisions

[867] The parties put expert evidence before the Court concerning the extent to which the quality of educational facilities is important to rightsholder parents' enrolment decisions. Dr. Landry offered one such opinion. The defendants relied on the expert evidence of Mr. Benoît Gauthier, who conducted original survey research to determine the factors most likely to inform school choice decisions. The plaintiffs tendered three expert reports in reply: from Dr. Landry, Dr. George Spears and Dr. David Marker.

1. Mr. Benoît Gauthier

[868] Mr. Gauthier is a specialist in social research generally, and survey research in particular. He holds bachelor's and master's degrees in political science from Université Laval, and a master's degree in public administration and a master's diploma in public sector management, both from the École Nationale D'administration Publique. He has also completed the course work and comprehensive exams toward a Ph.D. in political science at Carleton University. He is a designated Certified Marketing Research Professional.

[869] Mr. Gauthier was qualified as an expert in social research, including the design, implementation and conduct of survey research, and the analysis of survey and other data. He has 30 years' experience in survey research, having held a number of positions related to applied social research, and survey research in particular.

[870] Mr. Gauthier was asked to prepare an opinion on the relative importance of the quality of the physical facilities of minority schools among the factors motivating s. 23 rightsholders' enrolment choices in British Columbia and elsewhere in Canada. He was also asked to comment on Dr. Landry's conclusions about the relative importance of school facilities to enrolment decisions.

[871] At the outset of the trial, in December 2013, the plaintiffs challenged the relevance and necessity of Mr. Gauthier's opinion. I concluded that the Gauthier

Report was at least relevant as a response to Dr. Landry's opinion, and to issues surrounding assimilation and remedy. After having heard all the evidence, I can now see that it is also relevant to the question of what factors are important to rightsholder parents when they make enrolment decisions for their children. I also determined that Mr. Gauthier's opinion was necessary. While the plaintiffs also challenged the report because of some of Mr. Gauthier's research methodologies, I concluded that those concerns would go to weight rather than threshold admissibility.

Mr. Gauthier's opinion is based on three data sources: Minorities Speak Up; data collected by the CSF consisting of responses to surveys concerning students leaving Conseil schools (the "CSF Exit Survey Data"); and survey data collected in support of the Gauthier Report (the "Gauthier Survey Data").

a) Minorities Speak Up

[872] *Minorities Speak Up* is a Statistics Canada survey that targeted persons under age 18 in households where at least one parent belonged to the official language minority, and persons age 18 and over who themselves belong to the official language minority. The researchers drew a sample of approximately 52,000 respondents to the 2006 Canadian long-form census, all of whom identified as belonging to the official language minority. Those respondents completed a survey questionnaire directed at, *inter alia*, the respondent and his or her household, children and parents' demographics, language and culture; and the respondent's language skills and linguistic trajectory from childhood to adulthood, sense of belonging to the community, and educational experience.

[873] Mr. Gauthier observed that *Minorities Speak Up* does not concern itself with s. 23 rightsholders. The survey appears to also include Allophones whose FOLS is French or both French and English. He nevertheless went on to reach conclusions with respect to the interpretation of *Minorities Speak Up*.

[874] *Minorities Speak Up* concludes (at 54) that parents tended to choose a minority school for their children because French was the parent's mother tongue or main language (47% of children), or that French was the child's mother tongue

(28%) or for the child to learn French (25%). For children registered in a regular English programme, the reasons most often cited by the parents were the proximity of the school (27%), the Anglo-dominance of the child (18%) or parent (17%) and the quality of the school or programme (17%).

[875] On reviewing *Minorities Speak Up*, Mr. Gauthier concluded that in most cases, a majority school is chosen based on the existing language of the people at stake and the proximity of the school, which he classified as pragmatic considerations. In comparison, he noted that parents who elect to send their children to a minority school tended to do so because of the household's or the parent's mother tongue: cultural motivations fundamentally different from the pragmatic motivations of parents who took the opposite decision.

[876] Based on *Minorities Speak Up*, Mr. Gauthier observed that children from Endogamous households are 2.6 times more likely to attend a minority school than children from Exogamous families. Similarly, he noted that the study concluded that 66% of parents who have done both their primary and secondary schooling in French chose a minority language school for their children, whereas half as many who completed only their primary or secondary schooling in French made the same choice. Mr. Gauthier also noted a four-fold difference in likelihood of choosing a minority language school based on the main language spoken at home. Suggesting that he had no information to suggest that distance to the minority language school would be shorter for these groups, he postulated that the correlation must be related to cultural rather than pragmatic motivations.

[877] The plaintiffs challenged Mr. Gauthier's conclusion that persons with a stronger connection to the French language would not necessarily live closer to a minority language school. He agreed while under cross-examination that in some provinces, like New Brunswick and Ontario, there are some highly Francophone communities. He confirmed that persons in those communities would likely live closer to a Francophone school than those in communities where Francophones were only a small minority.

b) CSF Exit Survey Data

[878] The CSF Exit Survey Data provides information with respect to the reasons that students have left CSF schools. The person completing the survey is asked to explain why the child will no longer attend a CSF school by selecting one of the following options: out of province move, within British Columbia move, move to another CSF school, enrolment in an immersion school, or enrolment in a majority-language school. Mr. Gauthier agreed on cross-examination that many of these options were “destinations” rather than reasons. If the respondent chooses any of the last three options, though, the form asks the respondent to provide further details about the reasons for the student’s departure.

[879] Mr. Gauthier studied the Exit Survey Data. He found that parents move their children out of CSF schools for a variety of reasons. He observed that: “No reference was made to the state of the school infrastructure in the reasons given by parents to take their child out of a [CSF] school and place them in a majority-language school or an immersion school”.

[880] Mr. Gauthier acknowledged he has no knowledge of the processes in place to collect assemble and report on the information in the exit surveys. Therefore, he stated that he could not offer an opinion with respect to its value as empirical evidence. He therefore considered the information “illustrative of the underlying situation it pertains to document”.

[881] While he was under cross-examination, Mr. Gauthier confirmed that the surveyor can have an impact on responses. Mr. Gauthier did not know for a fact how the surveys were administered. The evidence from CSF school educators confirms that they were most often completed by school administrators after speaking to parents. He agreed that a parent might give more polite answers to a senior administrator than they otherwise would. However, he also noted a countervailing factor: the tendency of parents to not be intimidated by and speak their minds to persons in authority. He could not say how those factors might have influenced the answers given by parents.

[882] The dataset created by the exit surveys resulted in 600 responses between June 2008 and January 2012. Although he stated he would only use the responses as illustrative of the experiences therein, Mr. Gauthier performed a statistical analysis of the reasons given for departing CSF schools.

[883] Mr. Gauthier concluded that the most frequent reason cited for leaving a CSF school is to enrol in a majority school (32%) or an immersion school (28%). Together, these two categories totalled 60% of departures, and were equally frequent among schools that were part of the claim and outside the claim. The most frequent reason given for moving to those facilities was a desire for children to move to a larger school for purposes of socialization. That reason was more frequent for schools outside this claim (16%) than for schools that form part of the claim (4%). Following that, frequent reasons given included to be with siblings (65%), the availability of more interesting programmes (6%), the distance to the school (6%) and insufficiency of parent language skills (5%).

[884] Mr. Gauthier filed a supplemental expert report that provided his opinions about a set of 519 further Exit Surveys that were provided to him after he completed his first expert report. In that data, he found a single reference to the state of school infrastructure as a reason given by a parent to move their child from a CSF school to an immersion school. The most frequent reasons were the distance to school, followed by school difficulties and insufficient language skills.

[885] Mr. Gauthier observed that no reference was made to the state of school infrastructure in the reasons given by parents to take their children out of a CSF school and place them in an immersion or a majority school. He found two isolated references by the same parent to school transportation not being offered door-to-door. As a result, Mr. Gauthier concluded that the Exit Survey Data does not reveal school facilities to be a significant cause of children leaving CSF schools.

c) Gauthier Survey Data

[886] The Gauthier Survey Data contains the results of Mr. Gauthier's original survey of s. 23 rightsholders. As Mr. Gauthier did not have a complete list of s. 23 rightsholders, he elected to sample adult residents of Canada indiscriminately. The sample was drawn from a pre-recruited pan-Canadian panel, Probit, and complemented by automated calling in British Columbia. Respondents were submitted to four screening questions designed to identify s. 23 rightsholders. Where those questions identified a s. 23 rightsholder within the household, the respondent was invited to participate in a longer on-line survey.

[887] Mr. Gauthier confirmed that his sample was not a pure random sample, which would require a complete list of the population to sample from. On cross-examination, Mr. Grant, counsel for the plaintiffs, put to Mr. Gauthier that sampling ought to be random, and can be biased by self-selection of respondents. He maintained that the approach to sampling that was put to him was a purist, or academic approach to representative sampling. In practice, he explained, different standards are appropriate due to the modern reality that few persons want to participate in survey research.

[888] Mr. Gauthier maintained that different sampling standards apply with respect to comparative and descriptive research. Selection bias-- which can occur, for example, when the sample omits some proportion of the target population-- poses more acute concerns with descriptive research than with comparative research. If there is selection bias in a sample being used for comparative research, the data may still say something of value about the differences between the groups. Mr. Gauthier characterized some of his questions as comparative.

[889] Mr. Gauthier performed a pre-test of his survey. As a result of the pre-test, Mr. Gauthier concluded that the questionnaire was sound, understandable and included relevant questions. Mr. Gauthier agreed on cross-examination that his form of pretest would not have captured instances where a person misinterpreted the study but did not struggle with it. He agreed that using a pretest like a focus group,

or one that put different versions of a question to respondents, would have given him different information. However, he maintained that about 99% of surveys use his pretesting method.

[890] Mr. Gauthier explained that a total of 50,750 members of the pre-recruited panel, Probit, who lived outside Quebec were invited to participate in the study. A total of 9,323 persons completed the screening questions but were not s. 23 rightsholders. 1,095 were identified as rightsholders and continued on to complete the questionnaire.

[891] Mr. Gauthier did additional telephone sampling in BC. An automated caller dialed a total of 1,063,937 British Columbia land line numbers and 963,505 randomly generated BC telephone numbers. Some 9,805 numbers were on a do-not-call list, and 704,612 were not in service. 13,368 persons completed the screening questions. Of them, 1,388 were identified as possible rightsholders and were invited to complete the questionnaire. In total, 261 questionnaires were filled out by rightsholders identified through the automated calling system.

[892] Thus, in total, 1,356 rightsholder questionnaires were completed.

[893] Mr. Gauthier agreed while under cross-examination that response rate is one measure of survey quality. He agreed that he did not report the response rate to his research in his study. He did, however, report that the level of participation in the study should be taken into consideration, as should the fact that the research is not based on a random sample.

[894] It was also put to Mr. Gauthier that a high response rate is important to ensuring the researcher feels confident that the respondents would reasonably represent the target population. Mr. Gauthier agreed that was the case with very high response rates, such as responses of 90%-- a response rate so high that he had never seen one in a survey of this nature. He noted that it was unsettled whether there is an appreciable difference in the confidence a researcher could have at lower response rates-- such as between a 40% and a 5% response. He noted

that research with much lower response rates have been successful in producing meaningful information. He also averted to research suggesting no significant differences in reliability of samples with very low response rates, in the 5% range.

[895] Mr. Gauthier was also questioned about his use of the Probit panel. He agreed that the Probit panel is composed of households that were contacted randomly and that had agreed to become members of the panel. Probit received about a 1-2% response rate when it constructed the sample. Then, Mr. Gauthier's survey was sent to the pre-recruited panel members. About 21% of the members of the Probit panel agreed to participate in the survey before they were screened to determine whether they were Canadian rightsholders living outside Quebec.

[896] The evidence reveals that in July 2013, Mr. Gauthier emailed his contact at Probit to express concern about the participation rate. In August of that year, he expressed concern with the rate at which identified rightsholders from the BC telephone survey were going on to complete the on-line survey. Later, in a further email to Probit, he stated that the success of the project would be determined by the telephone calls. He explained that his goal in sending those emails was to urge his supplier, Probit, to take action to try to increase the number of responses to the survey. This suggests that participation rate was an important consideration for Mr. Gauthier.

[897] The respondents to Mr. Gauthier's survey ranged in age from youth to seniors, and answered with respect to the decisions they made for their children. The majority of respondents-- 68%-- had children age 19 or older. Sixty percent had children age 5 to 18. Mr. Gauthier agreed that a little more than 25% of respondents had children age 36 or more, meaning that their children were in secondary school at least 18 or more years ago. He agreed that his responses do not distinguish between what factors are important today as compared to what was important to parents many years ago.

[898] Mr. Gauthier used mathematical weighting to ensure the descriptive data were representative of the socio-demographic composition of the population being

studied. He weighted the answers of the individuals who completed the screening questions to ensure that they conformed to the distribution of the population aged 18 or more by province and age group in the 2011 census.

[899] Mr. Gauthier's survey was designed to elicit data concerning the elementary and secondary school trajectories of children in the household. The available trajectories were designed to elucidate whether the child attended a majority-language school from start to finish, a minority language school from start to finish, a majority-language school and then a minority language school, or a minority language school and then a majority-language school.

[900] Participants were given the opportunity to answer an open-ended question addressing why they chose that trajectory. Later, participants were asked to indicate the strength of their identification with a battery of pre-selected school-specific reasons why a parent may choose a particular school for their child, and a battery of pre-selected non-school-specific reasons for school choices. Finally, participants answered closing questions concerning their socio-economic and cultural profile.

[901] Mr. Gauthier's survey asked questions about the importance of a variety of factors to a parent's choice of a given school trajectory. Most of the time, the pre-selected battery of factors proposed positive attributes of a school. Then, parents were asked to rank the importance of those factors to the parent. (The propositions were phrased in the negative when asking why a given school trajectory was NOT chosen.) For example, parents were asked to rank the importance of the proposition that "[t]he school was close to home" to their decision to enrol their child in a given type of school.

[902] Mr. Gauthier noted that his original research showed that socio-cultural identification is paramount in school decisions. Households are more likely to choose a French-only elementary or secondary school trajectory where French is used most often at home, the parent has an above average cultural connection to the French community, the parent is below average in their level of pragmatism

about school decisions, and/or if the parent has an above-average Francophone self-image.

[903] With reference to reasons that parents chose a minority elementary school for their children, Mr. Gauthier observed that parents emphasized the value of bilingualism, as well as the school environment and facilities. At the secondary level, the most important factors were cultural attachment and the value of bilingualism, as well as the quality of the school facilities and environment.

[904] In response to questions about why a minority elementary school was NOT chosen, the distance to the minority language school was the only factor noted by parents to be moderately important. At the secondary level, a minority school was most often not chosen due to the child's preferences and the distance to school. Since parents were given the opportunity to signal other important reasons for not choosing a minority school, Mr. Gauthier concluded that other than distance from school, the reasons for NOT enrolling one's child in a French elementary or secondary school were not associated with the quality of the minority language school or the state of its infrastructure, but rather with socio-cultural identification.

[905] Parents typically did not indicate that they had strong reasons for not choosing a Francophone education. There were also a number of non-responses to the question. Mr. Gauthier related this to the fact that many parents may not have made a decision not to send their children to a minority language school; it might never have been a consideration or an opportunity that the family examined.

[906] Mr. Gauthier also reported on reasons given by parents for removing their children from minority language schools to enrol them in a majority school. At the elementary level, the main reasons included a desire for bilingualism, the ease of moving between cities, the distance to the school, and the unavailability of a minority elementary school in the region. There were too few responses with respect to the secondary level and English-to-French school trajectories for Mr. Gauthier to draw any conclusions.

[907] Examining why parents chose a majority elementary education for their children, Mr. Gauthier observed that the location of the majority school, or a lack of a local minority language school, is likely to influence the decision. Factors including the quality of the teaching and school environment were also important to the choice of a majority school. At the secondary level, the English-only trajectory was most often preferred because the school was local, or because of the quality of teaching, and environment, and the child's preference.

d) Conclusions

[908] In the final synthesis of his conclusions, Mr. Gauthier addressed the main factors that influence a decision to enrol one's child in majority or minority elementary or secondary schools. He ranked a number of factors as playing a role in school choice.

[909] Mr. Gauthier observed that a parent's socio-cultural identification is the most important factors influencing the decision to enrol one's child in a majority elementary school. If parents have weak ties to the Francophone community and the French language, they are significantly more likely to choose a majority elementary school. The proximity of the school is also an important reason for choosing a majority elementary school. The quality of the teaching environment plays a lesser role in the decision. Other significant factors include the need for a school large enough to support socialization and the need to put siblings in the same school. He did not find that the appearance of the school and quality of the infrastructure played a role in the choice of a majority elementary school.

[910] With respect to the decision to enrol one's child in majority secondary schools, socio-cultural identification continued to play a role, but to a lesser extent. Instead, factors such as location of the majority school or lack of a minority school were the most important. The school and teaching environments and student preferences were also important factors. Again, he found no support for the hypothesis that physical attributes of school buildings attract students to secondary schools.

[911] Mr. Gauthier then synthesized the factors that influence a decision to enrol in a minority elementary school. The most important factor was again the socio-cultural identification of the parent as shown by their connection to the community and their personal schooling in French. Personal values placed on bilingualism also influenced the decision. Some physical factors of school infrastructure also factored into the decision in favour of attending the minority school.

[912] With respect to the decision to enrol in a minority secondary school, Mr. Gauthier observed that the key factor was again cultural attachment or socio-cultural identification, as well as the value placed on bilingualism. As with minority elementary schools, the school facilities also attracted children to minority secondary schools.

[913] Mr. Gauthier concluded that he did not find that the physical attributes of school buildings factored into a decision to enrol a student in a majority school. He did, however, find that physical characteristics of school amenities might factor into a parent's decision in favour of a minority school.

2. Dr. Landry

[914] In his expert report, Dr. Landry gave his own view of how facilities influence a parent's decision to enrol their children in a minority school. He also responded to Mr. Gauthier's conclusions twice. He was cross-examined with respect to Mr. Gauthier's views while he was giving evidence concerning his expert report. Later, he prepared a report responding to Mr. Gauthier's report, and was cross-examined with respect to those conclusions as well.

[915] Dr. Landry was asked to explain how the quality of minority school facilities affect the quality of education, and whether school facilities are a factor considered by parents when deciding whether to enrol their children in minority schools. He explained that adequate facilities and proper training are of the utmost importance to achieving actualization pedagogy and community-building pedagogy. He relied on *Minorities Speak Up* to explain that close to one-fifth of French-speaking parents

outside Quebec chose a majority school because they judge them to be of higher quality or to have better programmes. He opined that equivalent facilities are therefore an essential element to fostering stronger attendance at minority schools.

[916] Counsel for the defendants, Mr. Doust, put to Dr. Landry that his conclusion that equivalent facilities are “essential” to fostering better attendance at minority schools was based on the views of 17% of respondents to *Minorities Speak Up*. Dr. Landry replied that the views of 17% of persons were sufficient to warrant his conclusion.

[917] In his report, Mr. Gauthier challenged Dr. Landry for relying on the data in *Minorities Speak Up* concerning the “quality of programmes and schools” to draw conclusions about the importance of “school facilities”. In Mr. Gauthier’s view, this demonstrates conceptual slippage. When Mr. Doust put this to Dr. Landry, Dr. Landry agreed “school facilities” and the “quality of programmes and schools” are not the same, and that the quality of programmes and schools includes more than just school facilities.

[918] While Dr. Landry was being cross-examined the first time, Dr. Landry took issue with many aspects of Mr. Gauthier’s expert report. In his report, Mr. Gauthier discredits the importance of distance to school choices by pointing to Exogamy as a more powerful predictor. In support of this view, Mr. Gauthier stated that he had no reason to believe that schools are more distant for Exogamous households than for Endogamous households. Dr. Landry urged that the mere fact of a high concentration of Exogamy shows a low concentration of Francophones, and thus may result in a greater distance to minority schools.

[919] Mr. Doust took Dr. Landry to Mr. Gauthier’s conclusion that rightsholders choose minority language schools for cultural reasons and majority schools for pragmatic or practical reasons. Dr. Landry stated that he agreed with the distinction generally, but believed there were more nuances to the question.

[920] Mr. Doust put to Dr. Landry the conclusions Dr. Landry reached with respect to the factors going to school choice in a paper he authored in 2003 (R. Landry, *Unlocking the Hidden Potential of Exogamy* (Moncton: Canadian Institute for Research on Linguistic Minorities, 2003)). There, Dr. Landry explained that the choice of a minority school is correlated with a strong Francophone identity, while majority schools are chosen for more practical or social considerations. Dr. Landry suggested that his thinking has evolved since he prepared that paper, and he now sees more nuance to the question. In his view, parents who lie at a mid-point with respect to their Francophone identity-- those who self-identify as Francophone but are not engaged in the Francophone community-- will choose a school based on practical considerations.

[921] The plaintiffs retained Dr. Landry to prepare a second expert report in reply to Mr. Gauthier's study. Dr. Landry's critique of Mr. Gauthier focuses almost exclusively on the prompted responses to Mr. Gauthier's original survey. He did not do any independent verification of the CSF Exit Survey Data because he did not believe it to be compelling data. He also did not examine the unprompted responses to Mr. Gauthier's survey, which was an important aspect of his original survey research and his conclusions. He likewise did not review some of Mr. Gauthier's research in 1998, which informed his original research. As a result, Dr. Landry's critique of Mr. Gauthier's overall conclusions must be treated with some caution.

[922] Dr. Landry's main critique was that Mr. Gauthier's sample was not representative of s. 23 rightsholders outside Quebec. He found that the geographic distribution of Mr. Gauthier's sample diverged extensively from the geographic distribution of rightsholders across the Canada. Additionally, Dr. Landry raised concerns with Mr. Gauthier's weighting practices.

[923] Then, Dr. Landry challenged some of the conclusions Mr. Gauthier drew when interpreting his survey results. Dr. Landry noted that Mr. Gauthier used an arbitrary numerical threshold to say when factors were important to parents or were not based on the average importance rating given to the factor. He observed that

some average importance ratings fell just short of the threshold. Thus, factors that were relatively important to parents were not discussed in Mr. Gauthier's report. This led Mr. Gauthier to ignore the importance parents assigned to physical facilities when choosing a majority school even though that factor was very close to meeting his importance threshold. Thus, Dr. Landry concluded that Mr. Gauthier systematically de-emphasized the importance of physical facilities, particularly as they relate to the reasons for choosing a majority-language school.

[924] Dr. Landry proceeded to present his own analysis and interpretation of the Gauthier Survey Data. He focused on Mr. Gauthier's data on prompted school choice reasons, but with some amendments such as a lack of weighting, and ensuring that parents were not duplicated for multiple children in the same trajectory. For simplicity, he grouped elementary and secondary school choices together.

[925] In Dr. Landry's analysis, a substantial number of respondents assigned a very high importance to school and physical facility reasons when making school choices. He noted that those reasons tended to be almost as important as other reasons for attending either a minority- or majority-language school.

[926] Dr. Landry cautioned that the results found in his analysis might not be replicated in a study with a representative sample of rightsholders outside Quebec due to the problems with Mr. Gauthier's sample.

[927] Examining comparative aspects, which he conceded pose less of a problem for reliability, he concluded that cultural identification does seem to play a role in school decisions, as respondents with a strong identification with the French community are more likely to enrol their children in a minority language school. Parents with a weak Francophone identification are more likely to enrol their children in a majority school. On the other hand, his analyses do not support Mr. Gauthier's global statement that socio-cultural identification is paramount in school decisions, or that the most important factor determining the decision to enrol in English elementary school is the socio-cultural identification of the parent.

3. Dr. Spears

[928] Dr. Spears provided another responding expert report on behalf of the plaintiffs. Dr. Spears holds a B.A. from the University of Western Ontario; an M.A. and Ph.D. in Cognitive Psychology, both from the University of Toronto; as well as a Post-Doctoral Fellowship in Cognitive Psychology from the University of Western Ontario. The majority of his professional work has involved conducting surveys and analyzing survey data. He has designed and analyzed more than 200 survey projects for a broad range of groups, from the public sector to private clients and businesses. In that work, he employs sophisticated approaches to research design and analysis, including multivariate analysis and statistical modelling.

[929] Dr. Spears was qualified without objection as an expert in quantitative and qualitative research and analysis, statistical methods, designing and conducting surveys and analyzing survey data.

[930] Dr. Spears was asked to review Mr. Gauthier's survey, and to comment on his design of the survey questions, his factor analysis of the survey data, the Exit Survey Data and Mr. Gauthier's use of it, and Mr. Gauthier's conclusions.

[931] Dr. Spears pointed to several serious problems with the questions Mr. Gauthier used to assess the importance of certain attributes of a school to parent enrolment decisions.

[932] Dr. Spears raised the concern that Mr. Gauthier used "double-barreled" questions. He observed that for two of the school qualities that Mr. Gauthier asked respondents to assess, Mr. Gauthier's question proposed that the parents saw no concern with a certain factor, then he gave examples. In one, he proposed that the parent saw no problem with school systems "such as the sprinklers, the ventilation and the seismic protection." The other question follows a similar pattern. Both questions are those related to school facilities.

[933] Dr. Spears advised that these are double-barreled questions, which are warned rigorously against in guides to survey design. He advised that it cannot be

known which aspect (or aspects) of the question the respondent is answering. While some respondents might focus on one item in the list, others might average their importance ranking across all items. Additionally, Dr. Spears noted that one of the double-barrelled questions posed its proposition in a passive construction, which left it open to different constructions by different persons.

[934] Next, Dr. Spears suggested that Mr. Gauthier categorized some responses that averted to facilities as though they did not. For example, one factor that might influence a parent is that “the school environment was pleasant”. This, Dr. Spears opined, might relate to aspects of school environment that are a product of its facilities, like crowding or lack thereof in lunchrooms, the scent in washrooms, and so on. He noted that Mr. Gauthier’s analysis of the survey results treated the factor as though it was unrelated to facilities.

[935] Finally, Dr. Spears suggested Mr. Gauthier confused importance and performance ratings in his survey structure. Dr. Spears advised that social research surveys routinely ask pairs of questions about issues involving a choice. One question asks the respondent to rank the performance on some dimension while the other asks about the importance of that dimension. He noted that Mr. Gauthier’s prompted questions are a hybrid. Mr. Gauthier assumed a high performance ranking by presenting a positively worded statement, and then asked respondents to rank its importance.

[936] Dr. Spears urged that Mr. Gauthier’s combination of the two scales in one question is problematic. If respondents disagree with the performance proposition (that a certain factor is good), they could handle the false proposition by ranking the importance of the factor in a number of ways. They might indicate that the factor was unimportant; they might suggest they “don’t know” the answer; or they might think that although they disagreed with the statement, it would be important if performance is high, and give it a high performance ranking. In Dr. Spears’s view, some of Mr. Gauthier’s respondents likely misinterpreted and responded to the

question at least some of the time. In his view, it is impossible to assess how much error is in Mr. Gauthier's data because of this problem.

[937] Dr. Spears also commented on Mr. Gauthier's analysis of respondents' unprompted comments. In his view, Mr. Gauthier attempted to explain away the importance of distance to school choice. With reference to the Exit Surveys, Dr. Spears suggested that the forms are not reliable, and were misinterpreted by Mr. Gauthier.

[938] Turning to Mr. Gauthier's synthesis of his conclusions, Dr. Spears expressed the view that Mr. Gauthier's report presented an unfounded ranking of reasons for school choice. Dr. Spears explained that the sources that Mr. Gauthier used in his analysis - the exit surveys, and answers to different questions on in Mr. Gauthier's survey- measured different matters with different metrics. He stated it was inappropriate to rank the factors together because the different metrics were not comparable. Overall, Dr. Spears concluded that Mr. Gauthier's ranking of reasons for school choices across all factors is "deeply flawed".

4. Dr. Marker

[939] Dr. Marker, another of the plaintiffs' experts in reply to Mr. Gauthier, is a statistician with more than 30 years' experience designing surveys and collecting and analyzing survey data. He holds a master's degree in Statistics and a Ph.D. in Biostatistics, both from the University of Michigan. He was qualified without objection as an expert in statistics, quantitative research, data collection, survey research, sampling, survey evaluation, data analysis and small area estimation.

[940] Dr. Marker was retained by the plaintiffs to reply to Mr. Gauthier's expert research, and to provide an opinion about his sample design, commenting on the representativeness of the resulting sample.

[941] Dr. Marker's expertise relates, in particular, to small area estimation, which refers to the design of research models to produce reasonable estimates where the sample size approaches zero.

[942] Dr. Marker opined that survey results can be biased when there is a combination of a low response rate, and respondents are unlike the population about which one wants to make inferences. As a result, in his experience, government policy makers have little (if any) use for surveys because they typically have very low response rates. In the United States, the Office of Management and Budget must approve all data collections funded by the government. It requires that any survey with a response rate of less than 80% conduct an analysis of non-response bias. On cross-examination, Dr. Marker agreed that he would not dismiss the results of a survey out of hand because it fell below that threshold. However, he would want to understand what had been done to check and adjust for potential bias.

[943] Dr. Marker challenged Mr. Gauthier's reliance on the Probit panel. He observed that low response rates from the Probit panel endanger the representativeness of the resulting sample. He noted that Mr. Gauthier only achieved a 21% response rate from those members of the Probit panel who had agreed to participate. This was compounded by the fact that only 1% or 2% of those asked to participate in the initial Probit panel agreed to join it. Thus, Dr. Marker concluded that the overall response rate Mr. Gauthier achieved in his panel was less than 0.5%, what Dr. Marker opined was an "extremely low response rate."

[944] With reference to the response rate to Mr. Gauthier's telephone survey in BC, Dr. Marker observed that the survey reached 1.3 million working telephone numbers, but received only 13,368 responses to the screening questions. Thus, the screener response rate was approximately 1%. About 1,388 persons that were screened identified that they might be rightsholders; from there, only 483 rightsholders and 222 non-rightsholders of the 1,388 completed the online survey. Combining the two stages, Dr. Marker concluded that the response rate to Mr. Gauthier's telephone survey was only 0.4% (483 of 1.3 million contacted phone numbers). He opined that this, too, was an "extremely low response rate".

[945] Counsel for the defendants challenged Dr. Marker's calculation of participation rate for the Probit survey, in particular, suggesting it was not

appropriate to take into account the level of the response to the initial survey. Dr. Marker explained that pre-recruited panels have largely arisen because they provide inexpensive, fast responses that keep up with the 24-hour news cycle. He was able to deal with the study that was put to him that suggested that the very low response rates should not detract from the reliability and credibility of the study. He noted that study was not peer-reviewed, and appeared to have been prepared by one of the largest pre-recruited panels in the United States.

[946] While he was being cross-examined, counsel put to Dr. Marker the suggestion by Mr. Gauthier that a low response rate is less important when a study is comparative than when it is descriptive. Dr. Marker disagreed with that proposition and gave examples of situations where incorrect analyses have been drawn when the data that was used was not representative.

[947] Dr. Marker went on to express concern that Mr. Gauthier's survey was not representative of the population. He criticized Mr. Gauthier for stating that it is difficult to generalize from the sample because it is not random, but nevertheless proceeding to weight the sample and generalize the results of his research.

[948] Based on his tests of the representativeness of Mr. Gauthier's sample, Dr. Marker expressed concern that the geographic distribution of the sample was not representative. Additionally, the age of respondents did not correspond to the ages of the population. Only five BC respondents were 18 to 24 years old. Only one of them had children. Because of Mr. Gauthier's weighting of the population to reflect the total population, those five young respondents were responsible for 19.7% of the total estimates from Mr. Gauthier's surveys, although they are less than 2% of the respondents.

[949] On the other side of the equation, 53% of the respondents to Mr. Gauthier's surveys were age 55 and older. He concluded that most 55 year olds would not have school-aged children; that would be even less likely for those close to 60 years old. Thus, half the survey respondents were unlikely to have current knowledge of the conditions in minority schools based on their own children's experience.

[950] Dr. Marker concluded that in his view, the response rate to both the Probit and telephone surveys were less than 0.5%, a figure completely out of line with the quality of data expected for the development of public policy. Given the low response rates and evidence that the respondents differed from the population of interest, he suggested the survey data could not be relied on to provide an accurate description of the population of rightsholders in BC.

5. Response from Mr. Gauthier

[951] Dr. Marker and Dr. Spears's opinions were put to Mr. Gauthier while he was under cross-examination.

[952] With respect to the allegation that Mr. Gauthier achieved a very low response rate from the Probit panel, Mr. Gauthier advised that today most social research is conducted through panels like Probit, and the standards for calculating response rates have changed. In his experience, the response rate should be treated as though it was 21% of the pre-recruited panel; the response rate should not be compounded by the response rate to the panel recruitment.

[953] Mr. Gauthier also commented on Dr. Marker's calculation that Mr. Gauthier only achieved a 0.4% response rate to his telephone surveys. He agreed that the response rate to the telephone survey, examined in isolation, was low. He did not propose an alternative, generally accepted method for calculating a response rate that differed from Dr. Marker's.

[954] With reference to the age distribution of his sample, Mr. Gauthier testified that it is common for young people to be underrepresented in modern samples. He agreed, though, that the fact that the younger group was weighted heavily raises the issue of whether the few young respondents reflected the total population of 18 to 24 year old rightsholders in BC. However, Mr. Gauthier's view was that it was irrelevant whether 18 to 24 years olds represented the total population because persons of that age were unlikely to have children, and in fact only one of the persons sampled in that group had children, and that child was not school aged.

[955] Mr. Gauthier also responded to Dr. Spears's comments on the idea that his questions inappropriately combined performance questions and importance questions. He stated that he was not interested in measuring performance in his study; he was only interested in importance. This answer did not address the fact that some respondents might have been confused by the positive performance statements when they disagreed with the propositions.

6. Conclusion

[956] Unfortunately, the expert evidence tells me nothing about the relative importance of physical facilities to rightsholders' enrolment decisions in British Columbia.

[957] Mr. Gauthier's report and conclusions are deeply flawed. His original research suffers from an exceedingly low response rate, coupled by indications that his sample does not correspond to the demographics of the target population. It is unwise to attempt to generalize from such research.

[958] There are likewise problems with the prompted questions that he posed. Mr. Gauthier's questions assumed a high level of performance, then asked respondents to rank the importance based on that proposition. This was likely to confuse respondents that did not agree with the proposed high level of performance. Moreover, the questions that he posed with respect to facilities, and his use of examples, were likely to confuse respondents. While Mr. Gauthier's pre-testing methodology might be widely accepted, it would not necessarily have captured this type of confusion.

[959] I am also satisfied that Mr. Gauthier's conclusions are subject to a different interpretation. By making a few small changes to the analysis, Dr. Landry reached a conclusion that was in direct opposition to Mr. Gauthier's. This shows me that the conclusions Mr. Gauthier reaches are of the type that reasonable people would tend to disagree about.

[960] Mr. Gauthier’s conclusions were also based on the CSF survey data. That data was never intended to be a rigorous study of reasons for school choice. The data was collected by school administrators from parents, and does not have any hallmarks of authenticity, particularly given the dynamic between school administrators and parents.

[961] Overall, then, I do not assign any weight to Mr. Gauthier’s conclusions.

[962] Dr. Landry’s view is that high-quality school facilities are essential to attracting enrolment to minority language schools in British Columbia. He based his opinion on the statement in *Minorities Speak Up* that 17% of respondents found that the school environment was relevant to their decision to enrol in a minority language school. In my view, school environment accounts for many factors other than school facilities. It might even include the Francophone culture of the schools. I do not find it to be of great assistance for assessing the importance of school facilities to enrolment decisions relative to other considerations.

[963] The most that I can take from the opinions of Dr. Landry and Mr. Gauthier is that parents with a strong Francophone identity and connection to the minority language community are more likely to enrol their children in minority language schools. Both researchers agreed with this proposition. It is also consistent with the conclusions I reached previously based on the work by Dr. Landry and Dr. Castonguay.

[964] Thus, when assessing whether the global educational experience meets the entitlement standard, school facilities should be weighed along with all other factors relevant to educational experience. The evidence does not establish that they are of any greater or lesser importance than any other factors.

IX. JUSTIFICATION

[965] Section 1 of the *Charter* affirms that *Charter* rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” While it is rare for governments to do so, it is open to the

defendants to attempt to justify a limit on s. 23 rights pursuant to s. 1: *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47 at para. 37.

[966] As the defendants suggest, this case is one of first impression on the interplay between ss. 1 and 23, particularly as s. 1 relates to the question of substantively equivalent minority language education facilities. In the defendants view, any localised or general failure to provide equivalent education can be attributed to limits that are justified, or to decisions that reflect a proportionate balancing of rights against the statutory mandate. The plaintiffs take the position that no breaches can be justified.

[967] Where a limit to a right is prescribed by law, the test established in *R. v. Oakes*, [1986] 1 SCR 103, provides a means for the government to justify the limit. It does so by balancing government's pressing and substantial objectives against the state's interference with the *Charter* right. First, the court determines the government's pressing and substantial objective. Then, the court performs a proportionality analysis that considers whether the law is rationally connected to the objective ("rational connection"), impairs the right or freedom as little as possible ("minimal impairment"), and whether the effects of the measure on the *Charter* right are proportional to the objective ("proportionality"): *Oakes* at 138-139.

[968] The defendants bear the burden of proof for a s. 1 analysis, except with respect to the initial question of whether the limit is prescribed by law, which is a pure question of law.

[969] To the extent that I find any breaches of s. 23 in connection with the Community or Systemic Claims, the specific breaches will fall to be justified based on the particular circumstances of the rights infringements at issue. I will therefore address the justification of each alleged breach in the chapters that follow. However, it is possible to make some common findings concerning the applicable legal principles, the nature of the legislative scheme, the broader provincial goals and the overall context.

[970] I begin with the parties' arguments concerning some of the interpretive principles that apply when a court is considering justification arguments. Then I address the legal framework for each aspect of the s. 1 test.

A. Interpretive principles

[971] The parties made submissions about three concepts and their role in the s. 1 analysis: context, deference and cost to the government.

1. Context

[972] Both parties emphasize the importance of context to the s. 1 analysis. In *Thompson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Mr. Justice Bastarache (for the majority) explained the central role that context plays in the test of justification under s. 1 (at para. 87):

The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in [*Oakes*] requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

[973] In the plaintiffs' view, a contextual analysis in this case requires the Court to take into account the need to protect and promote the French-language minority in BC, and the Province's role in protecting and promoting the language and culture. The context is not, the plaintiffs say, the Province's economic or budgetary objectives.

[974] That is not my reading of *Thompson Newspapers*. As I see it, to determine whether a limit to minority language education is demonstrably justified, the court must consider the whole context involving the nature of the problem that Government is attempting to address by limiting the right. Sometimes, that objective

might not relate directly to the *Charter* rights at issue. The government might have a myriad of other objectives underlying a decision to limit a right.

[975] To give an example, in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], the claimants challenged a requirement mandating photographs for driver's licences as a violation of their right to religious freedom. When deciding whether the infringement was justified, the Court had regard to the context of Alberta's objective, minimizing identity theft associated with the system: see for example paras. 42, 45, 56 and 63.

[976] As a result, in my view, to properly characterize the objective and determine whether it justifies a limit, courts must have regard to the full context of the government's decision even where that objective does not relate directly to the right at issue. In this case, the Province's economic and budgetary objectives may form part of the relevant context.

2. Deference

[977] When performing the proportionality analysis, courts will often afford governments a measure of deference. Where a government is dealing with a challenging social problem by way of a complex regulatory response, the measure of deference will be a high one: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 97. The court will be interested in determining whether the response to a social ill falls within a range of reasonable alternatives, and is demonstrably justified. Section 1 does not demand perfection: *Hutterian Brethren* at para. 37.

[978] The defendants urge that in this case, the legislature is entitled to a measure of deference at the proportionality stage of the s. 1 analysis. The plaintiffs take the position that "very little" deference should be afforded to the government, because in their view this case is not one involving a complex social issue or where the Province has chosen from range of alternatives. The plaintiffs liken measures limiting s. 23 rights to penal statutes threatening liberty, arguing that deference is

less likely to be applied in that context. The plaintiffs also urge that the precision inherent to the drafting of s. 23 should limit deference shown to a government.

[979] Some comments in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, are helpful for determining when a more deferential standard is appropriate. Citing *Edwards Books*, the Court suggested a more deferential posture is appropriate where the legislature is “mediating between the claims of competing groups”, as government will be “forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck”, often based on an assessment of conflicting scientific evidence and differing justified demands on scarce resources (at 993). In contrast, where the state is not mediating the concerns of different groups, but is acting as a “singular antagonist of the individual whose right has been infringed”, the Court is better placed to assess whether the least drastic means of achieving the purpose have been chosen, militating toward less deference (at 994).

[980] *Hutterian Brethren* shows that deference may be warranted even where the complex regulatory regime is designed to address a different problem from the one that the *Charter* right is designed to remedy. The Court deferred to the Government’s decision concerning how to address the emerging and pressing issue of identity theft: a problem different from how to best respect the needs of a religious community (at para. 37):

... Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government’s attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, per Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, per McLachlin C.J.

[981] In this case, there are factors militating both for and against a deferential standard. On the one hand, the defendants must balance the interests of children in many communities across British Columbia, and to a lesser extent the interests of

the minority against those of the majority. They are doing so using a complex regulatory response-- the capital funding allocation system and its many policies and assessment tools. That suggests a high degree of deference. On the other hand, while society places a high value on education, deciding how to allocate funds for schools is not exactly a decision about responding to a social ill. Thus, in my view, a middle level of deference is appropriate to account for the difficult task Government faces and the social priority placed on education.

[982] The plaintiffs also urge that breaches of some sections of the *Charter* are more difficult for governments to justify, and suggest that s. 23 should be one of them. The plaintiffs point to s. 7 of the *Charter*, arguing that those types of infringements are difficult to justify because s. 7 is subject to an internal limit. They say that the same phenomenon applies with s. 15, as the Supreme Court of Canada has only once concluded that an infringement was saved by s. 1, in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 [N.A.P.E.]. They say that this is because s. 15, too, is subject to an internal limit- the concept of “discrimination” introduced in *R. v. Kapp*, 2008 SCC 41. The plaintiffs say that s. 23, too, has an internal limit: the numbers warrant criterion and a tailored positive right. In light of that, the plaintiffs say that the defendants should face a high hurdle to justify a breach.

[983] In response, the defendants note that the internal limits and balancing in s. 23-- the numbers warrant and its concern with pedagogy and cost-- are not relevant in the equivalence analysis, and therefore should not place a higher burden on Government.

[984] From time to time, Courts have held that it will be particularly challenging to justify an infringement of s. 7 of the *Charter*. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Mr. Justice Lamer (as he then was) suggested that it might only be possible to justify infringements of s. 7 in exceptional cases, such as natural disasters, times of war or during epidemics (at 518).

[985] The Court addressed the relationship between ss. 7 and 1 in more detail in *Bedford*. At the time, there was some confusion about the applicability of s. 1 to s. 7 because of some parallels between the elements of the s. 1 test for justification and the principles of fundamental justice concerning arbitrariness, overbreadth and disproportionality. The Court delineated the different focuses of the two tests, before concluding that the significance of the fundamental rights protected by s. 7 supports the observation that laws that violate s. 7 are unlikely to be justified under s. 1 (at para. 129).

[986] The Court commented on the applicability of s. 1 to s. 7 claims again in *Carter*. Once again, the Court placed the fundamental importance of the rights to life, liberty and security of the person at the centre of the reason it is difficult to justify an infringement of s. 7 (at para. 95):

It is difficult to justify a s. 7 violation: see *Motor Vehicle Reference*, at p. 518; *G. (J.)*, at para. 99. The rights protected by s. 7 are fundamental, and “not easily overridden by competing social interests” (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

[987] In my view, the rights in s. 7 are difficult to override because the protected rights to life, liberty and security of the person are so fundamental that they cannot be easily overridden by competing social interests. A secondary consideration is the fact that s. 7 rights are already subject to limits, the rules of fundamental justice. In particular, the principles against arbitrariness, overbreadth and gross disproportionality under s. 7, and rational connection, minimal impairment and proportionality in the s. 1 test, are rooted in the same concerns, despite being analytically distinct. At the s. 7 stage, the concern is with the individual rights claimants; at the s. 1 stage, similar concerns are addressed with a focus on the competing social interests. Still, s. 1 has a role to play in s. 7 cases, as s. 1 allows

consideration of societal interests, which may be so important as to justify an infringement of s. 7.

[988] The reasons underlying the difficulty justifying s. 7 infringements do not apply equally to the right to minority language education. The rights to liberty and security of the person are related to the concern for the protection of individual autonomy and dignity (*Carter* at para. 64). The right to life is engaged where the law or state action imposes death or an increased risk of death on a person (*Carter* at para. 62). While the right to minority language education is important to maintaining our national unity, it does not engage the same fundamental human interests as do the rights to life, liberty and security of the person.

[989] Further, although the right to minority language education is limited by the numbers warrant criterion, those limits do not engage the same philosophical concerns as the elements of the *Oakes* test. The s. 1 test examines competing moral claims and broad societal benefits (*Carter* at para. 79). The limits imposed by the numbers warrant criterion are designed to limit government expenditures to what is practical in light of pedagogy and cost. The numbers warrant criterion is even less rooted in the same concerns as s. 1 than are the principles against arbitrary, overbroad and grossly disproportionate laws. The limits in s. 23 simply do not allow the Court to consider the broader public goals that might justify a limit to language rights.

[990] Less has been said about the reasons why s. 15 claims are so rarely justified. It appears that the dearth of cases where the right to equality has been justified pursuant to s. 1 does not occur because there is any higher standard placed on governments. Rather, these cases have proven exceptionally challenging to justify on the facts of the cases due to the fundamental human interests that are engaged and the competing interests at play.

3. Cost to Government

[991] The plaintiffs press that the cost of complying with the *Charter* will only most rarely justify an infringement of *Charter* rights. They note that the Supreme Court of Canada has only once upheld an infringing measure related to cost, in *N.A.P.E.*, and only then in the context of an exceptional financial crisis in Newfoundland (see paras. 72 and 97). The plaintiffs cite *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 147, for the proposition that cutting costs is not a pressing and substantial objective.

[992] From time to time, courts have expressed doubts about the potential for the Government to justify limits to rights on the basis of cost or administrative expediency. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, Madam Justice Wilson, writing for three of six judges, stated that “the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so” (at 218).

[993] In *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur*, 2003 SCC 54, the Court considered the constitutionality of chronic pain provisions in a scheme for workers’ compensation. The Court held that the provisions violated the complainants’ equality rights in a manner that could not be justified by s. 1. The government attempted to justify the infringement on the basis of four objectives: maintaining the viability of the fund in light of underfunded liability, developing a consistent legislative response, avoiding fraudulent claims and motivating claimants to return to work (at para. 108). The Court rejected the objective related to maintaining the financial viability of the fund, commenting that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*” (at para. 109). With reference to the second objective, developing a consistent legislative response, the Court commented that “[m]ere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right” (at para. 110).

[994] While limiting rights to prevent the cost of guaranteeing them is not an adequate purpose, costs are not irrelevant to the analysis. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 [*P.E.I. Judges Reference*], Lamer C.J.C. (for the majority) wrote that costs might be relevant to the minimal impairment analysis (at para. 283):

While purely financial considerations are not sufficient to justify the infringement of Charter rights, they are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial. Thus, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994, the Court stated that “the distribution of scarce government resources” was a reason to relax the strict approach to minimal impairment taken in [*Oakes*]; the impugned legislation was aimed at the protection of children. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, where the issue was the constitutionality of a provision in provincial human rights legislation, La Forest J. stated at p. 288 that “the proper distribution of scarce resources must be weighed in a s. 1 analysis”. Finally, in *Egan v. Canada*, [1995] 2 S.C.R. 513, where a scheme for pension benefits was under attack, Sopinka J. stated at para. 104 that

government must be accorded some flexibility in extending social benefits.... It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.

[Underline emphasis added. Italics emphasis in original.]

[995] Lamer C.J.C. went on to summarize three principles applicable to rights infringements that raise issues of cost (at para. 284):

Three main principles emerge from this discussion. First, a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1 (*Singh* and *Schachter*). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (*Irwin Toy*, *McKinney* and *Egan*). Third, financial considerations are relevant to the exercise of the court’s remedial discretion, when s. 52 is engaged (*Schachter*).

[996] In *N.A.P.E.*, Mr. Justice Binnie, writing for the Court, reviewed and explained the purported rule against cost being relied on as an objective for justifying rights infringements. In so doing, he emphasized comments that made it appear that the rule was qualified, and was not absolute. He commented that while courts would treat attempts to justify rights infringements using costs with scepticism, periodic

financial emergencies might justify the delayed implementation of *Charter* rights (at para. 72).

[997] I take from the cases the principle that costs will not normally be a sufficiently pressing objective, on their own, to justify a rights infringement; to do otherwise would devalue the rights in the *Charter*. *Singh, N.A.P.E.* However, courts may consider costs to be a sufficiently pressing and substantial objective, on their own, in exceptional circumstances, such as times of periodic financial emergencies: *N.A.P.E.* Further, where a measure is taken for a non-financial objective, the cost of implementing rights may well be considered by a court as a reason for relaxing the strict standard requiring that an infringing measure infringe a right no more than is necessary: *P.E.I. Reference*.

[998] I find the argument that cost may prove relevant to the minimal impairment stage to hold particular force with respect to violations of s. 23, as it requires Government to make expenditures out of public funds where the numbers warrant.

B. Prescribed By Law

[999] Section 1 provides that *Charter* rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (emphasis added). The words “prescribed by law” set the threshold that limits to rights must meet before it is open to Government to justify them.

[1000] The “prescribed by law” requirement is of particular interest in this case. The defendants argue that many of the plaintiffs’ challenges are to discretionary decisions made by statutory decision-makers. Thus, they say that the test for justification articulated in *Doré v. Barreau du Québec*, 2012 SCC 12, applies to those claims.

1. The Meaning of “Law”

[1001] The parties agree that the term “law” is broad enough to encompass a range of delegated legislation, including government policies in some situations. In *Greater Vancouver Transportation Authority v. Canadian Federation of Students* --

British Columbia Component, 2009 SCC 31 [GVTA] , the Court canvassed the types of policies that fall within the category of “law” for the “prescribed by law” requirement. Writing for the Court on this point, Madam Justice Deschamps explained that policies are said to be prescribed by law where they are binding rules of general application that are precise and accessible (at para. 50). To be classified as a law, a policy must be legislative in nature, in the sense that the policy establishes a norm or standard of general application, and has been established pursuant to a delegated rule-making authority. Madam Justice Deschamps confirmed that “[s]o long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as “law” which prescribes a limit on a Charter right” (at para. 64).

[1002] In my view, there is no question that the funding allocation system and its many components are prescribed by law. Those components include, *inter alia*, the *School Act*, and various guidelines, policies and orders made pursuant to it: the Operating Grants Manuals, the Capital Plan Instructions, the Area Standards, the Annual Facility Grant Policy, the Capital Asset Management Project Procurement Procedures and Guidelines, the Disposal of Land or Improvements Order, and the School Opening and Closure Order.

2. Discretionary Decisions

[1003] The parties disagree about what framework ought to apply to the justification of rights infringements where the plaintiffs challenge both a law and policy, and actions taken in application of those policies. The defendants suggest that the Court ought to apply the administrative law Charter values approach articulated in *Doré* to at least those aspects of the plaintiffs’ claim that concern actions taken by government. The plaintiffs take the view that the traditional test for justification set out in *Oakes* ought to apply. The dispute raises the question where the line should be drawn in the grey area between “limits prescribed by law” and discretionary decisions taken by administrative decision makers.

a) The Doré Framework

[1004] The defendants submit that legislation may be unconstitutional either because it violates a *Charter* right on its face, or because of the manner in which the legislation is applied. The former, they say, requires a remedy pursuant to s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11 [Constitution Act, 1982]*, while the latter suggests a remedy under s. 24(1) of the *Charter*. In the defendants' submission, the analytical frameworks for those two forms of breaches are distinct. In that connection, they rely on *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 20, *Multani v. Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 22 and *Hutterian Brethren* at paras. 66-67.

[1005] The defendants rely on that distinction to suggest that where legislation confers an imprecise discretion, with no express or implied power to limit *Charter* rights, the potential violation inheres in the exercise of discretion rather than the grant of discretion itself.

[1006] In the defendants' submission, the proper analytical framework for determining whether an exercise of statutory discretion disproportionately and unreasonably infringes the *Charter* was recently articulated in *Doré and Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12. They say the justification question should be subsumed in the deferential, administrative law framework of the reasonableness review, as that provides the appropriate focus on the particular exercise of the discretion rather than the validity of legislation.

[1007] The plaintiffs disagree. In their view, the *Doré* framework was designed to resolve a specific inconsistency in the Supreme Court of Canada's administrative law jurisprudence. Thus, they say that it applies where a discretionary administrative decision that raises a *Charter* issue is reviewed, and there is no corresponding challenge to the validity to the provision being challenged. The plaintiffs also observe that the *Doré* framework has typically been applied in

administrative law cases where there is no challenge to the constitutionality of the statutory authority.

[1008] Prior to *Doré*, discretionary orders that had the effect of limiting *Charter* rights were sometimes considered to be “limits prescribed by law”. Where a statute gave an adjudicator the authority to make a discretionary order, orders made pursuant to that statutory authority were inferred to be prescribed by law: *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [*Slaight*] per Lamer C.J.C. (dissenting in part) at 1080-81.

[1009] In *Slaight*, Chief Justice Lamer considered the applicability of s. 1 to statutory discretionary decisions. He considered that it would be “impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*” absent some express conferral or necessary implication. He held that “[l]egislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed.” Accordingly, he decided that an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*. *Slaight* at 1078.

[1010] The Chief Justice went on to distinguish between two types of statutory conferrals of discretion that might be subject to *Charter* scrutiny (at 1080). If a statute expressly or implicitly authorized a decision that would infringe a *Charter* right, then the impugned legislation ought to be subject to *Oakes* scrutiny. If a statute conferred a discretion pursuant to which a *Charter* right might be breached, but did not expressly or implicitly allow it, the decision, not the statute, would be required to satisfy the s. 1 standard of justification in *Oakes*.

[1011] *Slaight* was decided in 1989. At that time, on judicial review of discretionary decisions, courts sought to discern legislative intent by applying the pragmatic and functional analysis established in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 [*Bibeault*] and elaborated on in cases including *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. When an expert tribunal, protected by a privative clause, was acting within its jurisdiction, its actions

would be allowed to stand unless they were so “patently unreasonable” that the legislature could not have intended such a decision to be made: *C.U.P.E, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 237. However, given the inherent jurisdiction of a court to ensure that tribunals act within their statutory authority, courts would review whether a tribunal had exceeded its jurisdiction on the non-deferential correctness standard: *Bibeault* at 1086.

[1012] With *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Court imported a third standard into the standard of review analysis, the mid-point reasonableness simpliciter standard. That standard allowed courts to substitute their opinion for that of a tribunal where a defect was apparent after some searching. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court eliminated the patently unreasonable standard, and moved to two standards: reasonableness and correctness.

[1013] This evolution of the law of judicial review reflects a move away from a technical, formulaic examination of questions of legal and statutory jurisdiction, to a simpler, contextual, flexible test: *Dunsmuir* at para. 43.

[1014] As the law on judicial review of administrative actions moved away from its focus on the legal grant of authority, a question arose as to whether it was appropriate to apply the traditional *Oakes* test on judicial review of administrative action. It appears to me that as judicial reviews began to focus less on the grant of authority, the reasoning in *Slaight* that allowed the *Oakes* approach to be applied to discretionary decisions began to lose its force.

[1015] The issue was front and centre in the three-way split decision in *Multani*, a decision concerning the religious freedoms of an orthodox Sikh student who held a sincere religious belief requiring him to wear a kirpan at all times. The school board’s council of commissioners made a decision prohibiting the student from wearing the kirpan to school. The plaintiffs in that case sought a declaratory judgement that the decision was of no force or effect because it infringed the student’s right to religious freedom under s.2(a) of the *Charter* (at para. 1).

[1016] In the decision of the five-person majority of the Court, written by Madam Justice Charron, the Court considered that the *Oakes* framework ought to continue to apply to the review of discretionary decisions, albeit with a consideration of reasonable accommodation as part of the justificatory analysis. In their minority reasons, Justices Deschamps and Abella took the position that it was not appropriate to apply a constitutional law justification in the context of the review of an administrative law decision, as, in their view, the contextual standard of review analysis would prevent *Charter* breaches from being upheld. Mr. Justice LeBel, writing for himself, considered that it might be possible to dispense with some of the steps of the *Oakes* test, and focus only on the questions of proportionality and minimal impairment.

[1017] The concurring minority decision authored by Deschamps and Abella JJ. advocated for doing away with the s. 1 justification step in connection with discretionary decisions by administrative decision makers. They suggested the case was appropriately decided by recourse to an administrative law review rather than a constitutional law justification. In so doing, they stressed a distinction between the review of “*decisions and orders made by administrative bodies*” (which would attract the administrative law approach) and “the validity or enforceability of a norm such as a law, regulation or other rule of general application” (which would attract the usual constitutional justification analysis) (at para. 103). They urged that the purpose of constitutional justification was to “assess a norm of general application, such as a statute or regulation.” They suggested the analytical approach developed for that purpose did not translate easily to the assessment of the validity of an administrative body’s decision. As a result, they suggested that the administrative law review that would usually apply would ensure that no rights were violated (at para. 85).

[1018] Deschamps and Abella JJ. suggested the approach set out in *Slaight* ought to be reviewed (at paras. 108-109, 111). They rejected the idea that the expression “law” should include the decisions of administrative bodies. In their view, a decision did not fit within the definition of “law”, and it would be problematic for administrative bodies to consider justification in their decision-making process. The *Oakes* test,

they reasoned, was better suited to ensuring the executive and legislative branches of government could account for *Charter* infringing rules and policies (at paras. 112, 120-121):

An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope. Establishing a norm and resolving a dispute are not usually considered equivalent processes. At first glance, therefore, equating a decision or order with a law, as Lamer J. does in *Slaight*, seems anomalous.

...

To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This requirement makes the decision-making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct (*T.W.U.*) or reasonable (*Chamberlain*).

An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of "prescribed by law". That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed — conceptually and in practice — on the legislative and executive branches is not easily applied to administrative tribunals.

[Emphasis added.]

[1019] The majority in *Multani* disagreed. Madam Justice Charron, for the majority, considered that in order to maintain consistency in the law, it was necessary for discretionary decisions to be justified under s. 1 regardless of whether an infringement arose out of the wording of the statute or its application. The majority averted to *Slaight*, and noted that the *Charter* can apply in two ways: either by the words of a statute, or the actions of a delegated decision-maker applying it. In their view, decisions taken by statutory decision makers acting pursuant to an enabling statute that infringe the *Charter* had to be subject to the *Oakes* analysis because

they were limits “prescribed by law”. The majority rejected the distinction between normative rules and decisions applying that rule, suggesting the distinction was of little importance to rightsholders, and that the Government ought to meet the same burden in any event (at paras. 21-22). The majority applied the *Oakes* framework, while asking if the complainant had been reasonably accommodated as part of the test for justification.

[1020] Mr. Justice LeBel, writing for himself, walked the middle ground between the two approaches. He suggested that the s. 1 justification framework admitted of some flexibility, which would allow the *Charter* and its values to be applied to a range of administrative acts without being confined by the norm-decision duality espoused by *Deschamps and Abella JJ.* (at paras. 150-151). He suggested that the *Oakes* framework could be modified, dispensing with certain steps, and focusing on minimal impairment and proportionality (at para. 155).

[1021] In *Hutterian Brethren*, the Court maintained that distinctive approaches ought to be taken with respect to the justification of rights-limiting laws, and the justification of decisions taken with respect to a particular individual. There, the Court wrote that the courts below had erred by applying the majority in *Multani*’s “reasonable accommodation analysis instead of the *Oakes* test” (at para. 65). The Court confirmed that when the validity of a law is at stake, the *Oakes* approach ought to apply, asking whether the measure could be accomplished in a less infringing manner (at para.66). The Court suggested that a different analysis ought to apply to a government action or administrative practice. Chief Justice McLachlin emphasized that the new reasonable accommodation approach outlined by the majority in *Multani* “may be helpful ‘to explain the burden resulting from the minimal impairment test with respect to a particular individual’” (citing *Multani*, emphasis added by McLachlin C.J.C.) (at para. 67).

[1022] Chief Justice McLachlin went on to explain that the *Oakes* test was better suited to the relationship between a legislature and the people subject to laws of general application. In particular, when the constitutionality of a law is at stake, the

Court will be concerned not just with the impact on the individual claimant, but also with the societal impact and importance of the law. (at para. 69):

A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

[1023] With *Doré*, the Court completed its shift in how it treated the justification of individualized decisions subject to judicial review on a reasonableness standard.

[1024] *Doré* concerned a decision by a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge following a court proceeding. The lawyer challenged neither the provision under which he was reprimanded nor the length of his suspension. Rather, he challenged the constitutionality of the decision itself on the basis that it violated his *Charter* right to freedom of expression (at paras. 1-2).

[1025] Since the decision was a discretionary one made pursuant to delegated statutory authority, the Court considered whether the presence of a *Charter* issue required the replacement of the normal judicial review for reasonableness with the *Oakes* test used to determine whether the state has justified a law's violation of the *Charter* as a reasonable limit under s. 1 (at para. 3).

[1026] Writing for the Court, Madam Justice Abella considered that the *Oakes* test was an awkward fit with an adjudicated administrative decision. She reasoned that

the *Oakes* test was tailored to the justification of laws by the state (at para. 37). She further noted that it would be conceptually difficult to find a “pressing and substantial” objective in a discretionary statutory decision, or determine who ought to have the burden of defining and defending it (at para. 38). Invoking that test in the administrative law context would have the benefit of protecting *Charter* rights, but would do so “at the risk of undermining a more robust conception of administrative law.” (at para. 34).

[1027] Justice Abella went on to consider that administrative tribunals are experts in interpreting their home statutes (at para. 46). Therefore, she reasoned, an administrative decision maker exercising discretion under his or her home statute would have “particular familiarity with the competing considerations at play in weighing *Charter* values” (at para. 47). She concluded that “the fact that *Charter* interests are implicated does not argue for a different standard” than that which would apply according to *Dunsmuir* (at para. 45).

[1028] In conclusion, Abella J. set out how an administrative decision-maker should apply *Charter* values in the exercise of statutory discretion: The administrative decision-maker must balance the *Charter* values with the statutory objectives. First, the decision-maker should consider the statutory objectives (at para. 55). Then, the decision maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives, what she calls the “core of the proportionality exercise”, requiring a balancing of “the severity of the interference of the *Charter* protection with statutory objectives” (at para. 56). On judicial review, the question for the Courts is whether, in light of the impact of the *Charter* protection, the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play (at para. 57).

[1029] The Court expanded on this new approach to justification in the context of judicial review in *Loyola*. There, the Court considered a judicial review of a decision by the Quebec Minister of Education, Recreation and Sport to deny a curriculum exemption to a private, Catholic school. Part of the Quebec mandatory core

curriculum included a course on ethics and religious culture taught from a neutral and objective perspective (at paras. 1-2). The Minister had statutory authority to grant exemptions from the programme if the independent schools offered an alternative programme that the Minister deemed to be equivalent. This arose out of s. 22 of the *Regulation Respecting the Application of the Act Respecting Private Education*, CQLR, c. E-9.1, r. 1. It provides:

Every institution shall be exempt from the [compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

[1030] After the Minister denied the school's request for an exemption pursuant to s. 22, the school brought an application for judicial review of the decision. The school argued that the decision not to grant an exemption violated its right to religious freedom. There does not appear to have been any challenge to the Minister's statutory authority to grant exemptions; the concern was solely with how that discretion was exercised (at paras. 29, 32).

[1031] Writing for the majority, Madam Justice Abella wrote that the *Doré* framework was to be applied for determining whether the Minister had appropriately exercised his or her discretion (at para. 3). She confirmed that *Doré* requires statutory administrative decision makers "to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue" (at para. 4).

[1032] The majority also elucidated how the *Doré* framework relates to the *Oakes* test. Madam Justice Abella wrote that the *Doré* framework "finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on *Charter* rights under s. 1: minimal impairment and balancing." Both tests, she wrote, require that *Charter* rights are affected as little as reasonably possible given the state's objectives (at para. 40). Like *Oakes*, the test is a contextual one (at para. 41).

[1033] Madam Justice Abella offered some comments that are helpful to determining when *Doré* ought to apply rather than the traditional *Oakes* test. She averted to the confusion that had arisen about whether an administrative law or traditional *Oakes* approach ought to apply to the justification of a decision that is said to be in breach of the *Charter*. She suggested that *Doré* had the effect of eschewing “a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles” (emphasis in original) (at para. 3).

[1034] Madam Justice Abella reviewed the Minister’s decision for reasonableness, asking whether it reflected a proportionate balancing of the statutory mandate to grant exemptions only when a school offered an equivalent programme, and the religious freedoms of the school’s community (at para. 32). She wrote that “[o]n judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate” (at para. 37). A proportionate balancing, she explained, “will be found to be reasonable on judicial review” (at para. 39). She explained that the test was designed to review administrative decisions with *Charter* implications in all of their varied contexts, with respect for the specific expertise of statutory decision makers (at para. 42):

Doré’s approach to reviewing administrative decisions that implicate the *Charter*, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions: para. 47; see also David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues After *Multan*” (2006), 21 *N.J.C.L.* 127, at p. 149; and Stéphane Bernatchez, “Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?” (2010), 55 *McGill L.J.* 641. As Lorne Sossin and Mark Friedman have observed in their cogent article:

While the *Charter* jurisprudence can shed light on the scope of *Charter* values, it remains for each tribunal to determine . . . how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized *Charter* value, it will necessarily mean something

different in the context of a privacy commission than in the context of a parole board. [p. 422]

[1035] In the three-person concurring minority opinion, Chief Justice McLachlin did not mention the *Doré* approach. Rather, the minority applied the traditional approach under s. 1 of the *Charter* (at para. 88):

We are required to address several issues in deciding this appeal. First, we must decide whether Loyola as a religious organization is entitled to the constitutional protection of freedom of religion. Concluding that it is, we analyze the proper interpretation of the legislative and regulatory scheme at issue in this appeal, including the ERC Program and the exemption provision. We review the content of Loyola's proposed equivalent program, and then evaluate the Minister's decision in light of Loyola's constitutional right to religious freedom — first, determining whether Loyola's freedom of religion was breached, and second, determining whether that breach was minimally impairing and therefore justified under s. 1 of the [*Charter*]. Finding that Loyola's freedom of religion was infringed, and that the infringement was not minimally impairing, we offer guidelines on the appropriate scope of an equivalent program that would comply with the *Charter* while meeting the objectives of the ERC Program. Finally, we determine that the appropriate remedy is an order of mandamus granting an exemption to Loyola to teach such a program.

[1036] Having reviewed the history of the evolution of the *Doré* approach, I conclude that the *Doré* framework is to be applied in a narrower set of circumstances than the defendants suggest. It is not intended to apply when a court is assessing the constitutionality of all government actions. It is meant to apply on a review of government adjudications of the rights of individuals where there is no corresponding challenge to the legal framework. Where there is a challenge to a law, and its application by government actors to groups or individuals, the traditional *Oakes* framework ought to apply.

[1037] As I see it, *Doré* followed directly out of the confusion evident in *Multani*. In *Doré*, Madam Justice Abella expressed some of the same concerns about the fit between adjudicated administrative decisions and the *Oakes* framework that she and Madam Justice Deschamps referred to in their minority opinion in *Multani*. In *Doré*, she drew a distinction between the justification of laws as opposed to decisions, albeit without mentioning a dichotomy between norms of general

application and decisions. *Doré* adopts the approach advocated for by Mr. Justice LeBel in *Multani*, who would have focused on the minimal impairment and proportionality elements of the *Oakes* test.

[1038] Since *Doré* follows out of *Multani*, it seems to me that it is expressly intended to reconcile the Court's more recent flexible, contextual approach to judicial review with the justification of *Charter* breaches pursuant to s. 1. As the law of judicial review has shifted its focus away from assessing if a statutory decision maker acted within its jurisdiction, a court on judicial review of a discretionary decision will be less concerned with the interpretation of the statutory grant of authority. Thus, the *Oakes* approach, with its focus on the law's purpose and broader social context, is not an ideal fit.

[1039] It is my view that the *Charter* values approach articulated in *Doré* was originally intended to apply when a court is reviewing an adjudicative decision by an expert tribunal in the course of interpreting its home statute. With *Loyola*, the majority of the Court seems to have expanded the application of the *Doré* approach to decisions by members of the executive branch of Government, which may also proceed by way of judicial review. When a government actor is exercising discretion to make an individualized adjudicative decision, the Court will not be focused on the statutory grant of authority or the legislative scheme, and will usually be concerned with whether the decision is reasonable.

[1040] However, the justification for the *Doré* approach fails when a matter does not proceed by judicial review, and the parties challenge a law or policy of general application, along with how that law has been applied by executive or legislative actors. When the two are being challenged together, the link between the grant of statutory authority and government action is sufficiently strong that there is no need to move away from the traditional *Oakes* analysis. No concern arises that it would prove conceptually difficult to find a "pressing and substantial objective". There is likewise no issue determining who ought to have the burden of defining and defending the law or the actions.

[1041] Moreover, when the constitutional validity of a law is at stake, the *Oakes* framework's analysis of the pressing and substantial societal objective is important to giving full effect to the state and societal interests at stake, as suggested in *Hutterian Brethren*. Without examining "the law" or policy and the overall administrative scheme, the Court will not be able to adequately balance the effects of the infringement on the individual against the broader societal interests that the government is seeking to protect.

[1042] The defendants suggest that when a law is being challenged along with decisions taken in application of that law, the Court ought to engage in two separate analyses: an *Oakes* analysis concerning the law's validity, and a *Doré* analysis concerning the reasonableness of the actions taken.

[1043] I see such an approach as artificial. Sometimes, the government must take some action to apply the law before its *Charter*-breaching effects manifest. Divorcing the action from the law adds unnecessary complication to the analysis. The law ought to be considered together with how it is applied.

[1044] Divorcing consideration of the constitutionality of the law from its application is also unnecessary given the overlap between the *Doré* and *Oakes* frameworks. As explained in *Doré* and *Loyola*, and following the reasons of LeBel J. in *Multani*, the *Doré* framework can be understood as removing many aspects of the *Oakes* test, and focusing on minimal impairment and proportionality. Proceeding through the *Oakes* analysis will give full consideration to the societal context and state interest in the law, as well as the factors pertinent to the individual case. Proceeding through the *Doré* framework a second time, emphasizing only the individual factors, is a waste of time and resources. I note that even the defendants in their submissions combined their analyses under *Oakes* and *Doré* into one argument, and made no distinction between the two.

[1045] I also fear that the approach suggested by the defendants would create special problems for adverse-effect *Charter* claims. One can imagine situations where a law might be held valid because it is facially neutral. However, when that

law is applied through some positive action, it has a detrimental impact on a group of claimants. In such a situation, the defendants' approach would not allow the claimants the remedy of having the law struck down, and one better suited to their needs put in place. The claimants would be left to rely on the proportionate balancing of individual rights infringements by state actors, and thus be deprived of the equal benefit of the law.

[1046] The defendants rely on *Eldridge* for their suggestion that the Court ought to proceed through two analyses.

[1047] *Eldridge* concerned the failure of government to provide sign language interpreters for the deaf as part of the publicly-funded scheme for medical care. On finding a violation of s. 15(1) of the *Charter*, the question arose whether the infringement was saved by s. 1 (at para. 18).

[1048] The Court's analysis sought to define the precise source of the s. 15(1) violations. The Court concluded that it was not the legislation itself that infringed the *Charter*, but actions taken by hospitals and the Medical Services Commission pursuant to the legislation (at para. 19). In so doing, the Court confirmed that the *Charter* applied to provincial legislation, such that unconstitutional laws could be held invalid and of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Second, they noted, the *Charter* might be infringed by the actions of delegated decision-makers in applying the legislation, rather than the legislation itself. In those cases, they say, the legislation remains valid, but a remedy might be granted pursuant to s. 24(1) of the *Charter* (at para. 20). The defendants suggest that in *Mahe*, it was recognized by Chief Justice Dickson at 389 at 392, that the same two types of breaches noted in *Eldridge* can occur in s. 23 cases.

[1049] The Court in *Eldridge* went on to consider whether the rights infringement was justified under s. 1. The court assumed without deciding that the actions constituted a limit prescribed by law, and that the purpose of the decision was pressing and substantial (at para. 84).

[1050] *Eldridge* draws a distinction between the types of remedies that apply when a law is challenged, in comparison to when there is only a challenge to the actions taken pursuant to that law. However, *Eldridge* predates *Doré*, and applied the *Oakes* justification test. The reasoning in *Doré* does not suggest to me that the Court intended to follow the distinction drawn in *Eldridge*, such that the new approach would apply to all government actions to which the remedy provisions in s. 24(1) would apply. Indeed, *Eldridge* is only cited once in *Doré*, in a list of cases that applied the *Slaight* approach to s. 1 justification (at para. 31). I do not find *Eldridge* to be of assistance to my interpretation of the *Doré* framework.

b) Application to this Case

[1051] The defendants submit that the *Doré* approach, not the *Oakes* framework, ought to apply to this case. They suggest the allegations in both this action and the Petition amount to complaints that the discretion conferred on Treasury Board and other government officials under the *School Act* to allocate capital funding among has been improperly exercised, resulting in deficient minority language education facilities.

[1052] In the plaintiffs' view, this case is not the type that attracts the *Doré* framework for justification. The plaintiffs say that they challenge the constitutional validity of the Province's capital funding system, as it applies to the CSF. *Doré*, they say, is focused on contests to the validity of discretionary administrative decisions rather than the validity of the provisions under which the decisions are made. Similarly, the plaintiffs press that they do not challenge any particular funding decisions.

[1053] The plaintiffs also note the format of this case. This matter proceeded as a trial, with no suggestion by the defendants that this matter should be transformed into a judicial review, and decisions reviewed on a reasonableness standard. In the plaintiffs' view, the *Doré* framework is an awkward fit with this case, submitting that a full s. 1 *Oakes* analysis is the only logical choice. The plaintiffs also say that, given

that s. 23 rights are exercised collectively, it would be inappropriate to apply the *Doré* framework, with its focus on individualized administrative decisions.

[1054] In my view, the *Oakes* approach ought to be applied to the entirety of the plaintiffs' claim.

[1055] As both sides acknowledge, the plaintiffs' claim challenges the entirety of the Province's capital funding system because they say it has had the effect of trenching upon their rights under s. 23. To the extent that the plaintiffs challenge any particular decisions (or lack thereof), they rely on them as manifestations of those unconstitutional provisions. This is not a case where a challenge is being made to a discretionary, individualized decision made by an expert tribunal. It is a case where the executive branch is implementing a series of laws and policies of general application, and where the plaintiffs allege that the application of those laws and policies has a rights-infringing effect.

[1056] I cannot envisage divorcing consideration of the constitutionality of the capital funding system from the constitutionality of the application of the capital funding system. The two are best understood together. As the defendants themselves note in their argument, the capital funding system is "primarily rule-based, with modest allowances for the occasional exercise of discretion."

[1057] Moreover, it is crucial to apply the *Oakes* analysis in this case to ensure that the justificatory question is answered with the benefit of robust consideration of the broader social purposes underlying the Province's law and for allocating resources in the education system.

C. Pressing and Substantial Purpose or Objective

1. Legal Principles

[1058] The first element of the *Oakes* framework asks if the government is limiting a right for a pressing and substantial purpose.

[1059] The defendants suggest the purpose must relate to the infringing measure, considered in the context of the whole legislative scheme in which it exists. They urge that the objective must not be trivial, but does not require the government to prove it is attempting to address actual harm. They say the analysis at this stage is not to be an evidentiary contest.

[1060] The requirement that the objective be “pressing and substantial” ensures “that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection” (*Oakes* at 138). While the standard is a high one, the government need not adduce evidence of actual harm to establish that its objectives are pressing and substantial. The government can meet its burden by adducing “sufficient informed evidence of the importance of” its objective: *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 93. A court may simply accept that some objectives, once asserted, are “*always* pressing and substantial in any society that purports to operate in accordance with the tenets of a free and democratic society” (emphasis in original): *R. v. Bryan*, 2007 SCC 12 at para. 34.

[1061] In *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, Madam Justice McLachlin (as she then was) expanded upon how courts should discern the objective of the law. She confirmed that the objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure that must be justified. She expressed concern about objectives that are stated too broadly, cautioning that the analysis might be compromised by exaggerating the importance of the infringing measure (at para. 144). While the pertinent objective is that of the infringing measure, in *R. v. K.R.J.*, 2016 SCC 31, Madam Justice Karakatsanis (for the majority) confirmed that a more general purpose behind the enactment of the infringing measure may inform its specific objective (at para. 62).

2. Application to this case

[1062] The defendants suggest the rationale for the funding system as a whole is “to allocate scarce funds among the province’s school districts fairly, rateably,

efficiently, and transparently.” The defendants say that the system is intended to be fair and rateable in the sense that it is focused on the unique characteristics of school districts, the number of students in need of funding and the state and size of facilities, measured empirically and objectively. It is efficient, in their view, as it creates incentives for maximizing the use of existing space, and ensuring that expenditures are justified. In connection with transparency, they note that the system is primarily rule-based. The defendants submit that a system that is designed to treat all districts fairly within the confines of available funding will sometimes conflict with s. 23 rights.

[1063] In the defendants’ view, it cannot reasonably be disputed that a fair and rationale allocation of funds is a pressing and substantial purpose. In their view, proper allocation of resources is essential to the functioning of a free and democratic society.

[1064] The plaintiffs agree that the stated objective of “a fair and rational allocation of limited public funds” is pressing and substantial, as long as it is worded in this way. The plaintiffs raise issue with the suggestion that rateability is a valid purpose because they say it alludes to a *per capita* distribution of funding. Distribution *per capita*, the plaintiffs say, manifests formal equality, and is therefore not a pressing and substantial objective.

[1065] The evidence of the witnesses, including Mr. Wood’s evidence concerning how the various aspects of the Province’s capital funding system work together, establish that the Province’s capital funding system, and the decisions taken to apply that system, are designed to further the objective of a fair and rational allocation of limited public funds. The plaintiffs concede, and I agree, that is a pressing and substantial objective.

[1066] The purpose, however, should not be defined to include the objective of allocating resources “rateably”. Courts must exercise caution to avoid stating an objective so narrowly that it cannot help but pass the justification test. Including the word “rateably” would work an injustice by lowering the standard for the government

because it could easily establish that the measures were required to allocate resources ratably.

[1067] While I am prepared to accept that the overall objective of the capital funding system is the fair and rational allocation of limited public funds, sometimes I will treat that as a more general objective that informs the specific objectives of particular infringing measures. For example, where a breach arises out of a particular element or tool in the capital planning process, the purpose of that specific infringing measure is the relevant purpose, and may differ from the purpose of the system as a whole. Those issues will fall to be decided with respect to each of those breaches as they arise.

D. Proportionality

1. Rational Connection

a) Legal Principles

[1068] In *Oakes*, the Court explained that for a limit to be reasonable, the measures taken must be rationally connected to the purpose of the infringing measure. More specifically, the Court held that “the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective” (at 139).

[1069] The defendants submit that the rational connection standard is not an onerous one, and can be inferred based on logic rather than evidence. In that connection, they cite *RJR-MacDonald* at paras. 156-159, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 [*Little Sisters*] at para. 228, *Hutterian Brethren* at para. 48 and *Carter* at para. 99.

[1070] In *RJR-MacDonald*, the Court described that the rational connection aspect of the *Oakes* test requires a causal connection between the infringement and the benefit sought on the basis of logic. In other words, the government is required to show, on a balance of probabilities “that the restriction on rights serves the intended

purpose” (at para. 153). The Court reasoned that the government need not always provide scientific evidence to show the relationship; the court may “find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective” (at para. 154). The Court in *RJR-MacDonald* went on to consider expert and lay witness evidence, including market reports, to show that a prohibition on tobacco advertising was rationally connected to the government’s stated purpose.

[1071] Although the court in *RJR-MacDonald* relied on evidence in reaching its conclusions, the comments therein have since been applied to allow the inference of a rational connection based on reason or logic. Relying on those comments in *RJR-MacDonald*, the Court in *Little Sisters* concluded that the test at the rational connection stage “is not particularly onerous” (at para. 228). In *Hutterian Brethren*, the Court relied on *RJR-MacDonald* to find that the government must only show “that it is reasonable to suppose that the limit may further the goal, not that it will do so” (at para. 48). This was confirmed in *Carter*, where the Court commented at para. 99 that the government need only show the connection on the basis of reason or logic.

[1072] *Carter* provides some assistance in how the Court should delineate to what, exactly, the purpose must be connected. In *Carter*, the plaintiffs had argued that the absolute nature of the prohibition against assisted death was not rationally connected to the government’s stated goal of protecting the vulnerable. The Court held that this went too far, creating overlap with the next stage of the test, minimal impairment (at para. 101). Similarly, in *Hutterian Brethren*, the Court held that the Alberta Court of Appeal had confused the proportionality analysis at the final stage of the *Oakes* test with the rational connection stage by commenting that the risk flowing from exempting the group from the universal photograph requirement was minimal (at para. 51).

[1073] Together, *Carter* and *Hutterian Brethren* suggest that the court should not be overly concerned with the specific attributes of the nature of the means of

achieving the goal at the rational connection stage. The question is simpler: “whether there is a rational link between the infringing measure and the government goal” (*Hutterian Brethren* at para. 51).

b) Application to this case

[1074] The defendants submit that it is self-evident that the specific components of the funding allocation system are rationally connected to their objectives.

[1075] The plaintiffs disagree. In their submission, the evidence shows that the Province’s capital funding system does not take into account s. 23 of the *Charter* as a factor in provincial funding decisions, resulting in inadequate CSF facilities. The plaintiffs say there is no rational connection between the objective of maintaining a fair and rational allocation of limited public funds and excluding consideration of s. 23. The plaintiffs liken this case to *GVTA*, where Deschamps J. (for the majority) concluded (at para. 76) that there was no rational connection between the limits on political content in the legislation and the stated objective.

[1076] Like all aspects of the s. 1 test for justification, the rational connection will fall to be determined based on what specific measure has infringed what rights of which rightsholders. However, a word is warranted about the plaintiffs’ statement of the test.

[1077] In my view, the plaintiffs’ approach states the test at this stage too narrowly. The rational connection must be between the objective and the legislative scheme for achieving that objective. The underlying principle is to avoid arbitrary legislative regimes. The plaintiffs’ approach inappropriately attempts to link the province’s objective with the infringing effect of the measure, rather than the infringing measure itself. Their argument implies that the “absolute nature of the prohibition” must be linked to the objective. As is evident from *Carter* and *Hutterian Brethren*, that generally will not be the correct approach because it confuses the rational connection step with the question of minimal impairment.

[1078] This case differs from *GVTA*. There, the legislative scheme specifically singled out the speech and targeted it. The rights breach was inherent to the measure itself. In most instances, the plaintiffs' claim is grounded in the adverse effects of legislation, not legislation that targets minority language education rights.

[1079] The plaintiffs' argument also turns the test upside down, by suggesting the Province cannot show that a compliant provision would not further its stated objective. That is not the question. The question is whether the non-compliant provision is related to the objective. It is wrong to place undue focus on the steps that could have been taken, which falls to be considered in the minimal impairment stage of the test.

2. Minimal Impairment

a) Legal Principles

[1080] The minimal impairment stage of the proportionality analysis requires that the infringing measure "impair 'as little as possible' the right or freedom in question" (*Oakes* at 139). The question is whether the limit is reasonably tailored to the objective, with the inquiry considering if there are less harmful means of achieving the legislative goal in a real and substantial manner. In that way, it ensures the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's objectives (*Carter* at para. 102, *Hutterian Brethren* at paras. 53 and 55).

[1081] While the government must show that the limit is tailored to the objective, it does not require perfection. As I explain above, in this instance, the Province is entitled to a middle level of deference in light of the fact that it is implementing a complex regulatory regime designed to promote the social value of education.

[1082] The defendants also urge that some deference ought to be accorded to provincial legislatures at this stage to give effect to Canada's federalist values. They rely on *United Steelworkers of America, Local 7649 v. Quebec (Chief Electoral Officer)*, 2011 QCCA 1043 (leave to appeal refused [2011] SCCA No. 363). In that case, the Court advised caution when looking to evidence of other, less-impairing

regimes elsewhere as evidence that the actions are not minimally impairing (at paras. 45-46):

It implies that, as soon as there exists a solution elsewhere that is less restrictive than that existing under Quebec legislation, Quebec legislation becomes, by that very fact, too restrictive. This type of reasoning by degrees risks depriving legislators of legitimacy in the choices they make, choices that the appellants considered unreasonable, while the questions raised concern choices that are purely political. In other words, for a measure to be minimally intrusive, no law enacted in another jurisdiction may constitute a relaxation in relation to Quebec's *Election Act*.

Admittedly, when the *Charter* is involved, comparison with other legal regimes and case law from elsewhere is often relevant and helps to properly understand the issues in cases involving freedom of expression. Even so, to compare the choices made by the Quebec legislature with those made elsewhere concerning a subject as political as the electoral system may create a perverse effect by distorting the consideration of the minimum nature of the impairment. The measure need not be the most minimally impairing measure that can be imagined, but rather one that falls on a reasonable spectrum of possible measures in light of the legislative objectives.

[1083] In British Columbia, Mr. Justice Cohen relied on *United Steelworkers* to reach a similar conclusion in *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCSC 660 [FIPPA-BCSC] (aff'd 2015 BCCA 172 [FIPPA-BCCA]). He rejected the argument that an infringing measure was not minimally impairing simply because other Canadian jurisdictions enacted a less impairing scheme (at paras. 134-137).

b) Application to this case

[1084] The defendants submit that there is no less intrusive manner of creating a funding system without compromising the overall transparency, consistency, equality and integrity of the system. In the plaintiffs' view, there are less drastic means by which the defendants could achieve the objective of having a fair and rational capital funding system in a real and substantial way. To find otherwise, they say, would mean that a capital funding system tailored to s. 23 is inconsistent with a fair and rational capital funding system.

[1085] The plaintiffs once again look to *GVTA* as a parallel. They note that the Court there found at para. 77 that the defendants had implemented a blanket

exclusion of an important form of expression in an important place for discourse, which did not minimally impair rights. The plaintiffs say that this case, too, presents a blanket exclusion of s. 23 considerations, and therefore cannot be considered to be minimally impairing. As I see it, in most instances, the Province's capital funding system does not create a blanket prohibition like the provisions at issue in *GVTA*. It is a complex regulatory scheme for allocating funds to the education sector. Thus, the minimal impairment question is more complex than it was in *GVTA*.

[1086] The extent to which an infringing measure minimally impairs the plaintiffs' rights will fall to be determined based on the specific infringing measure and engaged rights at issue, and is addressed in subsequent chapters.

3. Proportionality of Effects

a) Legal Principles

[1087] The third and final element of the proportionality analysis requires “a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance’” (*Oakes* at 139, emphasis in original).

[1088] With time, our understanding of the proportionality analysis has broadened. We now understand that there must be proportionality between the deleterious and salutary effects of the measures. In *Hutterian Brethren*, the Court explained that this fourth and final step takes full account of the severity of the deleterious effects on individuals and groups. It therefore asks whether the benefits of achieving the purpose are worth the cost of the rights limitation (at paras. 76-77). As the Court explained in *R. v. K.R.J.*, 2016 SCC 31, “this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1” and “allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society” (at para. 79).

[1089] The defendants also suggest that the cost of rectification may be relevant to the justification analysis at the proportionality stage. As I discuss above, my reading

of the cases leads me to conclude that courts are hesitant to conclude that costs are a sufficiently important objective to justify infringing a *Charter* right. In the event that an objective passes that hurdle, then the cost savings may be considered as a potential salutary benefit to be weighed against the deleterious effects of the rights infringement.

[1090] However, it must also be taken into account that it is difficult to weigh the cost of rectification against the cost of a right. As Abella J.A. (as she then was) noted in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A.), the cost of rectification is inherently incomparable to the cost to the public of discriminatory measures (at 587):

The Supreme Court has in any event held that cost is not a constitutionally permissible justification for discrimination under s. 1: *Schacter v. Canada*, [1992] 2 S.C.R. 679 at p. 709, 10 C.R.R. (2d) 1 at p. 20, *per* Lamer C.J.C. Cost/benefit analyses are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet. On one side of the budgetary ledger will be the calculable cost required to rectify the discriminatory measure; on the other side, it will likely be found that the cost to the public of discriminating is not as concretely measurable. The considerable but incalculable benefits of eliminating discrimination are therefore not visible in the equation, making the analysis an unreliable source of policy decision-making.

b) Application to this case

[1091] The defendants suggest the benefits of meeting the objectives of the funding allocation are worth the modest inroads on the kind of “absolute and universal equivalence that is urged here” by the plaintiffs. Thus, they say that the capital funding system gives effect to s. 23 rights as fully as possible within the constraints of the particular mandates and objectives the Province is trying to achieve.

[1092] The defendants rely on some province-wide comparisons to show that the effects are proportional. They suggest it is appropriate to take into account the broader context at the s. 1 stage, including that the CSF is being treated similarly to majority school districts with similar demographic attributes. They also suggest that in some instances, strict application of s. 23 is not proportional to the modest

benefit that could be expected to flow from it (which they suggest would likely take the form of increased enrolment). They say the only means of correcting the infringement would be to divert, each year, in perpetuity, a disproportionate amount to resources to the CSF, to the detriment of other stakeholders in the education system. This, they say, is not a proportionate balancing of the competing interests at stake, regardless of the *Charter* protections afforded to s. 23 rightsholders.

[1093] In the plaintiffs' view, the defendants did not lead any evidence to establish "the salutary effects of having a capital funding system that does not take s. 23 considerations ... into account." They also suggest it is hard to see what those salutary effects would be.

[1094] The plaintiffs focus on what they imagine the salutary benefits would be of not making special accommodation for the CSF in the capital funding system. They suggest that the salutary effects of such a decision would be the political advantages to the Province from allowing it to say it treats all districts alike, which they say is not a valid salutary effect. They suggest the deleterious effects are a higher rate of assimilation and lower rate of transmission of French as a mother tongue in British Columbia.

[1095] The plaintiffs reject the defendants' suggestion that province-wide comparisons are relevant to the s. 1 proportionality argument. They urge that the province is attempting to argue through the back door comparisons that the Supreme Court of Canada specifically rejected in *Association des parents- SCC*. They urge that the local focus of the s. 23 analysis would be entirely undone if governments could justify a s. 23 breach by appealing to province-wide comparisons.

[1096] The plaintiffs also urge that the benefits of remedying the infringements would be greater than simply increased enrolment. They suggest the Province omits the value in offering a substantively equivalent educational experience to the children enrolled in CSF schools.

[1097] The plaintiffs' argument once again misstates the nature of the infringing measure. The plaintiffs focus on a capital funding system "that does not take into account the needs of the CSF". The approach the majority took in *Hutterian Brethren* is instructive. There, as here, the court was considering the justification of a neutral policy of general application. When examining the salutary and deleterious effects, the court examined the salutary effects of the regulatory scheme as a whole (preventing identity theft). It did not focus on the salutary effects of the particular effect the infringing measure had on the plaintiffs (requiring members of the religious minority to submit to photographs). The relevant salutary effects are the ones that arise out of the operation of the measure, not just the rights-infringing effect.

[1098] I am also satisfied the salutary and deleterious effects should be those at both the local and the systemic level. Undoubtedly, the salutary and deleterious effects on the rightsholder community at issue play an important role in the proportionality analysis. However, it is also important to take into account the benefits across the entire capital funding system at this stage. The local focus of the s. 23 analysis may disguise the fact that the CSF, while having substandard facilities at the local level, in fact operates a system that is the same as or better than the systems operated by other school districts across the Province.

[1099] Overall, I find that the pertinent salutary effects will include what the system provides rightsholders with in the local community. Those benefits will fall to be decided based on the particular community at issue.

[1100] The evidence of salutary effects must also include evidence of what the system has yielded for the CSF across the province, and how it compares to what the system has yielded for majority school boards. That evidence tends to reflect the extent to which the Province is achieving its goal of a fair and equitable allocation of resources across the province. I make some findings about the CSF's system-wide performance in Chapter XII, Public Funds, and take those findings into account in the s. 1 analysis.

[1101] Much like the salutary effects, the deleterious effects should also include consideration of both the local and systemic impact of the infringing measure. At the local level, the deleterious effects will include the particular nature of the breach, and the extent to which rightsholders' children are not receiving the global educational experience to which they are entitled. The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia.

X. REMEDIES

[1102] Where there is a breach of s. 23 that is not justified, the remaining question is the appropriate remedy. The plaintiffs seek remedies pursuant to ss. 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982*.

[1103] Pursuant to s. 52(1) of the *Constitution Act, 1982*, the plaintiffs seek declarations of invalidity in connection with certain aspects of the Province's capital funding system.

[1104] Pursuant to s. 24(1) the plaintiffs seek a range of remedies: declarations of positive rights; mandatory declarations requiring the Minister to transfer school board property to the CSF; a reporting order requiring the Province to account for its progress implementing remedies; an Expanded Admissions Policy; *Charter* damages; a trust remedy; and a duty to consult.

[1105] When deciding what remedies are appropriate, the plaintiffs urge the Court to consider that "[t]he evidence clearly establishes that the defendants have failed to take the steps necessary to fully implement s. 23 of the *Charter* in BC" since 1982, in spite of clear judgments in 1996 and 1998. Given the historic nature of the breaches, the plaintiffs urge the Court to implement extraordinary remedies.

[1106] Most of these allegations have been addressed in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. There, I conclude that many of the issues that arise in this claim were in the mind of the Minority Language Education Task Force in 1990 and 1991, and that knowledge was passed on to the

Ministry. However, I also conclude that the Task Force was not a formal representative body, and it was open to and reasonable for the Province to engage in broader consultations. The Province was unsure about the best method of implementing s. 23 in the Province, and explored different ways of doing so before settling on a single school board model.

[1107] The combined result is that, after *Mahe* was decided in 1990, the Province studied how to implement s. 23 of the *Charter* for about five years before establishing the FEA in 1995. Following two constitutional challenges, the FEA was reconstituted as the CSF by way of legislation rather than regulation, its jurisdiction was extended to include the entire Province, it was given greater rights to funding and powers to acquire property, and a dispute resolution process (the *Education Mediation Regulation*) was created to assist the CSF and majority boards to resolve disputes. All of these processes were in place by about 1999. I conclude that the Province was justified in proceeding slowly when initially implementing s. 23.

[1108] Since then, the CSF has been able to expand its programmes considerably. The Province has funded the CSF's acquisition of about 18 schools, and renovations and replacements of around half of them. The CSF also leases about 19 facilities, and the Province pays those leases.

[1109] It is with that context in mind that I consider what types of remedies might be warranted for any breaches of the *Charter*. I begin by resolving some preliminary questions concerning the plaintiffs' authority to seek remedies. Then I consider the availability of the specific remedies that the plaintiffs seek.

A. The Delineation of s. 24 and s. 52

[1110] The rights in s. 23 can be enforced with reference to two provisions of the *Constitution Act, 1982*: s. 24(1) of the *Charter* and s. 52(1).

[1111] Section 24(1) of the *Charter* provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain

such remedy as the court considers appropriate and just in the circumstances.

[1112] Section 52(1) of the *Constitution Act, 1982*, provides:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[1113] The two provisions differ in their application and in the types of remedies they offer. Section 52(1) applies to the entire *Constitution*, including the *Charter*. A supremacy clause, s. 52(1) results in any law that is inconsistent with the *Constitution* being declared of no force and effect to the extent of that inconsistency. Section 24(1) only applies to breaches of the *Charter*. It gives courts a wide discretion to provide an appropriate and just remedy to any person whose rights have been infringed.

[1114] There are two preliminary issues: whether remedies can be sought pursuant to ss. 24 and 52 concurrently; and whether the plaintiffs have standing to seek s. 24 remedies.

1. Concurrent Remedies Pursuant to ss. 24 and 52

[1115] Sections 24 and 52 serve different remedial purposes. Generally, s. 52 provides a remedy for constitutionally impermissible laws, while s. 24 provides a remedy when government actions taken pursuant to constitutionally valid legislation infringe the *Charter*. *R. v. Ferguson*, 2008 SCC 6, at paras. 61:

It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*. *Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.

[1116] Therefore, in *Schachter v Canada*, [1992] 2 SCR 679, the Court held (at 720) that in most cases, s. 52 remedies are not available in conjunction with s. 24(1) remedies:

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.

[1117] The plaintiffs urge that the remedies they seek pursuant to s. 24 rest on a different footing than those they seek pursuant to s. 52. Thus, they say that this is not a case where the plaintiffs seek remedies under ss. 24 and 52 in conjunction. They suggest that the s. 24(1) remedies are directed at rectifying the injustices of the past, while the s. 52(1) declarations are designed to prevent future injustices.

[1118] In *Schachter*, the Court left it open that, in rare cases, a remedy under s. 24(1) might be sought in conjunction with a remedy pursuant to s. 52 (at 720). In *Ferguson*, the Court expanded on this principle, and confirmed that, where necessary, remedies pursuant to both provisions could be applied in conjunction where it is necessary to provide the claimant with an effective remedy (at para. 63):

The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function primarily as a remedy for unconstitutional government acts. [Emphasis added.]

[1119] The court's comments in *Ferguson* echo the comments in Mr. Justice Lebel's concurring reasons in *R. v. Demers*, 2004 SCC 46, where he suggested that it might be appropriate, in some circumstances, to combine remedies pursuant to ss. 24 and 52 (at para. 104). In reaching that conclusion, he articulated the distinction between the aims of public law and private law litigation. Remedies in

private law litigation are targeted to compensating a plaintiff for a loss suffered at the hands of a defendant, while remedies in public law litigation seek to ensure compliance with the Constitution to the benefit of the rights and freedoms of all citizens. Private law seeks to compensate an individual for losses suffered due to past events, while public law remedies focus on future compliance and reach beyond the individual actors (at paras. 99-100).

[1120] However, given that public law actions are brought by an individual or group seeking redress, he also emphasized the importance of providing the complainant in a public law action with an appropriate remedy (at para. 101):

Nevertheless, public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to them. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by *this* person in assertion of *his* or *her* rights. Corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice. That is the case here. [Underline emphasis added. Italics emphasis in original.]

[1121] In this case, there are real corollaries between private law and public law litigation. As I explained in Chapter VI, The Respective Roles of the Province and the CSF, s. 23 is unique among *Charter* rights in that it places a positive duty on government to provide minority language education facilities out of public funds where the numbers so warrant. An unconstitutional failure by a government to provide the facilities to which a group is entitled manifests as a loss to rightsholders suffered at the hands of the defendants. I also note the real risk that generations of rightsholders might be lost if the government does not act expeditiously to meet its obligations. The need for concrete relief warrants a remedy pursuant to s. 24(1).

[1122] At the same time, there may also be grounds for relief pursuant to s. 52(1). To the extent that a rights breach is caused by the unconstitutional effects of a law, that law should not be left on the books. Section 52 requires that the law be declared invalid to the extent of the inconsistency. Thus, in my view, this case is

one of those rare circumstances where it may be appropriate to issue orders pursuant to ss. 52(1) and 24(1) in conjunction with one another to ensure the claimants have an effective remedy.

2. Standing to seek s. 24 remedies

[1123] The express wording of s. 24(1) makes the personal remedies allowed by that provision available to “[a]nyone whose rights or freedoms ... have been infringed or denied”. As a result, its remedies are available to a more limited class than would be available under s. 52(1).

[1124] The plaintiffs acknowledge that the CSF and the FPFCB are not individuals whose rights have been breached pursuant to s. 23. However, they take the position that rightsholders who did not receive minority language education as a result of breaches of the *Charter* ought to nevertheless be compensated by way of remedies pursuant to s. 24(1). In the plaintiffs’ submission, individual rightsholders should not be denied recourse because they were not well positioned to advance this claim.

[1125] The plaintiffs rely on *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*] at para. 51. They draw an analogy between the plaintiffs in that case and in this one, suggesting the CSF and the FPFCB are public interest litigants acting on behalf of a constitutionally-defined class of individuals whose legal rights are at stake, who cannot advance their claims as efficiently as the CSF and FPFCB could.

[1126] *Downtown Eastside Sex Workers* sets out the test for public interest standing. The question of remedies did not arise, and was not discussed. It is not helpful in assessing whether the plaintiffs have standing to seek personal remedies under s. 24(1) on behalf of rightsholders in this case.

[1127] The plaintiffs also cite comments made by Mr. Justice Willcock in a chambers ruling in this matter, *Conseil Scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2011 BCSC 1219 [*Association des*

Parents- Standing Ruling] at para. 71, which they say illustrates that the plaintiffs in this matter act in a representative capacity.

[1128] In *Association des Parents- Standing Ruling*, the defendants sought an order striking the CSF and the FPFCEB as plaintiffs in this case for not meeting the tests for either private or public interest standing. Mr. Justice Willcock began by reviewing the declarations that the plaintiffs seek pursuant to s. 24(1) of the *Charter* as well as the orders they seek for funding of capital improvement projects and the reporting orders (at paras. 4-5).

[1129] Mr. Justice Willcock considered the test for private interest standing as stated in *Boyce v. Paddington*, [1903] 1 Ch. 109 and *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607 at p. 617. He decided that the CSF was not entitled to private interest standing over all aspects of the claim even though some of the *indicia* of private interest standing were present, and the CSF was acting as the agent through which rightsholders exercise their constitutionally guaranteed rights (at paras. 50-55).

[1130] Instead, Mr. Justice Willcock considered that the CSF had public interest standing. In doing so, he took specific account of “[t]he unique, collective aspect of minority language education rights” and the corresponding “creation of school boards as a means of exercising the management and control of the education system mandated by the constitution” (at para. 63). He also took into account that school boards and parent associations frequently bring s. 23 actions to trial, which “speaks to the traditional role of the minority language school boards as representatives of the students for whom they provide instruction and facilities” (at para. 69). Given that role, he concluded that the CSF was the party best placed to litigate the matters at issue and ensure an effective challenge to unconstitutional legislation and government actions (at paras. 70-71).

The CSF acts in most instances as an agent of government: *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, 2005 BCCA 393; *Douglas/Kwantlen Faculty Assoc. v. Douglas College (S.C.C.)*, [1990] 3 S.C.R. 570. That fact alone does not, in my

opinion, preclude it from seeking declaratory relief from the courts in relation to the constitutional obligations of the Province. I am satisfied, given the particular constitutional role of minority language school boards, that the CSF is an appropriate party to speak to the public interest in the group rights conferred by s. 23 of the *Charter*. The issue of the sufficiency of the resources devoted to discharging the Province's positive obligation to fund minority language education may be litigated at the instance of the CSF.

Given this finding, it remains to be considered whether there is a more appropriate party to advance the claims made by the CSF. There are individuals asserting their own *Charter* rights in the case at bar. While individuals are the most appropriate parties to speak to alleged breaches of their rights, as rights-holders, they will speak to specific examples only. Their claims may result in a piecemeal assessment of the Province's observance of the duty to linguistic minorities described in the *Charter*. There is no one rights-holder capable of advancing the claim that individuals rights have been infringed as a result of a global error on the part of the Province, for example, in assessing transportation needs, or the global capital requirements of the minority language schools.

[1131] In light of that ruling, I consider that Mr. Justice Willcock has already decided that the plaintiffs have public interest standing to seek declarations, funding orders, and reporting orders pursuant to s. 24(1) of the *Charter* although they do not, technically, fit the criteria of "Anyone whose rights or freedoms ... have been infringed or denied." The defendants did not argue that the plaintiffs did not have standing to seek the other s. 24 remedies that they seek, namely, an Expanded Admissions Policy and *Charter* damages. I therefore proceed on the assumption that they do, without deciding the issue.

B. Section 52(1)

[1132] Pursuant to s. 52(1), where a law is inconsistent with the *Charter*, it is to be declared of no force and effect to the extent of the inconsistency. In *Schachter*, the Court explained that nullification pursuant to s. 52 is the typical approach when a law is found unconstitutional, but admits of some flexibility (at 695):

A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.

[1133] In some instances, it may be appropriate to issue declarations pursuant to s. 52 to the effect that the capital funding system is unconstitutional to the extent of an inconsistency. These remedies will be appropriate in the latter half of the decision, when examining the plaintiffs' complaints that the CSF is disadvantaged by the operation of capital funding system as a whole.

C. Section 24(1)

[1134] There is no doubt that the Court's jurisdiction to make orders pursuant to s. 24(1) is very broad. It allows courts to order whatever remedy it considers "appropriate and just in the circumstances". In *Mills v. The Queen*, [1986] 1 S.C.R. 863, Mr. Justice McIntyre (for the majority) commented on the wide and generous scope of the Court's discretion (at 965):

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

[1135] In *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*], the court cited McIntyre J.'s comments in *Mills*, and offered that the grant of discretion is fettered only by the concern of what is "appropriate and just", and should not be reduced to a binding formula for general application in all cases. However, the Court also noted that prior cases and judicial guidance might offer some assistance in assessing what is appropriate and just in given circumstances (at paras. 18-19).

[1136] In *Doucet-Boudreau*, the Court offered some assistance for courts to take into account when deciding whether a remedy is just and appropriate in the circumstances. The Court articulated five principles relevant to the question, which may be informed by jurisprudence relating to remedies outside the *Charter* context. To summarize them, an appropriate and just remedy should meaningfully vindicate the rights and freedoms of the claimants, and address the circumstances in which the right was infringed or denied. It must also apply means that are legitimate within the framework of our constitutional democracy, respecting the separation of functions between the legislature, executive and the judiciary. Third, the remedy

should invoke the functions and powers of a court; the remedy should be a judicial one. Fourth, the remedy should be fair as against the party that it is made. Finally, it should be allowed to develop novel and creative features to be flexible and responsive to the needs of a given case (at paras. 54-59).

[1137] The plaintiffs seek a number of remedies pursuant to s. 24(1), which they say are appropriate and just in this case: declarations, reporting orders, an Expanded Admissions Policy, *Charter* damages, a trust remedy and a duty to consult.

1. Declarations

[1138] Courts may issue declarations pursuant to s. 24(1). The principles concerning the granting of a declaration were stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 830-833. Where an issue falls to be determined between persons sharing a legal relationship, a declaration is available provided that real, rather than fictitious or academic issues are raised, and provided that a declaration will have the practical effect of determining the matter between the parties.

[1139] With respect to any failure by the Province to meet its positive obligations in particular communities in this case, in my view declarations under s. 24 will typically afford an appropriate remedy as a means of determining a very real legal matter between the parties.

[1140] At times in their argument, the plaintiffs seek declarations more in the nature of *mandamus* requiring the Province to take specific positive steps to remedy a problem. I acknowledge that declaratory relief presents the risk that the government will delay the implementation of declaratory relief. In *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*Insite*], the Court considered what remedy to award when a minister had refused an exemption to a safe injection site pursuant to s. 56 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. The Court held that a declaration that the Minister had erred by refusing the exemption would have been inadequate as the infringement was a serious one, threatening the lives of claimants. The delay while awaiting a new decision might give rise to new

litigation. The Court held that a bare declaration was not acceptable. Reasoning that the only option available to the Minister was to grant the exemption, the Court issued an order in the nature of *mandamus* requiring the Minister to grant the exemption to Insite forthwith (at paras. 148, 150).

[1141] Some of the same concerns are present here. With every year of delay, there is a real concern that more rightsholders might choose not to enrol their children in a CSF school, and lose their children's status as Education Rightsholders into the future.

[1142] However, this must be balanced against the proper role of the court in relation to the legislative and executive branches of government. In *Eldridge*, the Court confirmed that where there are various options available to government that may rectify a lack of constitutionality, a declaration as opposed to injunctive relief is more appropriate. The Court confirmed that it goes against the role of the court to dictate how the unconstitutional regime ought to be rectified (at para. 96).

[1143] A similar consideration was at play in *Mahe*. In that case, the plaintiffs sought declarations in respect of the rights which must be accorded to s. 23 rightsholders in Edmonton, as well as declarations that the legislation at play was of no force and effect to the extent it was inconsistent with s. 23 of the *Charter* (at 353-354). The Court declined to issue declarations of invalidity concerning the laws at issue in that case, as it would have had the effect of creating a legislative vacuum and temporarily precluding the public authorities from exercising their powers to change the existing system and bring it into compliance. The Court also considered that the plaintiffs were not entitled to any legislative scheme, but to a certain type of education system. For those reasons, the Court restricted itself to making a declaration in respect of the concrete rights of the parents, which left the government with some flexibility to fashion a response (at 392-393):

For these reasons I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the

government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. Section 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme. [Emphasis added.]

[1144] I have already explained that I do not consider the Province to have delayed implementing s. 23 of the *Charter* in British Columbia. In light of the importance of leaving some latitude to government, absent evidence leading me to believe that a declaration would not be effective, I will typically make an affirmative declaration of rights rather than compel the defendants to take specific actions.

Foremost among these, the plaintiffs ask the Court to issue declarations requiring the Minister to order the transfer school board property to the CSF pursuant to the newly amended s. 74 of the *School Act*, which provides:

74 (1) Subject to the orders of the minister, a board is responsible for the management of the schools in its school district and for the custody, maintenance and safekeeping of all property owned or leased by the board.

[1145] In Mr. Miller's discovery and the Province's case, Ministry officials maintained that the Minister had no power to compel school boards to dispose of property to the CSF. The legislative history reveals that s. 74 was amended by Bill 11-2015, *Education Statutes Amendment Act*, 4th Sess., 40th Leg., BC, 2015 [*Bill 11*], Cl. 12. *Bill 11* passed third reading on May 14, 2015, and came into force on July 1, 2015, when this Court was not sitting. The defendants closed their case in the middle of August 2015.

[1146] The plaintiffs say the amendments to s. 74(1) changed the nature of the powers the Minister has in connection with property owned and managed by school boards. In the plaintiffs' submission, the Minister now has broad, plenary authority to intervene in the public interest to make orders concerning the disposal of property.

[1147] For the defendants, the relevant question is not how the *School Act* qualifies the powers of school boards, but what jurisdiction lies with the Minister. The defendants press that cl. 12 of *Bill 11* simply added a new limit to the otherwise plenary power of school boards to deal with their properties without giving the Minister new jurisdiction to make limiting orders. The defendants point the Court to s. 168 of the *School Act*, which establishes the Minister’s jurisdiction. In their submission, the Minister’s jurisdiction pursuant to that provision is not unrestricted. They note, for example, that the Minister cannot order a school closure unless enrolment falls below eight students (s. 168(2)(g)). The defendants also point to comments made during the legislative debate concerning *Bill 11*, which tend to confirm that the legislature did not intend to expand the Minister’s jurisdiction.

[1148] In *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2013 BCSC 1242 [*Association des Parents- Injunction Ruling*], Mr. Justice Willcock considered an application in this case by the plaintiffs for an interim injunction requiring the Minister to order SD39-Vancouver to offer to lease the former J.W. Sexsmith Elementary to the CSF for a three-year period. The defendants argued there was no authority in the *School Act* for the Minister to make that order, and that the court should not issue a mandatory injunction directing the Minister to do something he is not empowered to do (at para. 19).

[1149] Mr. Justice Willcock explained that, in his view, the appropriate question at the first stage of the injunction test was “whether there is an arguable case [the plaintiffs] are entitled to a *Charter* remedy that would justify the issuance of the injunctions sought” (at para. 22). He went on to state (at para. 23):

A mandatory injunction compelling the Minister of Education to order [SD39-Vancouver] to deal with property in the manner proposed in relation to short-term relief should not be issued if there is no statutory authority for the Minister to make such an order, and therefore no triable issue as to the plaintiff’s right to seek that relief.

[1150] Mr. Justice Willcock considered the jurisdiction of the Minister set out in s. 168(1) of the *School Act*, and the Minister’s powers under ss. 73, 74, 85 and 96 of the *School Act*. He accepted the submission by the defendants that the scheme of

the *School Act* was such that SD39-Vancouver, like other school boards, holds its property with the powers and capacities of a natural person, and the Minister cannot order school boards to dispose of school property (at paras. 36-37):

I accept the submissions of the Province and [SD39-Vancouver] with respect to the scope of the powers of the Minister of Education under the *School Act*. The scheme of the Act is clearly intended to give plenary powers to the boards, subject to the power of the Minister to intervene in the public interest in relation to certain actions. While the board's powers are described in broad terms, the Minister's powers are specifically enumerated.

In my opinion, there is no statutory authority that would permit the Minister of Education to order [SD39-Vancouver] to offer to lease the Sexsmith property to the CSF. For that reason, I find there is no triable issue as to the plaintiffs' entitlement to the relief they seek in relation to the Sexsmith property.

[1151] As a result, he concluded that there was no triable issue in relation to the breach of the plaintiffs' claim for an order requiring SD39-Vancouver to dispose of property.

[1152] I agree with Mr. Justice Willcock's interpretation of the scheme of the *School Act*, and following the principles in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) at paras. 4-5 and *Chief Mountain v. British Columbia (Attorney General)*, 2011 BCSC 1394 at paras. 74-104, consider it appropriate to follow it.

[1153] As I see it, the Minister's jurisdiction to make orders is established in s. 168 of the *School Act*, which provides:

- (1) The minister, subject to this Act and the regulations,
 - (a) has charge of the maintenance and management of all Provincial schools established under this Act,
 - (b) must advise the Lieutenant Governor in Council on all matters relating to education in British Columbia,
 - (c) may designate a member of the public service to act on behalf of the minister, and
 - (d) may charge fees with respect to any goods or services provided by the minister or the ministry, and may establish different fees for different circumstances.
- (2) The minister may make orders for the purpose of carrying out any of the minister's powers, duties or functions under this Act and, without restriction, may make orders

- (a) governing the provision of educational programs,
- (b) subject to subsection (5), determining the general requirements for graduation from an educational program,
- (c) determining the general nature of educational programs for use in schools and francophone schools and specifying educational program guides,
- (d) preparing a process for the assessment of the effectiveness of educational programs and requiring a board or a francophone education authority to cause its schools to participate in the process for the purpose of comparison to provincial, national and international standards,
- (d.1) preparing a process for measuring individual student performance, and requiring a board or a francophone education authority to cause its schools to participate in the process for the purpose of assessing the effectiveness of educational programs,
- (e) governing educational resource materials in support of educational programs,
- (f) establishing and causing to be operated Provincial resource programs and Provincial schools in British Columbia,
- (g) requiring a board to close a school if the number of students attending the school falls below 8,
- (g.1) requiring a francophone education authority to close a francophone school if the number of francophone students falls below 8,
- (h) respecting distributed learning educational programs,
- (i) establishing committees and authorizing the payment of expenses to the members of the committees and other advisory bodies established under this Act,
- (j) governing fees that may be charged by a board or a francophone education authority, and those fees may be different for different circumstances,
- (j.1) designating an educational activity or a category of educational activities for the purposes of section 168.1,
- (j.2) establishing, for the purposes of section 168.1, the amount a student or a child registered under section 13 may be reimbursed, including
 - (i) setting the maximum amount that may be paid,
 - (ii) establishing a limit on the number of educational activities or categories of educational activities for which reimbursement may be made, and
 - (iii) setting different amounts and different limits for different educational activities or different categories of educational activities,

(k) respecting the use of student records, and records referred to in paragraph (d) of the definition of "student record", by boards and francophone education authorities,

(k.1) respecting the circumstances in which persons other than students and francophone students and their parents, and employees of boards and francophone education authorities, must have access to student records,

(l) establishing policies and procedures that are to be followed by boards and francophone education authorities in a tendering process related to a capital expenditure by the board or francophone education authority,

(m) [Repealed 2012-17-12.]

(n) respecting the appointment of auditors under section 158 (1) or, in the case of francophone education authorities, under section 166.37,

(o) respecting accounting, accounting records and financial reports and statements referred to in sections 156 (1), 157 (2) and 157.1,

(p) respecting the opening and closing of schools under section 73 (1) (a),

(q) respecting a board assisting in paying the cost of a person attending an educational institution outside of British Columbia under section 83 (b),

(r) [Repealed 2015-24-30.]

(s) respecting the appointment, remuneration and duties of a special advisor or special advisory committee,

(s. 1) establishing Provincial standards for a code of conduct required under section 85 (1.1),

(s.2) varying the dates in section 168.2 (3),

(s.3) for the purpose of section 86 (6), designating one or more persons, including a board, who provide procurement, managerial, administrative or other services as a designated service provider, specifying the service with respect to which a person is a designated service provider and specifying one or more boards with respect to which a person is a designated service provider, and

(t) that the minister otherwise considers advisable to effectively administer this Act or the regulations.

[1154] Nothing in that provision gives the Minister the power to make orders requiring school boards to dispose of land. That has not changed since Mr. Justice Willcock made his decision in *Association des Parents- Injunction Ruling*.

[1155] Sections 73, 74, 85 and 96 concern the powers of school boards in connection with the property they own. Due to c. 12 of *Bill 11*, the power of school boards to manage their property in s. 74(1), as amended, is now subject to valid ministerial orders in the same way that school boards' powers to establish and close schools (s. 73) and to acquire and dispose of land and improvements (s. 96(3)) always have been. The stipulation that those powers are "subject to an order by the Minister" does not expand the Minister's jurisdiction to make orders. It simply makes school boards' powers subject to a valid exercise of the Minister's power to issue orders pursuant to s. 168.

[1156] In reaching this conclusion, I am supported by the comments of Minister Fassbender in British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 40th Parl., 4th Sess., Vol. 26, No. 5 (13 May 2015). In the course of the legislative debate, Minister Peter Fassbender responded to a question from Mr. R. Flemming concerning the rationale for "a section that appears to give the Minister the ability to dispose much more easily of land that is held as an asset by 60 different school boards throughout the province of B.C." (at 8453-8454). Minister Fassbender responded as follows (at 8454):

Hon. P. Fassbender: Indeed, this section — I have had a number of discussions and feedback from school districts.

Let me make it very clear. Currently under the act the minister cannot order a board to dispose of property. That is in the purview of the board, and that does not change in the new act. The words "Management of schools and property" — that's the management of those schools and properties as it relates to any of the services to maintain those properties, to maintain the schools under the shared-services initiative.

Again, as we move forward in consultation with districts, under the regulations there will be clarity in terms of what that does and does not mean. But it is very clear — and I stand here clearly saying — in other sections of the act that the minister will not have increased powers to order boards to dispose of property.

[Emphasis added.]

[1157] Since the Minister has no jurisdiction or authority to order school boards to dispose of property, I will not make declarations requiring the Minister to transfer or

otherwise deal with school board property in favour of the CSF. Such a remedy would have no practical effect.

2. Reporting Orders

[1158] The plaintiffs also ask the Court to retain jurisdiction in this matter to do two things: (1) receive periodic reports regarding the defendants' progress in providing the relief ordered by the Court; and (2) make declarations and orders regarding temporary relief. The plaintiffs suggest there is a significant risk the declarations and orders sought would prove ineffective, pointing to what they say is a history of delay by the Province. The plaintiffs are particularly concerned about reporting orders concerning the relief sought in several communities, where they say poor conditions and lengthy delays require it: Vancouver (West), Vancouver (East), Burnaby, Abbotsford, Squamish, Whistler, Pemberton, Sechelt, Penticton, Richmond, Nelson, and Victoria (East).

[1159] The plaintiffs note several instances of courts retaining jurisdiction in s. 23 and other language rights cases. They rely on *Doucet-Boudreau*, where the trial judge held hearings requiring the defendants to report on the implementation of his remedies. They note that Mr. Justice Willcock retained jurisdiction in *Association des Parents - BCSC* "to hear applications for any further relief that may be sought by the Petitioners arising out of the issues raised by the pleadings" (at para. 161). Mr. Justice Vickers, too, retained jurisdiction: *Vickers #1* at para 54. They also point to *Lavoie v. Nova Scotia (Attorney General)* (1988), 47 D.L.R. (4th) 586, 84 N.S.R. (2d) 387 (NSSC(TD)) at 593-95; *La Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361; [1983] A.N.-B. no 245 (QL) (QB) at para. 109.

[1160] The plaintiffs also refer to *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 780 and the orders made thereunder: *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347 at para 3; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212 [1992 *Order*]. There, the Court retained jurisdiction during a temporary suspension of a

declaration of validity that had been put in place to allow Manitoba to translate its laws. The Court made several orders continuing the period of validity of laws pending their translation. In the *1992 Order*, the Court went further and addressed whether certain government documents also had to be translated.

[1161] The plaintiffs also suggest there is precedent for reporting orders in the field of human rights law: *Lepofsky v. TTC*, 2007 HRTO 23 at paras. 12-14 (where the tribunal remained seized of a matter pending a decision on what remedies would be required of the Respondent); *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 99 (in that case this was done on consent).

[1162] The plaintiffs take the position the reporting orders they seek meet the test for appropriate remedies set out in *Doucet-Boudreau*. In their submission, it is consistent with our constitutional democracy, and fair to both parties. They say that it is the best way to ensure that s. 23 violations are remedied without delay, while allowing the defendants some flexibility with respect to the modalities of implementation.

[1163] The defendants suggest that a reporting order is unnecessary in this case. They suggest that *Doucet-Boudreau* involved special circumstances: a longstanding, admitted violation of s. 23 that had gone unaddressed for many years. The defendants say any unjustified infringement of s. 23 in this case will be newly declared by the Court.

[1164] The defendants also take the position that it is unnecessary for the Court to retain jurisdiction as it is always open to the parties to return to court to seek enforcement of any orders granted in this matter. In their submission, there is great cost associated with this litigation, and it would be disproportionately expensive for the parties to return to court on a regular basis to report on the process of implementing whatever orders this Court grants.

[1165] The plaintiffs primarily rely on *Doucet-Boudreau*. In *Doucet-Boudreau et al. v. Nova Scotia (Minister of Education)* (2000), 185 N.S.R. (2d) 246, [2000] N.S.J.

No. 191 (QL) (SC), the trial judge acceded to the agreement between the parties that the court retain jurisdiction. The trial judge scheduled a further appearance at which time the respondents would report on the status of their efforts (at para. 245). The Court of Appeal for Nova Scotia described the procedure this way in *Doucet-Boudreau et al. v. Nova Scotia (Minister of Education)*, 2001 NSCA 104, noting the appellants did not agree to the precise format the reporting sessions took (at paras. 14-15):

It is instructive to review, briefly, what took place at the subsequent “reporting sessions” before the trial judge. I refer to these subsequent appearances before the trial judge as “reporting sessions” because that is what they were. They were not fresh proceedings instituted by the application of any party seeking relief. Three such sessions took place between the date of the trial judge’s decision (June 15, 2000) and the date of the order giving effect to that decision (December 14, 2000); namely, on July 27, 2000; August 9, 2000 and October 23, 2000. A fourth session was held on March 23, 2001. At least one further reporting session is to be held on August 10, 2001.

Prior to each reporting session the trial judge directed the Province to file an affidavit from the appropriate official at the Department of Education setting out the department’s progress in complying with the trial judge’s decision. The trial judge permitted the respondents and CSAP to cross-examine the government official on his affidavits. He also permitted the respondents and CSAP to adduce evidence, including rebuttal evidence. All of this was done without any application seeking particular relief, and, therefore, there was nothing to define the parameters of the reporting session. Further, all this was done over the objections of counsel for the appellant claiming that the trial judge had no jurisdiction to conduct these reporting sessions, that the trial judge was *functus officio*, that there was no fresh proceeding before him, and that the trial judge was powerless to make any order without such fresh proceedings. The trial judge rejected the objections of counsel for the appellant. It was only at the most recent reporting session (March 23, 2001) that the trial judge appears to concede that he is powerless to make any order with respect to any matter arising out of these reporting sessions.

[1166] In *Doucet-Boudreau*, the five-judge majority opinion authored by Iacobucci and Arbour JJ. held that the reporting orders made by the trial judge were appropriate and just remedies pursuant to s. 24(1). They noted that the trial judge had found “serious rates of assimilation and a history of delay in the provision of French-language education”, and ordered reporting hearings to identify difficulties with timely implementation, instead of requiring fresh applications when it appeared a party was not exercising best efforts to comply with a decision (at para. 60). The

majority held that the order was “a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23” without requiring significant time and resources from parents to bring fresh applications (at para. 61). Thus, the majority found that the orders meaningfully vindicated the rights at issue.

[1167] The majority was also satisfied the reporting order respected the framework of the constitutional democracy. They observed that the trial judge “took into account, and did not depart unduly or unnecessarily from, the role of courts” by building into his orders a “best efforts” requirement that allowed the government some flexibility (at para. 68).

[1168] With connection with the principle that a s. 24(1) remedy should call on the function and powers of a court, the majority considered that the order was a judicial one, as courts order remedies involving their continuing involvement in other instances, particularly in the courts of equity (at paras. 71-72). The majority also considered the means chosen to be fair, rejecting an argument that the reporting order was vaguely worded (at para. 83).

[1169] In affirming the trial judge’s reporting order, the majority placed importance on the trial judge’s findings concerning the behaviour of the government. The Court considered that it had been “clear to and accepted by the parties from the start that the government was required to provide the homogeneous French-language facilities at issue”, and that the trial judge had concluded the government had failed to prioritize s. 23 in the face of rapid assimilation (at paras. 63, 65). They expressed concern that the dissenting opinion inappropriately interfered with those findings of fact (at paras. 64-65).

[1170] In the four-member dissenting opinion, LeBel and Deschamps JJ. found the reporting order was not an appropriate remedy in the circumstances. They concluded that a court purporting to retain jurisdiction after a final order would be acting inappropriately by breaching the principle of separation of powers and the doctrine of *functus officio* (at para. 105).

[1171] The comments in the dissenting opinion concerning the separation of powers are apposite here. Deschamps and LeBel JJ. explained that the appropriate role of the Court is to interpret and declare the law and provide remedies for infringements. Courts should exercise restraint beyond those functions because governments have a tradition of complying with judicial interpretations and court orders (at para. 106):

Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite — or, perhaps, because of — the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

[1172] The dissenting opinion emphasizes the importance of the courts generally avoiding interfering in the management of public administration outside their duties on judicial review (at para. 110). This, Lebel and Deschamps JJ. opined, was particularly so after courts had rendered judgment, when courts should assume that governments will execute judgments and orders with reasonable diligence and good faith (at para. 111).

[1173] Applying that principle and the principle of *functus officio* to the situation, the minority found that the trial judge breached the principle of separation of powers by assuming a supervisory role over administrative functions that properly lie in the sphere of the executive, and are beyond the capacities of courts (at para. 120). The trial judge would have also “undermined the norm of co-operation and mutual respect that not only describes the relationship between the various actors in the

constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy” (at paras. 121).

[1174] The dissenting opinion also left it open that it might be appropriate for a court to order a remedy that breached the separation of powers principle in some circumstances. Lebel and Deschamps JJ. wrote that it might be argued that it is appropriate to breach the principle where necessary to vindicate rights or if the government had ignored less intrusive judicial measures; however, they found that the case did not give rise to either of those arguments (at para. 135). They found that alternative remedies were available to vindicate rights, and that the evidence did not reveal that the defendants had failed to comply with previous court orders (at paras. 136-137, 139-140):

Turning to the first argument, if the hearings were aimed at ensuring the vindication of the claimants’ rights by providing them with the opportunity to enforce or alter the remedy, there were alternatives available. If the claimants felt that the government was not complying with any part of the order, then they could have brought an application for contempt. The majority seems to suggest that contempt proceedings would have been less effective in this case in ensuring timely performance of the order, without being any more respectful of the separation of powers. However, we would note that expedited applications are possible in Nova Scotia and other jurisdictions to deal with cases quickly and efficiently. In addition, the reporting order at issue in this case precluded applying to any other judge for relief and was, in this way, even more limiting than a contempt proceeding. Most importantly, contempt proceedings are more consistent with our adversarial system, which is based on the common law norm of giving the parties primary control over the proceedings (see J. I. H. Jacob, *The Fabric of English Civil Justice* (1987), at p. 13). In contrast, the present order for reporting sessions placed the trial judge in an inappropriate, ongoing supervisory and investigative role despite the availability of the equally effective, well-established, and minimally intrusive alternative of contempt relief.

Consequently, it is clear that the order for reporting hearings was not the only means of vindicating the claimants’ rights, and that recourse to a readily available alternative would have been consistent with a defining feature of our legal system. Recourse to this alternative would not have resulted in an interpretation of the court’s remedial powers that was so broad as to purport to endow the court with powers that it was “never intended to exercise” (*Dunedin, supra*, at para. 22). It is important to stress that in the present case, it is not clear that actual recourse to a contempt application would have been necessary. The point is simply that if judicial enforcement of the

deadlines in question were necessary, recourse to this alternative would not have overextended the court's powers.

...

The second argument is simply not applicable in this case. The facts here do not require us to decide whether previous government non-compliance can ever justify remedial orders that breach principles of procedural fairness and the separation of powers. The Government of Nova Scotia did not refuse to comply with either a prior remedial order or a declaration with respect to its particular obligations in the fact-situation at hand. No such order was made and it is impossible to determine whether the government would have responded in the present case to either a declaration of rights, or the injunction to meet the deadline as these measures were combined with the order purporting to retain jurisdiction to oversee the reporting sessions. Therefore, it cannot be asserted that the trial judge's order has succeeded where less intrusive remedial measures failed.

Moreover, what was required by the Government of Nova Scotia to comply with its obligations pursuant to s. 23 was not self-evident at trial. The trial judge was not faced with a government which was cognizant of how it should fulfill its obligations, but refused to do so. Indeed, at issue before the trial judge was precisely the question of what compliance with s. 23 involved. The present order, therefore, did not overcome governmental recalcitrance in the face of a clear understanding of what s. 23 required in the circumstances of the case. Remedies must be chosen in light of the nature and structure of the Canadian constitutional order, an important feature of which is the presumption of co-operation between the branches of government. Therefore, unless it is established that this constitutional balance has been upset by the executive's clear defiance of a directly applicable judicial order, increased judicial intervention in public administration will rarely be appropriate.

[1175] Reading the majority and the dissenting opinions together, it appears as though reporting orders may be appropriate in some circumstances. The majority found that the trial judge's reporting order was appropriate due to the nature of the breach in that case, particularly evidence that the government had willfully delayed implementing s. 23 in the face of known, rapid assimilation. The dissenting opinion did not disagree that it might be appropriate to implement such an order in an instance where it appeared that the government was likely not to comply with a declaration. The difference between the two opinions, regarding the separation of powers principle and how it applied to the case, appears to arise out of their view of the trial judge's findings of fact, and whether there was government conduct to justify finding that the orders were necessary to ensure compliance with the court's orders.

[1176] In my view, though, the decision does not stand for the proposition that such orders are appropriate in all s. 23 cases. The principles surrounding separation of powers explained in the dissenting opinion are important and valid ones. Canadian tradition is that governments will comply with declarations of constitutional rights. Courts must exercise caution not to stray into the role of the executive and the legislature except in those instances where it is necessary to ensure vindication of rights, or where there is reason to believe that the government will not comply with an order expeditiously.

[1177] This echoes the conclusion that *Hogg* reaches concerning the appropriateness of reporting orders. After expressing approval for the dissenting view in *Doucet-Boudreau*, he suggests that “[a] supervisory order should be a remedy of last resort, to be employed only against governments who have refused to carry out their constitutional responsibilities”, in part because the courts cannot easily be apprised of all the considerations required to evaluate progress in the development of a school building (at 40-46).

[1178] Similarly, in *Association des Parents- SCC* the Court emphasized the tradition of state actors taking *Charter* declarations seriously, and considerations related to the proper role of the court in relation to the executive. There, the court affirmed that it is best left to minority language school boards and the government to work out between themselves the best manner of achieving s. 23 rights, without deep participation by courts in operational questions around school construction (at paras. 65, 67):

That said, there is a tradition in Canada of state actors taking *Charter* declarations seriously: see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 40-37. As this Court noted in *Doucet-Boudreau*, “[t]he assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully” (para. 62). Indeed, this represents one reason why courts often choose to issue declarations in the context of s. 23 (M. Doucet, “L’article 23 de la *Charte canadienne des droits et libertés*” (2013), 62 *S.C.L.R.* (2d) 421, at pp. 462-63).

...

The declaratory relief granted by the judge at the conclusion of the first phase of litigation defers to the parties, allowing them to determine among themselves the best course of action to remedy the lack of equivalence (see *Mahe*, at pp. 392-93). To the extent that there are disputes between a provincial ministry of education and a minority language school board over how best to ensure compliance with the requirements of s. 23, these disputes should be worked out between those parties whenever possible. While parents may have representation on school boards, and thus have a degree of input over school board priorities, school boards are also governmental actors. It does not play to the institutional strength of courts to have judges participate deeply in operational questions, such as detailed decisions surrounding the construction of a new school facility. In the face of competing resource demands and the imperfect realities of day-to-day management of an education system, s. 23 of the *Charter* requires good faith on the part of all interested parties to ensure substantive equivalence for rights holders.

[Emphasis added.]

[1179] Taking into account the totality of the evidence in this case, I am unable to conclude that the context makes a reporting order necessary or appropriate. This is not a case like *Doucet-Boudreau* where the government has accepted that a school is necessary and willfully delayed building a new school. To the contrary, there are minority language schools to serve the students living in all the claim areas. Even students from Burnaby and Abbotsford, where there are no schools in the communities themselves, have access to reasonably proximate schools by way of transportation. Moreover, I am not persuaded that a lack of minority language schools is contributing to the high rate of assimilation in British Columbia, or that they will slow its strong pull.

[1180] I do not find evidence of inappropriate delay by the province implementing s. 23 in any communities. Rather, it is appropriate in this case to presume that the government will act expeditiously to comply with any declarations that I may grant. It would go beyond the competencies of this court to delve into the intricacies of school planning by way of reporting conferences. Against that back drop, and given that the parties may always return to court by way of application, I find that a reporting order is not appropriate or just in this case.

3. Expanded Admissions Policy

[1181] The plaintiffs also seek, as a remedy, the right to admit non-rightsholders to CSF schools. The plaintiffs say the remedial purpose of s. 23 protects the admission of non-rightsholders pursuant to a Descendant Clause as a remedy for delay implementing s. 23 of the *Charter*. The plaintiffs urge that otherwise, the Province would be able to benefit from a reduction in the number of rightsholders caused by its failure to implement s. 23 of the *Charter* between 1982 and 1996. The plaintiffs suggest that children who were of school-age in those years are now of child-bearing age, and their children would be eligible to attend CSF schools if the Province had acted sooner.

[1182] The defendants counter that given the number of Francophones in the participation rates in the province, it is not clear how many rightsholders have lost the right for their children to attend minority language schools in British Columbia. The defendants also suggest it would be inappropriate for the Court to grant such a remedy in the face of valid legislation restricting admissions. The defendants take the position that it exceeds the role of a court to allow a law to be broken for a period of time as a remedy without at least striking down that law.

[1183] I have already concluded that the defendants have validly restricted admission to CSF schools. For the plaintiffs' proposed remedy to be appropriate, a number of conditions precedent would need to be fulfilled: evidence that the minority was not receiving what it was entitled to in a given community; an ongoing breach for a sufficient period of time as to create a generation of lost rightsholders; and evidence that members of the minority were actually deterred from sending their children to minority language schools. The plaintiffs did not tender this type of evidence.

[1184] Moreover, given that the Province has validly restricted the admission of rightsholders, I do not find that this is an appropriate remedy. In *Doucet-Boudreau*, the majority explained that an appropriate and just remedy is one that employs means legitimate within the framework of a constitutional democracy. Courts must

respect the appropriate functions of the legislature, executive and judiciary (at para. 56). Acting within its powers to do so, the Province has validly chosen to restrict admissions to the children of s. 23 rightsholders and Immigrant Rightsholders. Declaring otherwise valid laws invalid as a remedy would require the court to inappropriately stray into the proper sphere of the legislature. I therefore decline to grant the plaintiffs an Expanded Admissions Policy regardless of whether they could establish that individuals have lost their rightsholder status as a result of substandard facilities.

4. Charter Damages

[1185] The plaintiffs seek *Charter* damages to recognize the harm done to members of the French-language community individually, and at large. The defendants submit that this is not an appropriate case for *Charter* damages.

[1186] The plaintiffs rely on the test for *Charter* damages set out in *Ward*, which outlines (at paras. 25-29) the three purposes of granting *Charter* damages: compensation, vindication and deterrence. In their submission, granting damages would further all three purposes in this case.

[1187] The plaintiffs submit that awarding *Charter* damages would help to compensate for the Province's failure to live up to its constitutional obligations for more than 30 years, and what they say is the consequent acceleration of the assimilation rate. The plaintiffs also suggest that *Charter* damages would serve the objects of vindication and deterrence, and engage the seriousness of the state conduct by sending a strong message that governments cannot delay the implementation of s. 23. It would also, they say, deter future violations by imposing an economic incentive on the defendants to comply with their constitutional obligations.

[1188] In *Ward*, the Court held that s. 24 is broad enough to include the remedy of damages for a *Charter* breach, a distinct public law remedy that would require society to compensate an individual for a breach of their rights (at paras. 20-22).

The court articulated four steps for the test: proof of a breach, functional justification of damages, a lack of countervailing factors and quantum (at paras. 23-57).

[1189] The plaintiffs' argument for *Charter* damages focuses on the functional justification for damages. They leave aside the countervailing factors, which are important in this case.

[1190] In *Ward*, the Court confirmed that even where damages are functionally justified, other considerations might render *Charter* damages inappropriate or unjust (at para. 33). The Court pointed to two such considerations: the existence of alternative remedies and concerns for good governance.

[1191] As a countervailing factor, in some situations, an award of damages might not be appropriate "unless the state conduct meets a minimum threshold of gravity" (at para. 39). The principle, recognized prior to *Ward* in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, "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" (*Ward* at para. 40). The Court listed among those the legislative and policy-making functions, as "the law does not wish to chill the exercise of policy-making discretion" (at para. 40). The Court held that damages should not be awarded for actions taken pursuant to a law that was later declared constitutionally invalid due to the important need that public officials carry out their duties, unless there was some evidence of bad faith, an abuse of power, or actions that are clearly wrong (at paras. 41, 43):

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 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.

...

[43] Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. Mackin established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is “clearly wrong, in bad faith or an abuse of power” (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to Mackin and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant’s Charter rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that “malice” be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower “negligence” standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just”. While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of “practical wisdom” concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

[Emphasis added.]

[1192] In many instances, the “public good” countervailing factor will negate the plaintiffs’ claims for *Charter* rights. The plaintiffs ground their claims in the application of a valid law-- the capital funding system-- that might subsequently be found to be invalid because of its effects on the CSF. There is value in ensuring that public officers can act to apply those laws without fear of prosecution. Absent bad faith, an abuse of power or clearly wrong decisions, government actors should not be held liable in damages for actions taken to apply those laws.

[1193] I have already explained that I see no intent or malice on behalf of the defendants. They were justified in operating at the speed they did when implementing s. 23 of the *Charter*. I do not find any evidence of bad faith, an abuse of power or clearly wrong decisions following *Vickers #2*, as the Province has worked steadily at providing the CSF with facilities where the numbers warrant.

[1194] Additionally, in many instances the other countervailing factor noted in *Ward*, the availability of other remedies, will be at play. In particular declarations are likely to spur the defendants to provide the CSF with needed space, where appropriate.

[1195] In the plaintiffs' submission, *Charter* damages are particularly appropriate in respect of breaches in several areas, given the delay and conditions in those communities:

(a) Victoria; (b) Vancouver, west of Main Street; (c) Burnaby; (d) Squamish; (e) Whistler; (f) Sechelt; (g) Penticton; (h) Abbotsford; (i) Chilliwack; (j) Kelowna; (k) Nanaimo; (k) the failure to provide the Conseil with the means to reduce bus ride-times to a constitutionally acceptable level; (i) the failure to indemnify the Conseil for the cost of the leases it has made with ELSDs and private organizations to provide instructional space; and (j) the failure to include the constitutional obligation to provide French-language education and educational facilities where the numbers warrant as a driver in the Province's capital plan.

[1196] In the chapters relating to those communities, I will take specific account of the province's decisions and level of responsibility for any situations where rightsholders are not receiving all that they are entitled to, and explain how countervailing factors apply to the plaintiffs' claim for *Charter* damages.

5. Trust Remedy

[1197] The plaintiffs suggest that the creation of a trust fund would be an effective and constructive means of remedying deficiencies in the defendants' capital planning system.

[1198] The plaintiffs tendered expert evidence concerning how a trust remedy might work based settlements of Aboriginal land claims. I will discuss that evidence

before addressing the plaintiffs' argument that a trust remedy is just and appropriate in the circumstances.

a) Facts

[1199] Ms. Lisa Ethans graduated from Washington State University with a four-year degree in Business Administration with a focus on accounting. She is a Certified Public Accountant, Senior Appraiser of the American Society of Appraisers, a Fellow of the Institute of Chartered Accountants, a Charter Business Valuator and is certified in Financial Forensics. She is currently a partner in the Financial Advisory Group at Deloitte LLP, where she leads the British Columbia forensics practice.

[1200] Ms. Ethans's practice focuses on structuring and administering First Nation Community Trusts. She was personally involved in assisting clients to structure all nine First Nation Community Trusts where Deloitte acts as an administrative trustee, and was in the process of structuring four more at the time she prepared her expert report.

[1201] Ms. Ethans was asked to address the following questions:

1. What are First Nation trusts, and why were they created?
2. What is the First Nation community trust model, and why was it created?
3. How do First Nation community trusts operate (with concrete examples)?
4. Have First Nation community trusts been successful?
5. In general, what are the circumstances in which community trusts have proven to be beneficial?

[1202] Ms. Ethans explained that a First Nation trust is a legal trust often used as a vehicle for a government or company to transfer funds or assets to a First Nation for the benefit of both current and future generations. She advised that they were originally created to address situations where the Federal Government owed funds to a First Nation, such as those associated with the settlement of lawsuits or land claims.

[1203] Ms. Ethans advised that a First Nation trust traditionally does not allow for community involvement and decision-making. A third party trustee invests and disburses funds according to the trust instrument, and the Chief and counsel determine how funds will be spent, with variable requirements for reporting to the community.

[1204] A First Nation *community* trust, by contrast, usually involves input from the community members that the trust is meant to benefit. To address concerns about a lack of communication with respect to the trust funds, Deloitte developed a model where a third-party, non-voting trustee is responsible for disbursing the funds (the “Administrative Trustee”). Several members of the First Nation also become trustees (the “Nation Trustees”) and are responsible for making decisions concerning trust funds. While the Administrative Trustee cannot vote, he or she wields a power to veto a Nation Trustee decision in violation of the trust instrument.

[1205] Ms. Ethans’ view was that all of the First Nation community trusts that Deloitte administers have been successful. She observed that Chiefs and Councils, Nation Trustees and the communities were actively involved in trust meetings, and no Nation Trustees had resigned because of a desire not to be engaged in the trusts. She confirmed that no Administrative Trustees had exercised their veto power, and no lawsuits had been taken against any of the Deloitte-model trusts. She further observed that the trusts had been protected by their terms, had received unqualified audit opinions, and had withstood political challenges. She also observed higher community engagement in connection with the trusts, and advised that no settlers had reported any issues.

[1206] Ms. Ethans suggested several factors that make a community trust particularly beneficial, specifically:

1. Monies being transferred by one party for the benefit of a group or community;
2. The community or group of beneficiaries can be clearly identified but may otherwise be very diverse;
3. The purpose for which the monies are to be used can be clearly identified;

4. The expenditure of the monies is expected to take longer than 1-2 years and/or the monies will be invested over the medium to long term
5. The funding party seeks certainty that the funds will be spent as intended;
6. The decision-makers over the expenditure of the funds are to be representatives of the group of beneficiaries;
7. A stable, non-political group is needed to represent the interests of the community or group members so as to separate politics from funding decision;
8. Community or group input is required or desired for decisions as to how to spend the funds;
9. Members of the group or community to benefit from the funds do not necessarily have sufficient experience in investment management, project management, accounting, finance and legal issues to cooperatively manage the funds themselves; and
10. A vehicle is needed to achieve some common vision as to how funds should be spent.

b) Discussion

[1207] The plaintiffs rely on Ms. Ethans's evidence to show that trust funds are an effective way to provide a measure of financial autonomy to specific groups while ensuring accountability. They suggest the creation of a trust fund similar to a First Nation community trust as an appropriate remedy, with or without a requirement that the defendants make significant changes to their capital funding system.

[1208] In the plaintiffs' view, a trust fund would be an effective and constructive means of addressing the deficiencies in the defendants' capital planning process. It would also, they say, be aligned with the positive obligation that s. 23 places on governments to provide minority language educational facilities out of public funds. It would provide rightsholders with funding to fully realize management and control.

[1209] The plaintiffs suggest that trust remedies are not foreign to s. 23 claims. They note that in *Arsenault-Cameron et al. v. Prince Edward Island* (1997), 147 Nfld. & P.E.I.R. 308; [1997] P.E.I.J. No. 7 (QL) (PEI Sup. Ct.), the plaintiffs sought a nominal sum of \$5,000 damages, to be paid into a "trust fund" for the "ongoing educational needs of s. 23 children in the Summerside area" (at para. 113). While

the trial judge did not award damages, he did not reject the idea that the damages could have been paid into a trust fund (at para. 115).

[1210] I also note that in the litigation before Mr. Justice Vickers, the FPFCB sought an order under s.24(1) of the *Charter* for a charitable purpose trust for the benefit of rightsholders in the Lower Mainland and Victoria, for the purpose of restoring the cultural and the linguistic rights and heritage of those persons.

[1211] With reference to the principles governing when a remedy is just an appropriate as stated in *Doucet-Boudreau*, the plaintiffs submit that a trust would satisfy the first principle by vindicating the claimants' rights, and addressing the circumstances in which the right was infringed or denied. They say that it would allow the community to determine its own capital funding priorities and provide the CSF with financial autonomy to respond to the systemic claim, while preventing the CSF's capital priorities from being neglected by the capital funding system.

[1212] Second, the plaintiffs say that the remedy is constitutionally legitimate and does not depart from the role of courts adjudicating disputes.

[1213] Third, the plaintiffs suggest that the remedy falls within the capacity and powers of the Court's expertise, advising that a trust would not require the Court to make a detailed order concerning the structure of the trust fund, and would be flexible enough to allow the parties to determine the exact format to the trust.

[1214] Fourth, in the plaintiffs' view, the trust remedy would be fair to both the plaintiffs and the defendants. It would not, they say, impose substantial hardship unrelated to the rights at stake, and it will ensure that the breach of s. 23 is effectively remedied.

[1215] The defendants take the position that a trust is not appropriate in this case. In their view, the evidence has demonstrated the need for government oversight and scrutiny of capital projects, including those of the CSF. No trustee, they say, would have the necessary command of the system and the competing interests at stake

that the Ministry has. In that connection, they suggest the evidence established several instances where, in hindsight, the Minister was justified refusing CSF requests for capital funding. They also take the position that it would be dangerous to rely on the CSF's optimistic enrolment projections to justify building new facilities, as the cost of those facilities and maintaining them would be unduly burdensome.

[1216] The plaintiffs' request for a trust remedy appears to be separate and apart from their claim for *Charter* damages. The plaintiffs appear to seek this remedy pursuant to s. 24(1) as a remedy for laws that unjustifiably infringe s. 23. To justify the claim for a trust fund, they point to what they see as the defendants "systemic lack of regard" for the capital implications of s. 23 of the *Charter*, the need to "address the defendants' capital system's lack of responsiveness" to the plaintiffs' needs.

[1217] As I explain above, pursuant to *Schachter* and *Ferguson*, a remedy for unconstitutional laws is typically found in a declaration of invalidity pursuant to s. 52(1) of the *Charter*. Occasionally, a positive remedy might be available in conjunction to ensure an effective remedy. A trust would fall in that category.

[1218] In this case, though, I am not persuaded that a trust for the linguistic minority is a just and appropriate remedy as it would trench on the role of the legislative and executive branches of government: *Doucet-Boudreau* at para. 56. The legislature and executive have established law and policy for ensuring that capital projects are justified, built to standards that ensure equity across the system and that ensure the distribution of scarce resources across the Province. They have the authority to do so pursuant to their continued jurisdiction to oversee the structures of the education system pursuant to s. 93.

[1219] Granting a trust remedy would allow the CSF to operate outside those laws and policies. It would therefore have the effect of invalidating those processes as they apply to the linguistic minority. Meanwhile, the Province would be deprived of their right to craft a new system that is responsive to s. 23 and responsive to the Province's pressing and substantial objectives. It would deprive the defendants of

their remaining jurisdiction over minority language education pursuant to s. 93 of the *Constitution Act, 1867*, as well as their right to supervision over the CSF.

[1220] In the result, I do not find that a trust remedy is a just and appropriate remedy in the circumstances.

[1221] However, that is not to say that the plaintiffs might not require some flexible funding to remedy deficiencies with the capital planning system. As I develop in Chapter XLII, Lack of Funds and a Capital Envelope for the CSF, this can be achieved by requiring the Province to craft a Capital Envelope to address the CSF's needs. Such an envelope would provide the CSF with some financial security and flexibility while respecting the proper role of the legislature and the executive by allowing them to oversee the CSF's capital decisions using valid capital planning tools.

6. Duty to Consult

[1222] At the end of the plaintiffs' written submissions on remedy, the plaintiffs submit that the Court ought to draw from the well-developed case law regarding the duty to consult in the context of aboriginal rights, and recognize that the Province bears a similar duty when making policy decisions that have an impact on French language and culture. The plaintiffs cite the duty as it was explained in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 42-44.

[1223] The plaintiffs do not appear to have pleaded the existence or breach of that type of a duty to consult with the CSF. At most, they seek orders requiring that when new capital funding systems are developed, they be developed in consultation with the CSF. That is fundamentally different from the type of duty to consult discussed in *Haida Nation*. They did not argue the issue orally. Due to the schedule for the exchange of oral argument that the parties agreed to, the defendants had no notice of this argument until after they had already tendered their written argument, and substantially completed their oral argument. Since this issue seemingly was

raised as an afterthought, and because it would be unfair to the defendants, I will not address it.

[1224] Having set out the legal and factual principles that inform the entirety of the claim, I turn to the second part of these reasons.

XI. INTRODUCTION TO PART 2: DISCRETE REQUESTS FOR FACILITIES

[1225] In the second part of these reasons, I address several of the plaintiffs' claims for discrete minority language educational facilities and resources province-wide. There are four of them: equivalent public funds (Chapter XII, Public Funds), increased funding pursuant to the Annual Facilities Grant (Chapter XIII, The Annual Facilities Grant), increased transportation funding (Chapter XIV, Transportation) and space and facilities for linguistic and cultural programming (including early childhood education) (Chapter XV, Linguistic and Cultural Programming).

[1226] All of these claims raise the question what the number of children across the province are entitled to. I am satisfied that at the provincial level, the numbers fall at the highest extremity of the sliding scale.

[1227] In *Association des Parents- SCC*, Karakatsanis J. confirmed that courts may defer to decisions in earlier litigation concerning where the numbers fall on the sliding scale. She suggested that "where numbers have previously been found to warrant equivalent services, for example, in earlier litigation, the 'numbers warrant' analysis may become somewhat pro forma" unless evidence calls the numbers in earlier litigation into question (at para. 48).

[1228] In *Vickers #1*, Mr. Justice Vickers concluded that the numbers in the Lower Mainland and Fraser Valley (3,848 students likely to enrol in CSF schools based on an agreed statement of facts) warranted the highest level of management and control (at paras. 44-47). As I see it, Mr. Justice Vickers was situating the numbers at the school district level for the purpose of determining what level of management and control was warranted province-wide.

[1229] Now, the CSF has jurisdiction over the entire province, including substantially more rightsholders. The CSF had 5,382 students enrolled in 2014/15: more than a number of small school districts. I therefore find that the number of children of rightsholders likely to enroll in CSF programmes across the province warrants provincial-level minority language educational facilities provided out of public funds on a standard of equivalence to the facilities afforded to the majority.

[1230] I bear that standard in mind when addressing the plaintiffs' claims for improved resources and facilities in the next four chapters.

XII. PUBLIC FUNDS

[1231] Section 23(3)(b) provides that where the numbers warrant minority language educational facilities, the facilities are to be "provided out of public funds." This raises issues about the extent to which the Province provides the CSF with public funds for minority language education facilities, and whether the CSF is receiving its fair share.

[1232] The plaintiffs take the position that majority districts have access to many financial resources that the CSF does not. They point to majority districts' legacy asset bases, existing Local and Capital Reserve amounts, and revenues from leasing surplus property, international student programmes and School Site Acquisition Charges as sources of funding that the CSF does not have access to.

[1233] The defendants agree that majority boards have some funding advantages that are not available to the CSF, specifically legacy assets and access to School Site Acquisition Charges. However, they urge that it is important to take into account the scale of the CSF's population. They further note that the CSF has access to sources of funding that majority school boards do not, like funding for its leases and Federal government operating and capital funding, which they say more than counterbalances the benefits to majority districts. They take the position that the in fact the CSF comes out ahead of majority boards in terms of the funding made available to it.

[1234] Here, I address sources of funding available to both the majority and the minority, before turning to sources available exclusively or primarily to one group or the other. To conclude, I engage in a relative balancing of the sources of funding to discern whether, in practice, the CSF is disadvantaged because it lacks access to funds made available to the majority.

A. Sources Available to both the Minority and the Majority

[1235] All districts have access to Capital Planning Cycle funding, Local and Restricted Capital Reserve accounts and Operating Block funding.

1. Capital Planning Cycle Funding

[1236] All districts have access to funding through the Ministry's Capital Planning Cycles. The defendants take the position that the CSF has received a proportionate share of that funding in light of its enrolment.

[1237] Mr. Palmer's evidence reveals that since 2001, the Ministry's Capital Planning Cycle has invested about \$111 million in major capital projects for the CSF. The Ministry invested an average of \$42 million in major capital projects for each majority school board since 2001. Only 7 of 59 majority districts also had aggregate capital funding of more than \$100 million in the same period: SD61-Greater Victoria (\$108 million); SD43-Coquitlam (\$119 million); SD44-North Vancouver (\$125 million); SD34-Abbotsford (\$147 million); SD41-Burnaby (\$187 million); SD39-Vancouver (\$274 million); and SD36-Surrey (\$277 million). All of those school boards have significantly higher enrolment than does the CSF.

[1238] Mr. Palmer's evidence also shows the Capital Planning Cycle funding that each district received since 2001, on a per student basis, based on 2014/15 enrolment levels. On average, majority districts received \$4,649 per student since 2001. The CSF received more than \$21,000 per student in that period. Only two districts received more annually on a per student basis in that period: SD50-Haida Gwaii and SD19-Revelstoke. The defendants suggest that both SD19-Revelstoke and SD50-Haida Gwaii are small districts that had high *per capita* spending because

they each received one elementary and one secondary project. The CSF constructed at least four new schools in the same period: École Secondaire Jules-Verne (Vancouver), École Au-cœur-de-l'île (Comox), École Élémentaire Mer et Montagne (Campbell River), and École Victor-Brodeur (Victoria). It also acquired École L'Anse-au-Sable (Kelowna), École Élémentaire Océane (Nanaimo) and École Élémentaire Anne-Hébert (Vancouver (East)) in that period.

[1239] The defendants' charts also illustrate the comparison between the CSF and only those majority districts where the CSF operates programmes ("Competing Districts"). The Competing Districts received \$6,951 per 2014/15 student in those districts (aggregated) in that period, with only SD19-Revelstoke exceeding the CSF's *per capita* funding. The CSF's per pupil Capital Planning Cycle funding was about double that of the next nearest district, SD47-Powell River, which received about \$10,600 per student.

[1240] In the plaintiffs' submission, the defendants erroneously included in their calculation the capital transfers that benefited the CSF, while simultaneously benefiting the majority boards from which the CSF acquired an asset. They note that majority boards benefited by about \$41 million from transferring assets to the CSF, improving the situation of the majority relative to that of the minority. I note that even based on the plaintiffs' argument, which calculates capital funding per student after removing the asset transfers to the majority, the CSF fares far better than the majority average and better than every other district except for SD50-Haida Gwaii, SD19-Revelstoke and SD49-Central Coast. In the end, very little changes upon removing the majority board profits from transfers to the CSF.

[1241] The plaintiffs also argue that given the CSF's percentage variation of enrolment between 2001/02 and 2014/15, it ought to have received a disproportionately higher percentage of capital funding as compared to the majority boards. Indeed, the CSF's enrolment grew by 100% between 2001 and today. Almost every other school board had declining enrolment, many with between 20% and 40% enrolment decline. Of the six districts that had growing enrolment in that

period, none saw enrolment growth of 20% or more. I agree this is the case, and find that capital expenditures since 2001 have appropriately favoured the CSF.

2. Local and Restricted Capital Reserve Accounts

a) Facts

[1242] From time to time school districts fund portions of capital projects using their capital reserve accounts: the “Local Capital” Reserve and the “Restricted Capital” Reserve.

[1243] School districts have two capital reserve accounts: a Local Capital Reserve and a Restricted Capital Reserve. School boards can only spend from their Restricted Capital Reserve account with the Minister’s approval. They may spend from their Local Capital Reserve account at their discretion: *School Act* s. 141(1)(b).

[1244] Mr. Miller advised that the Minister typically approves the use of Restricted Capital Reserve when that project is a relatively high priority based on the Ministry’s Capital Planning Cycle metrics. That way, the Minister ensures that Restricted Capital Reserve funds lessen the burden on the Province to fund projects using Capital Planning Cycle funds. All projects constructed with Restricted Capital must adhere to the Area Standards.

[1245] Local Capital Reserve funds can only be used on capital projects. Otherwise, school boards can spend Local Capital at their discretion. Mr. Miller advised that districts usually use Local Capital to fund projects that would not be supported in a Capital Planning Cycle, like school board offices and lower-priority projects. Mr. Miller also advised that Local Capital may be used to build amenities in excess of the Area Standards. SD36-Surrey has even used its Local Capital to acquire school sites. The plaintiffs also suggest Local Capital could be used to improve building functionality, which is typically not a high Ministry priority.

[1246] The most common way for school boards to generate Local and Restricted Capital Reserves is by selling surplus assets. Mr. Miller commented that some of the proceeds from the sale flow into each account depending on how the asset was

originally paid for. If a school board funded a proportion of the construction of the asset with its own money, it retains the same proportion of the proceeds of the sale as Local Capital. The remaining proceeds flow into Restricted Capital. So, if a school board paid for 85% of the cost of acquiring and constructing a school, when that asset is sold the school board retains 85% of the proceeds as Local Capital. The remaining 15% of the proceeds flow into the district's Restricted Capital account.

[1247] Sometimes, a school board is considered to have funded 100% of the cost of acquiring and constructing an asset using its own funds. Prior to 1947, many schools were owned by municipalities and were paid for entirely by local taxpayers. After 1947, many of those facilities were transferred to school boards free of charge. Since the Province did not contribute to the acquisition of those schools, school boards retain all of the proceeds as Local Capital if they choose to sell them today.

[1248] If a school board cannot prove what local taxpayers contributed to the cost of the asset, then the default position allows the school board to retain 25% of the proceeds of sale in its Local Capital Reserve account. The remaining 75% of the proceeds flow into the district's Restricted Capital Reserve account.

[1249] Districts can supplement their Local Capital Reserve by designating an unlimited proportion of their operating revenue to Local Capital each year. Districts can supplement their Restricted Capital Reserve with cost savings from Ministry-funded capital projects.

[1250] Local and Restricted Capital play a limited role in Capital Planning Cycle project approvals. Mr. Miller and Mr. Bonnefoy confirmed that the Ministry has looked to districts to bring something to the table by identifying Local and Restricted Capital Reserve they can contribute to a requested project. Mr. Miller advised that school boards can sometimes create a business case to have projects funded that would not otherwise be by contributing Local and Restricted Capital Reserve funds.

[1251] This practice changed with the beginning of a new “Cash Management Strategy” in about 2014. Now, school boards are required to contribute their capital resources to projects being funded through the Ministry’s Capital Planning Cycle. This goes beyond Restricted Capital to school district idle Local Capital and operating surpluses. Mr. Palmer testified that the requirement arose out of an Auditor General’s report that found that public entities, like school districts, had too much idle cash sitting on their books. Mr. Palmer testified that the new strategy also requires school boards to fund capital project budget overruns using their own resources.

[1252] As the project evolved, the Ministry decided that seismic projects would not be subject to the strategy. For seismic projects, districts are only expected to contribute Restricted Capital.

[1253] Mr. Palmer’s evidence was that the Cash Management Strategy has no impact on project prioritization. He confirmed that projects are prioritized by need and merit-- effectively, the Space Rank and FCI scores.

[1254] As of about 2014, across all 60 school districts, Mr. Miller was aware of about \$80 million in Restricted Capital Reserve accounts, and a further \$130 million in Local Capital Reserve accounts.

[1255] Mr. Palmer’s evidence was that the Ministry tracks whether the Minister approved the use of Restricted Capital on a given project. The evidence reveals that since 2001, the Province funded some 499 capital projects at a cost of about \$3 billion. The records show that districts contributed Restricted Capital to about 12% of capital projects approved in that period. The promise of Reserve Capital was linked to the approval of about 44, or 9% of capital project approvals. The total amount of Restricted Capital Reserve approved for use in those 44 projects was \$107,587,318, or around 3.6% of the Province’s total spending on capital projects.

[1256] Of course, this also includes some CSF projects that included Restricted Capital. While he was under cross-examination, Mr. Bonnefoy testified that between

2004 and 2010, the CSF generated some capital reserve when it subdivided and sold a portion of the site for École Gabrielle-Roy (Surrey). The CSF also generated some capital reserve through the sale of the first building it acquired to house École L'Anse-au-Sable (Kelowna).

[1257] In Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), I conclude that due to cost savings associated with the construction of École Secondaire Jules-Verne, the CSF was allowed to retain about \$1.2 million for its Restricted Capital Reserve account. The CSF also retained cost savings from the construction of École Au-cœur-de-l'île (Comox), which also came in under budget.

[1258] Both Mr. Allison and Mr. Bonnefoy testified that the CSF has not actively supplemented its Local Capital Reserve account by transferring operating revenue to its capital accounts.

[1259] The evidence shows that the CSF has spent a significant portion of its accumulated Restricted Capital. The CSF contributed about \$1.75 million in Restricted Capital Reserve to its capital projects since 2001. The Ministry approved the use of some of those funds for the CSF to acquire École Élémentaire du Bois-joli (Delta), and some for the CSF to acquire a replacement facility for École Élémentaire L'Anse-au-Sable (Kelowna). Additionally, the Minister also approved the CSF's request to use of some Restricted Capital to acquire and relocate portables in Squamish when École Élémentaire Les Aiglons faced an eviction from its heterogeneous, leased space at Garibaldi Highlands Elementary.

[1260] I accept the proposition that the CSF currently has very little (if any) Restricted Capital. If the \$80 million in Restricted Capital Reserve funds held across the Province were proportioned between all districts based on their enrolment, the CSF would have about \$800,000. If the \$130 million in Local Capital were distributed proportionally to all school boards on the basis of population, the CSF would have about \$1.3 million. I consider the CSF to be missing those funds.

[1261] The CSF has, however, been able to contribute a proportionate amount of Restricted Capital Reserve funds to its capital projects since 2001. Given that the CSF has about 1% of the student population, its proportionate share of the \$107 million in Restricted Capital Reserves spent by school boards on capital projects would be about \$1 million: about \$750,000 less than the amount the CSF contributed to its capital projects in that period.

b) Discussion

[1262] The plaintiffs argue that the CSF has limited Local and Restricted Capital Reserves, placing it at a disadvantage when the CSF is trying to have its projects approved. The defendants take the position that the CSF has had access to a proportionate amount of Restricted Capital in light of its enrolment. As I see it, the CSF has limited Local and Restricted Capital Reserves, causing it to miss out on its proportionate share to the amount of about \$2 million.

[1263] This is troubling given the small role that Local and Restricted Capital Reserves play in project approvals. The evidence shows that projects from all districts compete for limited capital funds. If the Province must choose between supporting a project where a district can contribute some funds and a project where a district cannot, the district that can offer financial support is more likely to have its project approved.

[1264] The plaintiffs' position is that, to the extent that the new Cash Management Strategy leads to less funding for the CSF's urgent capital projects and incentivizes funding other projects before the CSF's, it is contrary to s. 23 of the *Charter*. The plaintiffs suggest that, contrary to Mr. Palmer's evidence, the Cash Management Strategy is likely to impact how the Ministry prioritizes capital projects.

[1265] The defendants take the position that due to the Cash Management Strategy, school districts do not benefit in the form of project approvals from holding Restricted and Local Capital. They say that districts will be expected to exhaust their Local and Restricted Capital Reserves for all projects. They also point to

Mr. Palmer's evidence that the prioritization of projects will not change based on what districts can contribute. Thus, they say, holding capital reserve funds will not be of much benefit to districts going forward.

[1266] As I see it, it is premature for the plaintiffs to make the claim that they do concerning the Cash Management Strategy. A *Charter* breach cannot be proven based on speculation. Mr. Palmer's evidence was that the Cash Management Strategy would not have any impact on project prioritization. The plaintiffs do not point to any evidence that the Cash Management Strategy has led to any majority-board projects being favoured over CSF projects, and the CSF not receiving what it is entitled to as a result. I therefore reject the plaintiffs' argument.

[1267] The defendants' argument is also premature. There is little evidence about how projects will be approved pursuant to the new Cash Management Strategy. There is no evidence to suggest that all school districts will exhaust their Local and Restricted Capital Reserves, and that they will no longer play a role in project approval.

3. Operating Block Funding

[1268] The defendants argue that the CSF benefits more than any other district from the Ministry's method for allocating operating funding: the "Operating Block". I begin by describing how the Operating Block functions before discussing the extent to which the CSF benefits from it.

a) The Operating Block Funding Mechanism

[1269] The Operating Block is an envelope of funds Treasury Board allocates to the Ministry to distribute to school districts, who use it to pay for the cost of operating educational programmes. Once districts receive their Operating Block grants, they make all decisions with respect to how to spend those funds on programme delivery. For 2013/14 through 2015/16, the Ministry anticipated the Operating Block would be about \$4.7 billion to be divided between all 60 school districts each year.

[1270] The Ministry divides the Operating Block between school districts using its operating funding model. Mr. Miller advised that the Ministry publishes an annual “Operating Grants Manual” with appended tables showing how the funding model works and the amounts that are provided to school districts. Mr. Lebrun, a funding analyst with the Funding and Allocation Branch of the Resource Management Division at the Ministry, is responsible for preparing the Operating Grants Manual and its associated tables.

[1271] For about 20 years, Mr. Miller advised, the Ministry’s “Technical Review Committee” has been responsible for reviewing the operating funding model. Every year, the Minister directs the Technical Review Committee to review certain elements of the funding model. The committee recommends changes which are implemented provided that the Minister approves. The Technical Review Committee has representation from the Ministry as well as representatives from school boards and trustees, who are appointed by the BC Association of School Business Officials (“BCASBO”), the professional association of school business officials working in school districts, including Secretary-Treasurers; and the BC School Trustees Association (“BCSTA”), the professional association that serves and supports school trustees across all of BC’s school boards. Mr. Stewart and Mr. Miller both sat on the committee.

[1272] Mr. Lebrun attends all Technical Review Committee meetings and is responsible for updating the terms of reference and its plans and deliverables. Since 2005/06, he has also kept minutes of their deliberations. Mr. Lebrun also finalizes the committee’s recommendations. If the Minister accepts the recommendations, he incorporates them into the Operating Grants Manual and tables.

[1273] The operating funding model went through significant changes in about 2002. Prior to 2002, the Ministry funded specific aspects of school board operations (the “Resource-Cost Funding Model”). Thereafter, the Ministry began allocating unrestricted grants to school boards based on enrolment (the “Enrolment-Based

Funding Model”). The Ministry’s position is that change benefited the CSF more than any other district.

[1274] Mr. Miller explained that pursuant to the Resource-Cost Funding Model that existed prior to 2002, the Ministry specifically funded school programmes, and the operation of a school and building space whether leased or owned. School boards received an amount for each FTE student, and additional funding for every elementary and secondary school, as well as amounts for district-level operations. Districts also received grants to reflect the varying costs of delivering specific programmes, the districts’ geographic characteristics and educator salaries.

[1275] In 2002, the Minister directed the Technical Review Committee to design an enrolment-based model, which was put in place for 2002/03. The new Enrolment-Based Funding Model eliminated almost all targeted funding to encourage efficiency and give boards more operational autonomy.

[1276] Mr. Miller and Mr. Lebrun explained that the Enrolment-Based Funding Model is comprised of several elements. First, school boards receive a basic allocation of \$6,900 per FTE student and a smaller amount for each distance education student. The basic allocation distributes about 79% of the Operating Block.

[1277] In addition to the basic allocation, the funding formula provides supplements for some students with unique needs (the “Unique Student Factors”). Districts receive additional funding for each student with special needs. Further supplements provide extra amounts for students with aboriginal ancestry, students with English or French as a second language and non-graduated adult students. Since 2012/13, there has also been a supplement for vulnerable students. Together, these factors distribute about 12% of the Operating Block.

[1278] The Ministry also provides districts with supplements to account for differences between school districts (the “s”). There are seven Unique District Factors: a small community supplement; low enrolment supplement; rural factor;

climate factor; sparseness factor; student location factor; and a salary differential. Together, these Unique District Factors allocate about 8% of the Operating Block.

[1279] The small community supplement is intended to recognize the costly nature of operating schools with low enrolment that cannot be consolidated because they are a significant distance from one another. School districts are eligible for this supplement if they operate schools that are more than five kilometres apart, and the sum of the students in those schools is less than 250 students for elementary and 600-650 for secondary. The schools that attract that supplement tend to be small, isolated and rural. However, as a provincial school district operating small schools, the CSF also benefits from this supplement.

[1280] The Ministry also provides a low-enrolment supplement that provides additional funds to small, rural districts to recognize that they cannot achieve economies of scale. Districts are allocated a base amount on a sliding scale based on the number of students in the district. Mr. Lebrun's evidence is that this differs from the small community supplement because it is more focused on the costs of operating the district, and low enrolment at the district level, as opposed to an inability to consolidate schools.

[1281] A third Unique District Factor, the rural factor, recognizes the cost of operating districts at a distance from Vancouver and regional centres. The supplement compensates school boards for the cost of acquiring goods and services in remote areas. According to Mr. Lebrun, it differs from the small community and low enrolment factors in the sense that it relates to a paucity of access to resources rather than the cost of operating within the district.

[1282] The Ministry recognizes differences in energy costs with an environmental factor. This factor allocates funding to recognize the added costs of heating and cooling in some areas of the Province.

[1283] A sparseness factor recognizes the added costs associated with population dispersion, like travel of specialized teachers and multi-school events. It is provided to districts with schools located at some distance from the school board office.

[1284] Additionally, the funding model currently has a Student Location Factor, which recognizes the density of students around schools and the need to transport those students to and from school. A Supplemental Student Location Factor is provided based on special needs enrolment. Mr. Miller advised that this replaced some funding that had previously been allocated for transportation, the Transportation and Housing Supplement. I discuss these supplements in detail in Chapter XIV, Transportation.

[1285] The final Unique District Factor is a salary differential. This recognizes that the average teacher salary varies based on seniority, and makes an adjustment where average salary costs differ from the provincial average.

[1286] According to Mr. Miller, the CSF benefits the most from the Unique District Factors. Recently, the CSF was allocated about \$17 million pursuant to these factors. The next closest district received \$10 million, and the supplements declined from there.

[1287] In addition to the Unique Student and Unique District Factors, several supplements support districts undergoing change. A declining enrolment supplement temporarily supports districts that have seen severe enrolment declines while they restructure their education system. A funding protection supplement also ensures that districts see no more than 1.5% decline in their funding levels from year to year. These factors together allocate 1% of the Operating Block. The CSF, which has growing enrolment, has not benefitted from these factors.

[1288] A final factor is specific to the CSF. The CSF receives a 15% funding premium on all of its funding coming out of the Operating Block to recognize its unique funding needs: the “15% Francophone Supplement”, which I discuss later in this section.

[1289] While the Enrolment-Based Funding Model is calculated based on the number of students, the supplements seem to be based on the Technical Review Committee's calculation of the actual costs of operating schools in certain conditions. As I explain in Chapter XIV, Transportation, the Student Location Factor reallocates the amount that was distributed by the Transportation and Housing Supplement under the Resource-Cost Funding Model, which was based on actual transportation costs.

[1290] The amount distributed pursuant to the small communities supplement is likewise cost based. Mr. Lebrun confirmed that the Technical Review Committee attempted to estimate the actual costs of operating small schools in rural areas, and recommended that the Minister allocate the same amount. The Minister accepted that recommendation. Mr. Lebrun's evidence is that the low enrolment factor is likewise based on the Technical Review Committee's attempt to quantify the cost of operating a school with low enrolment.

[1291] The rural factor was included under the Resource-Cost Funding Model. At that time, it was based on the added cost of shipping a 500lb box from Vancouver to each school district. Mr. Lebrun's evidence is that under the Enrolment-Based Funding Model, the Minister intended to provide approximately the same amount of funding to districts as they previously received pursuant to that supplement. Similarly, the climate factor was calculated based on actual degree days of heating and cooling for the Resource-Cost Funding Formula, and that amount is redistributed by the Enrolment-Based Funding Model. However, now that the funds are distributed based purely on enrolment, Mr. Lebrun has not verified whether the factors continue to reflect the actual costs of what they are meant to address.

b) The CSF's Early Deficit

[1292] The plaintiffs take the position that the CSF was not funded appropriately under the Resource-Cost Funding Model, leading the CSF to encounter a major deficit in 1999/00. In 2002 the entire operating funding system was changed from a Resource-Cost Funding Model to the Enrolment-Based Funding Model. As a result,

the legislative scheme that gave rise to the deficit no longer exists, and has not existed for nearly 14 years.

[1293] It seems to me that the plaintiffs likely led evidence concerning the deficit in anticipation of an argument that the choices they made led to the deficit, and caused some of the circumstances in which the CSF finds itself today. The defendants do not advance that argument.

[1294] The CSF has long offered many services that the majority boards do not, resulting in different and sometimes higher costs. In the late 1990s and early 2000s, the CSF offered door-to-door transportation services from students' homes to school. The CSF also offered full-day Kindergarten before that became the provincial standard in 2011/12. In Dr. Ardanaz's view, those services were essential to the CSF's ability to attract and retain students.

[1295] The CSF began to realize that it had some unique funding needs that it believed were not being taken into account by the Resource-Cost Funding Model. The Resource-Cost Funding Model gave school boards an allocation for each school it operated. The CSF thought that it ought to receive funding for the square metres in both its homogeneous and heterogeneous schools. The Minister did not recognize the CSF's heterogeneous programmes for that element of the funding formula. (The CSF did receive funding for each student in those schools.) Additionally, the CSF was frustrated that it incurred an added cost paying for school-based administrators for its heterogeneous programmes when it employed its own school-based administrators.

[1296] Dr. Ardanaz also pointed to what the CSF saw as problems with the transportation funding system. Dr. Ardanaz testified that transportation funding was based on a district's historical transportation expenditures. Dr. Ardanaz's view was that the CSF was not compensated for its actual transportation costs.

[1297] The CSF raised these issues with the Ministry in April 1998. Mr. Rick Connolly, Director of the Ministry's Capital Branch at the time, responded to the

CSF's request in May 1998. Initially, he refused to recognize more schools and required the CSF to pay for additional transportation cost out of start-up funding it received from the Federal government.

[1298] As discussions on funding for the CSF continued through 1998, both sides made some concessions. The Ministry agreed to recognize additional lease amounts related to school-board level administrative fees being charged by majority school boards, recognize several more schools, and provide the CSF with more English as a second language funding. The CSF did not receive additional transportation funding.

[1299] Despite the movement on those issues, the CSF incurred a deficit in 1999. In its early years, the CSF operated at a small surplus, which grew to \$1,105,512 by 1998. Then, the CSF began to accumulate a deficit. The CSF's deficit was \$1,301,307 in 1999, and accumulated to \$3,752,022 in 2000.

[1300] Due to the CSF's deficit, the Ministry established a financial review team to examine the CSF's financial operations (the "Review Team"). In advance of the Review Team's arrival, CSF staff prepared a Briefing Note on its operating costs and funding challenges (the "Financial Review Briefing Note"). The CSF explained that it incurred a gross deficit of \$2.4 million, which was reduced to a net operating deficit of \$1.3 million due to a surplus the previous year. The CSF attributed the deficit in part to deficits of \$573,000 for teacher salaries, \$215,000 for support salaries and over \$1 million for transportation.

[1301] The Financial Review Briefing Note addressed the three concerns that Dr. Ardanaz had pointed to in his communications to the Ministry. It pointed to some concerns with high lease costs from majority school boards, and double administration costs. The CSF also raised the issue of school recognition, highlighting its view that the CSF operated programmes on 47 sites, but only received financial recognition for 18 schools. The CSF also noted the high cost of contract bus services.

[1302] In its January 2000 final report, the Review Team made a series of recommendations for the CSF and the Ministry. Based on Board-level discussions about what recommendations to implement, the CSF prepared a deficit elimination plan, which it submitted to the Ministry in early 2000.

[1303] After the CSF sent its deficit elimination plan to the Ministry, CSF senior staff and Board members met with Mr. Connolly, who had become Assistant Deputy Minister of Education, and Mr. Owen. Mr. Connolly was willing to recognize more of the CSF's unique needs. Dr. Ardanaz explained that the CSF had several further meetings with Ministry officials, and met with Minister Penny Priddy in May 2000. The CSF asked the Minister for a grant to help it retire its \$4.1 million accumulated deficit, suggesting that they had cut about 10% of its budget, causing a potentially devastating impact on the CSF's operations.

[1304] In June 2000, Minister Priddy agreed to recognize seven further CSF schools. The Ministry would also provide the CSF with additional one-time grants of \$400,000 for lease costs and \$600,000 for learning resources. Dr. Ardanaz conceded that funding helped to retire the deficit. In July 2000, Minister Priddy approved the CSF's deficit and its plan to retire it over five years.

[1305] By October 2001, the CSF was able to write to Deputy Minister Charles Ungerleider and confirm that the CSF would incur a \$1.7 million operating surplus for the year. Some of those funds would be put toward retiring the CSF's deficit, and others were put toward initiatives to improve the CSF's financial controls. The CSF related the surplus to a number of changes, including increased funding from the Ministry.

[1306] In the end, the CSF was able to retire its deficit in three years, according to Dr. Ardanaz. Dr. Ardanaz explained that while the CSF did reduce its personnel, in the end, it did not amount to a 30% reduction in teaching personnel. Further, the CSF amalgamated programmes so that it did not deny students access to minority schools.

[1307] The CSF also sought a tri-partite committee with representatives from the Ministry, the FPFCB and the CSF to conduct an in-depth study and report on the costs of Francophone education. A few meetings took place, and the CSF asked for Ministry funding to complete a study. The new Deputy Minister, Deputy Minister Emery Dossdall, was open to the study, but refused the CSF's request for funding to complete it, averting to the Ministry's review of the operating funding model.

[1308] In fact, beginning with 2002/03, the Ministry moved to the Enrolment-Based Funding Model, and the CSF began to generate surpluses.

c) 15% Francophone Supplement

[1309] Today, the Ministry recognizes the additional operating costs associated with the CSF's linguistic and cultural programming by way of a 15% supplement to all of its Operating Block grant (the "15% Francophone Supplement").

[1310] The defendants plead the 15% Francophone Supplement in defence to the plaintiffs' claim. The plaintiffs respond that the supplement is not a special benefit that has been afforded to the CSF. Rather, the plaintiffs' position is that the supplement is an adjustment to the Enrolment-Based Funding Model to recognize the CSF's higher operating costs for providing minority language education.

[1311] Mr. Bonnefoy and Mr. Miller testified about how the 15% Francophone Supplement came to be. According to Mr. Bonnefoy, when he began working for the CSF in about 2004, the CSF faced added cost pressures recruiting and training staff, developing and acquiring learning resources and transporting students. In November 2004, Mr. Jean Watters, the CSF's Superintendent, wrote to Deputy Minister Dossdall and stated his view that the Ministry's funding allocation system did not recognize the CSF's unique needs. Mr. Watters formally requested that the Minister establish a task force to investigate and report to the Minister on all aspects of provincial funding for the K-12 Francophone education system.

[1312] Mr. Miller explained that the Ministry endeavoured to work jointly with the CSF to address its operating funding needs. In January 2005, Deputy Minister

Dosdall committed the Ministry to reviewing recommendations from previous bodies, and studying the funding formula and the CSF's differential cost requirements. He asked the CSF to prepare a report identifying the specific cost differentials between the CSF and school districts with similar enrolments and unique geographic features.

[1313] The CSF engaged Trillium Business Strategies Inc. ("Trillium") to prepare the report. In May 2005, Trillium completed the report, entitled "Funding for Francophone Education: Challenges Facing the Conseil Scolaire Francophone" (the "Operating Funding Report").

[1314] The Operating Funding Report pointed to a number of unique cost pressures the CSF faced. Those included the cost of providing linguistic and cultural education for students. The CSF also faced additional costs related to staffing levels, teacher recruitment, teacher in-service and professional development costs, learning resources, and distance learning. It also noted that the CSF was not eligible for French-as-a-second-language ("Francisation") funding despite the burden of educating rightsholders' children that spoke limited or no French. Other issues related to the CSF's lack of an asset base to generate local revenue, the cost of leasing properties and the cost of transporting students to and from schools.

[1315] Mr. Bonnefoy explained that the CSF submitted the Operating Funding Report to the Ministry. Mr. Miller testified that the Minister was prepared to begin funding Francisation services immediately. According to Mr. Miller, the Minister also broadly accepted the need to adjust the provincial operating grant formula to recognize the added costs the CSF incurred related to its linguistic and cultural mandate. However, the Ministry required better quantification of the CSF's differential costs. The Minister decided to provide Francisation funding immediately, then establish an annual grant to the CSF to account for its unique needs.

[1316] On July 19, 2005, the Minister announced that beginning in 2005/06, it would provide the CSF with an additional \$1,100 for each student who spoke French as a second language. Mr. Bonnefoy confirmed that this in fact occurred. Over the

course of a series of meetings in 2005, the Minister also agreed to fund administrative fees in leases for fees associated with district-level services. School-based fees, though, would continue to be the CSF's responsibility.

[1317] The Ministry also asked the CSF to prepare a report giving more specifics about its financial request. With the assistance of Trillium, the CSF prepared a report dated March 2006 entitled "Funding Requirements for Minority Language Education" (the "Funding Requirements Request"), to provide further details quantifying its needs.

[1318] The major part of the Funding Requirements Request sets out existing, expanded and new CSF programmes designed to address the CSF's minority language obligations between 2006/07 and 2009/10. For each programme, the CSF articulated the basis for the programme requirements and the costs that would be associated with the programme in each year.

[1319] The CSF identified incremental costs associated with its staffing needs. The CSF planned to provide sufficient classroom teachers to limit split classes to two grade levels. In connection with cultural programmes, the CSF planned to employ regional cultural coordinators to facilitate the development and implementation of cultural activities in each region. Further, the CSF employed specialists to deliver its English language arts programme at the elementary level, which resulted in extra staffing costs. The CSF also planned to expand its teacher and administrator recruitment programme. Additionally, the CSF averted to a programme to promote minority schools to the Francophone community.

[1320] The CSF additionally identified additional costs associated with a new technology programme it planned to implement to facilitate communication and professional development, provide students with laptops and to improve wireless technology. The CSF also requested funds to contribute to before- and after-school care for elementary students in existing space in CSF schools.

[1321] In connection with its capital programme, the CSF asked for funding to put toward the development and implementation of a five-year facilities plan and facilities studies. The CSF also requested additional funds to hire a person into a facilities management position.

[1322] In connection with its existing student transportation programme, the CSF requested extra funding to establish reasonable walk limits and create efficient bus services.

[1323] The Funding Requirements Request estimated that the incremental costs of delivering existing, expanded and new programmes through the 2009/10 school year would require the following amounts, which would be funded by the Provincial and Federal Governments, respectively:

	2005/06	2006/07	2007/08	2008/09	2009/10
Provincial Component	\$10,577,750	\$11,000,250	\$11,496,470	\$11,013,150	\$12,520,670
Federal Component	\$3,975,000	\$3,995,000	\$3,995,000	\$3,995,000	\$3,995,000

[1324] Mr. Bonnefoy explained that the CSF estimated the provincial components based on the cost of the programs that were detailed in the report. The federal component consisted of amounts the CSF was already receiving pursuant to five-year agreements between the Provincial and Federal governments.

[1325] While Mr. Bonnefoy was being cross-examined, it was put to him that there was some duplication between the costs stated for each program, and between the Federal and Provincial components of the funding the CSF requested. Mr. Bonnefoy initially disagreed, before conceding that there appeared to be some similarities. I note that he was argumentative and uncooperative in this point of his cross-examination. On my review, there does appear to be some duplication of costs; for example, between the costs associated with a vocational programme and a programme for leadership training and development.

[1326] The CSF requested that the Province provide it with a supplement each year equivalent to 25% of the operating grant that would be allocated to a majority school district. The CSF noted that would amount to about \$9,077,536, or \$2,553 per pupil, for the 2005/06 school year. The CSF acknowledged that supplement would be about \$1.5 million short of the estimated costs of delivering the existing, expanded and new programmes detailed in the Funding Requirements Request. The CSF undertook to fund the remainder through judicious application of its Operating Block grant funding. Additionally, the CSF requested a one-time retroactive payment.

[1327] Mr. Miller was involved in the Ministry's review of the Funding Requirements Request. He advised that the Ministry examined which requests were one-time in nature, which may have been funded previously (such as by the Federal Government), and those that could be combined to achieve savings. The review identified that \$5.4 million, or 60% of the initial \$9 million request, was specifically targeted to language and culture, and was non-duplicative.

[1328] Mr. Miller revealed that Ministry staff also considered how to justify an inclusive funding factor that could be applied to the CSF for the foreseeable future. Ultimately, the analysis led Ministry staff to a 15% funding supplement on top of the CSF's Operating Block grant, retroactive to the previous school year.

[1329] Based on that, in March 2006, the Minister approved a one-time grant of \$3 million toward the eventual settlement of the issue. After Ministry staff had studied the issue, in October 2006, Deputy Minister Dosdall wrote to Mr. Watters and confirmed that the Ministry would provide the CSF with a supplement equal to 15% of its final annual operating grant, beginning with and retroactive to the 2005/06 school year, net of the \$3 million advance payment.

[1330] Mr. Bonnefoy explained that while he was pleased with the 15% Francophone Funding Supplement, he was also concerned the CSF would not be able to implement all its plans. The CSF abandoned the teacher and administrator retention incentive and its student transportation project. However, Mr. Bonnefoy

confirmed that he did not communicate to the Ministry that the funds would be inadequate.

[1331] Mr. Miller did not recall ever being told that the 15% Francophone Supplement would not be adequate for the CSF's purposes. He advised that in December 2006, the Minister received a letter from Ms. Marie Bourgeois, the CSF President, expressing thanks for the 15% Francophone Supplement. Ms. Bourgeois advised that the additional resources would "allow the Conseil to implement its strategic plan", creating "a win/win situation for your government and the Francophone community." While under cross-examination, Mr. Bonnefoy hesitantly conceded that the supplement was "win/win".

[1332] The operating grant manuals show what funding the CSF received pursuant to the 15% Francophone Supplement in each year. Those amounts are as follows:

Year	Estimated Amount of the Francophone Supplement
2006/07	\$5,611,896
2007/08	\$6,005,564
2008/09	\$6,723,695
2009/10	\$7,106,929
2010/11	\$7,713,730
2011/12	\$7,766,363
2012/13	\$8,147,441
2013/14	\$8,665,691
2014/15	\$9,041,409

d) The CSF's Operating Funding and Surpluses

[1333] The defendants prepared a series of charts based on evidence from Mr. Lebrun showing the average per pupil operating funding that all districts received at three points in time: 2000/01, 2009/10 and 2013/14. Those points in time reflect the year prior to the change to the Enrolment-Based Funding Model, the point when the litigation commenced, and the most recent date for which the Court has complete evidence.

[1334] In 2000/01, the CSF's per pupil operating allocation came to \$10,300. The provincial average at that time (including the CSF) was \$6,262 per student. The average allocation in Competing Districts was \$6,341. The CSF fared better than all districts in the Province except four: SD49-Central Coast, SD84-Vancouver Island West, SD87-Stikine and SD92-Nisga'a.

[1335] In 2009/10, the CSF's per pupil operating allocation came to \$12,759, greater than the provincial average (including the CSF) of \$8,182, and the per pupil average in Competing Districts, which averaged to \$8,443. At that point in time, six districts received more per student than the CSF: SD49-Central Coast, SD50-Haida Gwaii, SD74-Gold Trail, SD84-Vancouver Island West, SD87-Stikine, and SD92-Nisga'a.

[1336] In 2013/14, the CSF's per pupil operating allocation came to \$13,066. The provincial average at that time was \$8,690 per student, while the average in Competing Districts was \$8,958. At that point, seven districts fared better than the CSF: SD8-Kootenay Lake, SD49-Central Coast, SD50-Haida Gwaii, SD74-Gold Trail, SD84-Vancouver Island West, SD87-Stikine, and SD92-Nisga'a.

[1337] Since about 2005, the CSF has had sufficient operating funding to generate surpluses. The Court was presented with the CSF's Statements of Financial Information beginning with the 1996/97 budget year. These records show the operating funding that the CSF received year over year, and its operating surpluses and deficits. The accumulated deficits and surpluses are as follows:

Year	Accumulated Operating Surplus/(Deficit)
1996/97	\$0
1997/98	\$2,821,704
1998/99	(-\$1,301,307)
1999/00	(-\$3,752,033)
2000/01	(-\$1,642,697)
2001/02	\$724,567
2002/03	\$775,604
2003/04	\$960,349
2004/05	\$1,434,883

2005/06	\$5,769,360
2006/07	\$8,860,586
2007/08	\$7,132,335
2008/09	\$5,793,403

[1338] Mr. Bonnefoy recalled that by 2009, the CSF was showing net accumulated operating surplus funds of \$5.7 million. Mr. Bonnefoy explained that those surpluses related to the funding received as part of the 15% Francophone Supplement. They were earmarked for spending over the course of the CSF's five-year strategic plan.

[1339] The CSF continued to generate, and then deplete its operating surplus during Mr. Allison's time as Secretary-Treasurer, which began in about January 2010. In about June 2010, the CSF had an operating surplus of about \$4 million. Since that time, the accumulated operating surplus has decreased to about \$1 million.

[1340] Mr. Allison admitted while under cross-examination that since he has become Secretary-Treasurer, the CSF has incurred non-perpetual expenses that he expected would cease in the future-- namely, the legal fees related to this litigation. I allowed that line of cross-examination because Mr. Allison put it in issue and because the adequacy of the CSF's operating funding to meet its transportation needs is a live issue.

[1341] The table below shows the CSF's accumulated surpluses and expenditures on legal fees associated with this litigation during Mr. Allison's tenure as Secretary-Treasurer:

Year	Accumulated Operating Surplus/(Deficit)	Change over previous year	Legal Expenses
2009/10	\$4,242,349	(-\$1,551,054)	\$165,523.94
2010/11	\$1,853,493	(-\$2,388,856)	\$694,455.60
2011/12	\$2,680,336	\$826,843	\$2,028,146.22
2012/13	\$1,837,208	(-\$843,128)	\$2,724,684.30
2013/14	\$1,058,719	(-\$778,489)	\$4,125,459.12

[1342] Mr. Allison conceded that from the time he became Secretary-Treasurer and the litigation began in 2012, through January 2015, the CSF spent about \$12 million on legal fees associated with this litigation. Mr. Allison refused to admit that were it not for the legal fees, the CSF would have been in surplus to the amount of \$13 million (\$12 million, plus the current \$1 million surplus). He maintained that the CSF reduced operating expenses to fund the litigation, so the CSF would have spent more on operating expenses.

[1343] The documentation shows that CSF spent just short of \$10 million on this litigation in the five years between 2009/10 and 2013/14. The amounts spent depleted the surplus by less than \$1 million in most years. Thus, the CSF paid for its legal fees primarily by cutting its operating expenditures.

[1344] Mr. Allison agreed, however, that once the litigation concludes, the CSF will be able to apply the operating funds spent on the litigation to other purposes, such as transportation costs, should the CSF Board of Trustees so decide.

e) Conclusion

[1345] The plaintiffs argue that the Province mobilized insufficient resources to permit the CSF to accomplish its mandate in its early years. The plaintiffs point in particular to the failure to recognize all of the CSF's schools, the lack of adequate transportation funding and the double administration costs being charged by school boards. In their submission, the Province was wrong to treat the CSF the same as every other district in those early years.

[1346] The defendants take the position that since 2001/02, the CSF has received far more in operating funds *per capita* than the provincial average: always in the top 10 school districts. They suggest that those few districts that receive more in operating funding *per capita* than the CSF are remote districts with whom the CSF usually does not compete, and whose unique characteristics warrant unique funding recognition.

[1347] The plaintiffs argue that to the extent that the CSF receives higher operating funding *per capita*, that is by design to recognize the unique challenges the CSF faces as the only provincial school district. They note that each of the factors relates to an added cost pressure, and observe that the CSF faces those cost pressures.

[1348] It is true that under Mr. Connolly's leadership, the Province treated the CSF in the same manner as other districts with respect to operating funding. This is clear from statements made in letters by Mr. Connolly, as well as the Review Team's mandate to ensure that the CSF was being funded consistently with other districts. This was a formal equality approach that posed the risk of failing to treat the CSF differently to achieve substantive equality.

[1349] However, the Ministry has moved away from this approach. When the Enrolment-Based Funding Model was implemented in 2002/03, the CSF began to benefit more than any other district from Unique District Factors. The plaintiffs do not challenge the operating funding system that exists today except in connection with transportation funding. As I see it, the historic issues related to the Resource-Cost Funding Model have been resolved.

[1350] Since 2002/03, at least, the CSF has been a very well-funded school district. It has generated significant surpluses every year. The CSF benefits more than majority boards from the Unique District Factors in the Enrolment-Based Funding Model: about \$17 million per year in recent years. The CSF also began benefiting from the 15% Francophone Supplement after 2006/07. It benefited from between \$7 million and \$9 million in each of the past five years.

[1351] However, I find that each of the Unique District Factors is linked to an actual cost differential that arises out of operating a school district with a certain characteristic. While the CSF is very well-funded on the operating side, its increased operating funding is designed to compensate the CSF for the actual increased cost pressures it faces because of its unique situation as a provincial school board. Similarly, the 15% Francophone Supplement is designed to fund a

number of aspects of the CSF's linguistic and cultural programming needs, and is based on the actual cost of providing those services.

B. Sources Available Exclusively or Primarily to Majority Boards

[1352] The defendants acknowledge that majority school boards have access to several sources of funding that the CSF does not: revenue from surplus space, and the benefits flowing from School Site Acquisition Charges. However, in their submission, it is important to consider what the CSF's advantage would be if it had the benefit of those incomes, proportionate to the CSF's size of the B.C. student population. They say that the amounts the CSF is missing out on are small.

1. Revenue from Surplus Space

[1353] The evidence focused on two ways school boards can use their surplus space to generate revenue: admitting and charging tuition to international students, and renting or leasing surplus space to private parties. The plaintiffs say the CSF has limited ability to generate funding from those sources because it does not have excess space. The defendants take the position that the CSF could generate funds the way that the majority boards do but chooses not to, and that any amount the CSF is missing out on is, in any event, very small.

[1354] A school board's ability to generate funds by leasing its facilities depends on the amount of surplus space it has in its asset base. The majority boards have, on average, 20.19 square metres of space per student. The Competing Districts have an average of 15.61 square metres per student. The CSF has less space per student than the provincial average, but more than the Competing Districts, at 18.29 square metres per student.

[1355] The replacement value of the CSF's assets base also sheds some light on whether it has an asset base that is similar to what the majority has. As of January 2015, the average replacement value *per capita* of district assets (excluding the CSF) was \$29,961.32. In the Competing Districts, the replacement value was \$37,656. The replacement value *per capita* of CSF assets is below both averages,

at \$24,597. About 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF.

[1356] When a school board has surplus space in its facilities, it can use that space to educate international students for a tuition fee. The revenue from international students is typically treated as operating revenue; however, it gives school districts more room to allocate operating funding to their Local Capital Reserve accounts, or to offer enhanced services, at their discretion.

[1357] The Court received evidence of the revenue that B.C.'s school districts generated from international tuition fees in 2011/12, 2012/13 and 2013/14. The information is reported as "Offshore Tuition Fees".

[1358] In 2011/12, 47 districts generated \$138,803,821 in offshore tuition fees. On average, those districts generated about \$2.9 million, ranging from a high of \$14.9 million (SD43-Coquitlam) to a low of \$6,100 (SD82-Coast Mountains).

[1359] In 2012/13, 47 districts generated \$146,488,513 in offshore tuition fees. On average, those districts generated about \$3.1 million, ranging from a high of \$16.1 million (SD39-Vancouver) to a low of \$20,000 (SD27-Cariboo-Chilcotin).

[1360] In 2013/14, 48 districts generated \$155,854,816 in offshore tuition fees. On average, those districts generated about \$3.2 million, ranging from a high of \$18.2 million (SD39-Vancouver) to a low of \$8,000 (SD54-Bulkley Valley). That year, the majority districts involved in this claim generated almost \$100 million in international tuition fees, with an average of \$555,402 generated per district in the claim.

[1361] Of course, there is also a cost associated with educating international students. The evidence shows that in 2013/14, the cost of educating offshore students, across all districts, totalled about \$103,584,383. Thus, the net income from those sources across all districts in 2013/14 was \$52,270,433: a profit margin of about 33%.

[1362] The CSF did not generate any funds from international student tuition in any of those school years.

[1363] The defendants argue that if the \$52,270,433 net profit all districts derived from international student tuition were distributed proportionately between districts, given the CSF's 1% share of the total student population, its share of the international student tuition fees would be \$522,704.

[1364] Districts may also supplement their revenue by renting surplus space. As I explain in Chapter XXXV, Leases, pursuant to Section 100.1 of the *School Act*, revenue from leases of less than five years, with no option or right to purchase ("Short-Term Leases") can be designated as either operating or capital income, at the school board's election. If the school board allocates the proceeds to capital, it will flow into the district's Local Capital Reserve account, as though the district had allocated its operating income to Local Capital.

[1365] Proceeds from leases of longer than five years ("Long-Term Leases") are treated differently. Pursuant to Generally Accepted Accounting Principles, Mr. Stewart explained, those funds must be treated as capital, and flow into the district's Restricted Capital Reserve account.

[1366] In 2011/12, the CSF generated \$19,000 from rentals and leases. The remaining 59 districts generated \$20,486,183: an average of \$347,223 per district. Among the majority districts, the revenues generated ranged from a low of \$1,600 (SD84-Vancouver Island West) to a high of \$3.4 million (SD39-Vancouver).

[1367] In 2012/13, the CSF once again generated \$19,000 from rentals and leases. The 59 majority districts generated \$22,073,311, representing an average of \$374,123 per district. Among the majority districts, the revenues ranged from a low of \$0 (SD84-Vancouver Island West) to a high of \$3.3 million (SD39-Vancouver).

[1368] In 2013/14, the CSF generated more lease revenues, about \$42,474. The remaining 59 districts generated \$21,798,175 in lease revenues, an average of

\$369,460 per district. Once again, SD84-Vancouver Island West generated no lease revenues, while, at the upper end, SD39-Vancouver generated \$3.5 million.

[1369] Mr. Allison's evidence was that the CSF generated all of its rental revenues by renting or leasing classrooms to community groups. The evidence reveals that the CSF also leases space to many daycares and preschools, but it does so for a nominal fee of \$1.

[1370] The plaintiffs also note that majority board financial statements show that they are able to generate "other income". The plaintiffs say that the CSF does not and cannot generate that income in the same way as majority boards. There is very little evidence about what is included in the "other income" category. The defendants suggest that it is primarily funding for aboriginal education. In my view, given the lack of information about what that income is and what it is targeted to, there is no way to discern whether the CSF is able to generate that funding and whether it is missing out on an advantage available to the majority.

[1371] The plaintiffs say that sometimes, school districts generate significant revenue using their surplus space. They give the example of SD48-Sea-to-Sky, which in 2013/14 received about \$2 million in international student fees and about \$338,701 in rental and lease funding. SD48-Sea-to-Sky's operating revenue in that year was \$39,899,008. The funding it generated from rentals and tuition fees represented 5.8% of its operating revenue.

[1372] On the other hand, at the low end of the scale for the communities included in the claim, SD46-Sunshine Coast had income from international tuition fees of \$100,300 and rental income of \$93,342 in 2013/14. Its total operating revenue that year was \$34,994,674. Overall, those sources accounted for 0.55% of its total operating revenue.

[1373] The CSF generated \$0 in tuition that year, and \$42,474 from rentals and leases. Its total operating revenue was \$68,384,968. Overall, international tuition and lease revenue accounted for 0.06% of its operating revenue.

2. School Site Acquisition Charges

[1374] Mr. Miller explained that some districts have access to capital funding from a Land Capital Reserve Trust Fund. Those funds are generated by School Site Acquisition Charges, which majority school boards have been able to levy since about 2000.

[1375] The *School Act* and Division 20 of the *Local Government Act*, R.S.B.C. 2015, c. 1, work in tandem to collect fees from real estate developers that school boards can use to purchase school sites. As a precondition, the school board and municipality must enter into an agreement for the collection of School Site Acquisition Charges. Then, if a new residential development would create a demand for new and expanded school sites, the municipality will collect a charge from the developer that is held in trust for the school district to purchase school sites to serve that community.

[1376] Mr. Miller advised that, much like Restricted Capital Reserve funds, school boards cannot spend funds in their Land Capital Reserve Trust Fund without approval from the Minister. This policy, too, is designed to ensure that the funds lessen the burden on the Province's Capital Planning Cycle. Further, funds must be spent on sites directly related to new residential development growth.

[1377] Mr. Miller gave evidence about how School Site Acquisition Charges came to be. The Ministry introduced the concept by way of the Capital Plan Instructions for 1996/97, then rescinded it in 1997/98 due to backlash from developers. In the spring of 1999, the Province reintroduced School Site Acquisition Charges. That year, the Capital Plan Instructions highlighted amendments to the *School Act* and the *Municipal Act* that would require local governments to collect a School Site Acquisition Charge from developers on behalf of school boards, where new residential development would create a demand for new and expanded school sites. According to Mr. Miller, the original intent was for the charges to cover one-third of the cost of site acquisitions.

[1378] By 2005, nine school boards had entered into agreements with municipalities to collect School Site Acquisition Charges. By the time Mr. Miller gave evidence in 2015, 14 school boards had entered into those types of arrangements.

[1379] The charge in each district reflects a base rate per housing unit that will be created by the new development. The rates range from a low of \$207 per unit in Chilliwack to \$800 per unit in Burnaby.

[1380] School districts have spent about \$33 million from the Land Capital Reserve Trust Funds. Mr. Palmer's affidavit shows that SD36-Surrey has used its Land Capital Reserve Trust Fund to help finance at least four site acquisitions.

[1381] As of about 2014, Mr. Miller commented, there was a further \$40 million unspent in Land Capital Reserve Trust Funds. School Site Acquisition Charges do not yet fund one third of the cost of site acquisitions as was first hoped.

[1382] The CSF does not have the ability to levy School Site Acquisition Charges. Mr. Bonnefoy raised this as an issue with the Ministry in November 2009. Mr. Miller conceded that the Ministry never discussed how School Site Acquisition Charges would apply to the CSF, as the CSF was still a new entity when the charges were being developed, and the Ministry did not imagine it would become a growing district. Mr. Stewart explained that since the charges are designed to acquire sites for schools that will serve housing developments within specified geographic boundaries, the Ministry determined that it would not have been appropriate to give the CSF a proportion of the levied School Site Acquisition Charges.

[1383] The defendants argue that the disadvantage to the CSF is a small one. They note that given the CSF's relative share of the BC student population, its share of the School Site Acquisition Charges generated in the past 10 years would be small: less than \$750,000 total. The CSF's share of the amount that has actually been spent, \$35 million, would be about \$350,000 total. The defendants also argue that School Site Acquisition Charges are like taxes, and that following *Mahe* at 367, they fall outside the minority's right to management and control.

[1384] As I see it, it does not flow from s. 23 that the CSF must have the ability to level School Site Acquisition Charges. Levying those fees is not essential to its mandate of management and control over matters going to language and culture. However, the Ministry is required to provide the CSF with minority language educational facilities on the basis of equality with the majority. Thus, the CSF's inability to levy those fees is only problematic if it contributes to the CSF being in a position of inferiority to majority school boards.

C. Sources Available Exclusively or Primarily to the CSF

[1385] The CSF has access to some sources of funding that majority boards do not. These include funding for its leases and Federal funding for both its operating and capital expenditures.

1. Funding for the CSF's leases

[1386] Currently, CSF leases are treated differently than majority school board leases. Since the operating funding model moved to the Enrolment-Based Funding Model, all majority boards are expected to fund leases out of their Operating Block grants. However, the Ministry decided that it would continue to fund leases for the CSF independently of the Operating Block grants. I discuss this in more detail in Chapter XXXV, Leases.

[1387] That said, by Mr. Miller's account, it is not the norm for school districts to operate their regular programmes in leased facilities. Most school boards own their schools.

[1388] The defendants concede that much of the lease funding the CSF receives flows directly to majority boards, supplementing their rental income. Thus, they acknowledge that the Court may not need to take that advantage into account when balancing the relative benefits that the CSF receives against its disadvantages. They do, however, suggest it would be appropriate to take into account the funding that the CSF receives for its leases with private entities, as no other districts benefit from such funding. In that connection, they name the Atchelitz Farmers' Hall, which

is the gymnasium for École Élémentaire La Vérendrye (Chilliwack), and the CSF's school board office. I note that the CSF leases from other private entities: spaces in community centres for École Élémentaire de la Vallée de Pemberton (Pemberton) and École Élémentaire La Passerelle (Whistler), as well as a church basement for École Élémentaire Rose-des-Vents (Vancouver (West)).

[1389] The evidence shows that in 2012/13, the CSF anticipated that the lease costs for the Atchelitz Hall would be \$18,242 annually, and the lease of the CSF's school board office would be \$108,360 annually. The CSF told the Ministry that by 2014/15, its lease of community centre space in Pemberton would be \$17,000 annually, that its lease of community centre space in Whistler would be about \$49,173. The lease of the church basement in Vancouver (West) was expected to be \$12,000 by 2014/15. Thus, the CSF tends to benefit by about \$204,775 per year as a result of its leases with private entities.

2. Federal Funding

[1390] The defendants urge that funding from the Federal Government is a significant benefit that the CSF receives that majority boards do not. The evidence shows that the CSF has benefited from Federal start-up, operating and capital funding.

a) Federal Start-up Funding

[1391] When the CSF was created, the Federal Government provided the Province with funds to implement minority language education in British Columbia. The Provincial Government and the Minister of Canadian Heritage (on behalf of the Federal Government) entered into the *Canada- British Columbia Special Agreement for the Implementation of Francophone Schools Governance* ("Start-Up Agreement") in March 1997.

[1392] Pursuant to that agreement, the federal government agreed to fund half the eligible expenses submitted by the Province over three years, to a maximum of \$12 million. The funds were specifically targeted to:

- a) Start up governance costs (meeting with parents; communications; start up administration; negotiations with Boards and travel);
- b) Language upgrading costs (including curriculum development, assessment and evaluation; examinations; welcome measures; learning resources; networks and mediated courses; and teacher training).
- c) Costs associated with the operation of FEA/CSF schools (support for small enrolment schools; fixed costs of special needs students; administration costs of schools and authority; additional transportation support for large geographic areas; minor capital costs, including acquisition of furniture and equipment);
- d) Capital costs (including acquiring permanent or semi-permanent assets; costs related to acquiring and developing sites; purchasing, constructing and making major alterations to buildings for school purposes); and
- e) Costs of ensuring Francophone students have access to Francophone schools, including transportation costs and boarding allowances.

[1393] Between 1996 and 1999, the CSF received a total of \$21,400,622 pursuant to the Start-Up Agreement: half from the Province and half from the Federal Government. Mr. Miller confirmed that the majority of that funding was spent on operating expenditures, including funding for the CSF's early leases. The documentation reveals that about \$14,073,640 was spent on operating costs, and \$423,900 was spent on capital costs. The remaining funds were spent on language upgrading and start-up costs.

b) OLEP Operating Funding

[1394] The Official Languages and Education Protocol ("OLEP") is a framework by which the Federal Government provides the Province with funds for French-language education. Those funds have been available for a number of years through a series of agreements known as the *Canada-British Columbia Agreement on Minority Language Education and Second Official Language Instruction* (the "OLEP Agreements").

[1395] Mr. Miller's evidence was that the CSF has consistently received about \$4 million of the \$5.5 million that the Ministry receives each year for minority language education pursuant to the OLEP Agreements: about two-thirds of that funding. Between 2005/06 and 2008/09, the CSF consistently received about \$4 million per

year in base and supplemental operating funding to improve student recruitment, hire teachers and improve access to post-secondary education. The Ministry received about \$1.5 million per year for the same purposes, which it used to develop French-language resources and examinations, and to support minority language education in the Province.

[1396] In addition to funding for minority language education, the OLEP Agreements provide the Province with funds targeted to French as second language instruction. Those funds are allocated on a per-pupil basis to majority school boards offering French immersion and core French as second language courses. The CSF also receives some funding under this heading to offer Francisation to its students.

[1397] The evidence shows that the Federal Government provides the Province with a total of about \$5.5 for minority education and \$16 million for French as a second language, for a total of \$21.5 million per year. The CSF receives about \$4.5 million, or about 18% of that funding, while it has 1% of B.C.'s student population. If those funds were distributed *per capita*, assuming the CSF has 1% of the population, its CSF's share would be \$215,000. Thus, its net benefit above its pro rata share is \$4,285,000 per year.

c) Federal Capital Funding

[1398] On the capital side, Mr. Miller explained, the Province entered into an initial agreement and a series of amending agreements for the Federal Government to contribute funding to the CSF's capital projects. Those funds are available exclusively to the CSF.

[1399] Mr. Miller explained that the first agreement concerned funding that was expected to flow between 2001 and 2005. The *Canada-British Columbia Auxiliary Agreement on Capital Projects* (the "Special Agreement") was completed in March 2002. Pursuant to that agreement, the Federal Minister of Heritage agreed to contribute up to \$15 million toward capital projects for the CSF. The funds could only be spent on enhancements to the schools for "community facilities".

[1400] When the Special Agreement was signed, it listed a number of projects and estimated the federal contributions the CSF planned to request up to the \$15 million maximum. At that time, two projects, for École Gabrielle-Roy (Surrey) and École André-Piolat (North Vancouver), were at an advanced planning stage. The plan envisioned that the Federal Government would contribute about \$2,057,367 to École Gabrielle-Roy, and a further \$1,541,397 for École André-Piolat.

[1401] The Special Agreement also listed a number of future projects that the Province and the CSF anticipated would be approved going forward. Since those projects were not approved or underway at the time, the Special Agreement was amended from time to time to make more of the \$15 million available for the projects that were ultimately approved.

[1402] Mr. Miller advised that, by September of 2006, the \$15 million in Special Agreement funds were all spent, and Minister Shirley Bond signed an agreement to that effect. The federal funds were spent as follows, on the following enhancements to CSF schools:

Project	Federal Funds	Federal Dollar Enhancements	Estimated BC Funding
École Gabrielle-Roy (Surrey)	\$2,082,091	Pre-school; experimental theatre; Expanded multipurpose room	\$8,624,017
École André-Piolat (North Vancouver)	\$1,541,397	Pre-school; Expanded Gymnasium and Library; Performing Arts Component; Community Foyer	\$9,049,392
École L'Anse-au-Sable (Kelowna)	\$371,710	"Renovation and addition"	\$4,570,290
École Élémentaire du Bois-joli (Delta)	\$1,300,000	School and "Community Space"	\$1,600,000
École Élémentaire Côte du Soleil (Powell River)	\$1,100,000	School and "Community Space"	\$1,526,990
École Élémentaire Franco-Nord (Prince George)	\$1,104,802	School and "Community Space"	\$1,725,092

École Victor-Brodeur (Victoria)	\$3,000,000	Performing arts centre; daycare; pre-school; after school programme; site development; library books for adult use	\$16,144,845
École Secondaire Jules-Verne (Vancouver)	\$4,500,000	Full-day kindergarten; preschool; performance arts; expanded library, gymnasium and multipurpose area; ancillary spaces	\$20,799,143 (This was an estimate at the time, and the actual BC contribution was higher)

[1403] Although the Special Agreement has expired, under the most recent OLEP Agreement, covering the years 2009/10 through 2012/13, a provision allows the Federal Government to approve complementary contributions to emerging priorities identified by the Province, including infrastructure projects (the “OLEP Complimentary Funding Provisions”). Mr. Miller advised that these provisions allow some capital projects to be considered for OLEP capital funding.

[1404] Mr. Miller recounted that in 2011 the CSF received \$1.2 million in complementary OLEP capital funding for a new CSF school, École Élémentaire Mer et Montagne (Campbell River). He continued that this was the first new Federal Government funding made available to the Province for CSF capital projects in addition to the \$15 million provided under the Special Agreement. As of the time the evidence at trial concluded in August of 2015, a request for federal funding for the École des Pionniers Replacement Project (Port Coquitlam) was outstanding.

[1405] Overall, then, pursuant to the Special Agreement and the OLEP Complementary Funding Provisions, since 2002 the CSF has received \$16.2 million in capital funding that majority schools are not eligible to receive.

D. Conclusion

1. Submissions

[1406] The plaintiffs argue that majority boards have access to many funding sources for capital projects that the CSF does not. The defendants argue that any disadvantages to the CSF are more than counterbalanced by funding sources available to the CSF that are not available to the majority.

[1407] The plaintiffs raise a preliminary issue with the defendants' counter-argument: that the defendants conflate capital and operating funding flowing to the CSF and majority boards. While the sources of funding the defendants point to represent a mix of operating and capital funding, in my view this is not problematic. Where the majority or minority has access to operating funds that the other does not, it can allocate those funds to its Local Capital Reserve, creating a capital advantage. However, where operating funds are meant to compensate a district for an actual cost it incurs, it is not reasonable to infer that those funds could be allocated to capital expenditures, and they should be removed from the balancing of funding sources.

[1408] The plaintiffs also argue it is not appropriate to look at the benefits to the CSF on a *per capita* basis. As I explain in Chapter VIII, Entitlement, in *Association des Parents- SCC*, Karakatsanis J. stated that, in giving effect to s. 23 rights, the courts should not focus on *per capita* costs as a marker of formal equivalence (at para. 33). I do not take her comments to mean that *per capita* costs and funding are irrelevant. The comments must be understood as suggesting that governments are not likely to meet their duty by providing the same amount of funding, *per capita*, to minority boards as to the majority. To ensure substantive equivalence, *per capita* funding may need to be higher for minority boards because they incur higher *per capita* costs. What *per capita* funding a government provides to the majority and the minority, and what costs a minority board incurs to provide minority language education, are relevant factors that can help a Court to determine if the Province is providing sufficient public funds for Minority language educational facilities.

[1409] The plaintiffs say that the CSF is disadvantaged when it comes to acquiring school sites because it is not eligible for School Site Acquisition Charge funding. They suggest that the Province could have put in place a different system that would have given the CSF access to a proportion of funds generated by the charges, or a system specific to the CSF in light of its need to acquire school sites. The plaintiffs also argue that since the Ministry has generated cost savings with respect to site acquisitions due to School Site Acquisition Charges, the Ministry ought to have applied those savings to sites for the CSF.

[1410] The plaintiffs also take the position that majority boards are able to generate very large sums in supplementary operating revenue from their surplus assets. They say that although the CSF is technically allowed to generate revenue in the same way, because it lacks an asset base and surplus space, it is unable to generate the same amount of supplementary operating revenue.

[1411] While the plaintiffs acknowledge that the CSF benefits from federal funding, they advise that in light of the CSF's growing enrolment, the funds it receives represent a smaller percentage of the CSF's operating budget each year.

[1412] The defendants acknowledge that the CSF does not have access to School Site Acquisition Charges or a historic asset base. However, their position is that the CSF has substantially "caught up" with the majority at this point, and does not have significantly less space than the majority. Thus, they say, that it is open to the CSF to also generate funding from leasing its facilities and educating international students. They note that the CSF chooses to lease and rent its surplus space, at no charge, to early childhood education providers. Thus, they say that the CSF has made a decision to focus on providing early childhood services at the expense of revenue it could earn if it were to seek to enrol international students or to lease for profit.

[1413] The defendants suggest that regardless, if the CSF were eligible for the advantages that majority boards have, given its small proportion of B.C.'s student population, its relative benefit from those advantages would be small. When making

that argument, they take a generous approach that assumes the CSF has a 1% share of the overall student population, as it does in 2015/16. They also take into account the gross international student income as opposed to the net income. Then, they annualize the benefits that have accrued to majority boards as shown in the evidence.

[1414] Based on those premises, the defendants urge that the CSF is at most missing out on about \$1.5 million in international student revenues, \$220,000 in rental income, \$1.1 million in “other income” and \$54,000 in School Site Acquisition Charges annually. They maintain, of course, that international student income and “other income” is exaggerated. The defendants say that even taking that most generous approach, the CSF is losing out on about \$3 million annually.

[1415] In the defendants’ submission, those benefits are completely counterbalanced by the benefits that the CSF receives. They point out that the CSF’s annualized pro rata benefit from OLEP funding alone would be sufficient to offset the advantages to the majority boards. Above, I conclude that benefit is about \$4,285,000 per year. If all OLEP Funding were divided pro rata, the CSF would only be entitled to about \$215,000. Thus, its net benefit above its pro rata share is \$4,285,000 per year. The defendants suggest that the Court should consider that the net surplus the CSF has above its pro rata share would counterbalance any disadvantages to it.

2. Analysis

[1416] In my view, the majority boards have some clear advantages over the CSF with respect to capital funding.

[1417] For one, because the CSF is a very new school district, it has had less opportunity to generate Local and Restricted Capital Reserves over time. It does not have a historical asset base that would allow it to generate capital reserves by disposing of surplus properties. It has not been allocating portions of its operating budget to its capital reserves, which is understandable given the fact that operating

funds are directed at actual cost differentials related to the CSF's operations. The CSF has generated less in capital reserves than the approximately \$2 million in capital reserves that would be its proportionate share on a *per capita* basis if all the capital reserves across all districts were divided between school districts. As a result, I find that Local and Restricted Capital reserve accounts are benefits that disproportionately accrue to the majority school boards.

[1418] This is troubling because capital reserve amounts play a small role in project prioritization in the Capital Planning Cycle. As Mr. Palmer explained, after the Minister ranks all projects against one another in a Consolidated Capital Plan, some projects might be approved out of the order of priority where a district can contribute some Local or Restricted Capital. This has the effect of creating more room in the Capital Envelope, which allows the Minister to approve more projects overall. As I explain in Chapter XXXVI, Expansion Projects and the Enrolment Driver, in one instance SD36-Surrey was able to contribute some capital reserve to projects, which allowed several of them to be approved at once. CSF projects in Penticton and Sechelt were passed over: projects in areas where I conclude that rightsholders are not receiving the facilities they are entitled to. Thus, as I develop in later chapters, the CSF has been hurt by its proportionate lack of access to Capital Reserve funds.

[1419] With respect to funds that can be generated from surplus assets, I note that the value and space in the CSF's asset base, *per capita*, is within the range of what majority school boards have access to. However, that does not mean that the CSF is not disadvantaged. While the value of the CSF's assets and its space may be similar to what the majority has access to, those schools are spread throughout the Province and cannot be closed and consolidated. Further, the CSF has greater need for space than majority boards because of the challenges that arise out of teaching split classes and instructing a significant proportion of students with French as a second language needs. As a result, the CSF has less ability to use its asset base to generate funds by leasing or disposing of property.

[1420] The CSF has not generated any revenues from international student tuition fees. The 48 majority school boards who did so in 2013/14 earned net revenues of about \$52,270,433: an average of 1,088,967 per district. Some districts, like SD39-Vancouver, generate considerably more.

[1421] The CSF generates limited revenues from leases compared to majority school boards: in 2011/12 and 2013/14, the CSF generated about 11% of the provincial average each year. At the same time, a few districts generate no lease revenue.

[1422] Part of the reason the CSF generates so little lease revenue is that it chooses to lease its surplus space to early childhood education providers for a notional amount of \$1. However, in my view, even if the CSF made different decisions, because it does not have the ability to close and consolidate schools the way that majority boards do, it will never be able to generate the type of lease revenue and revenue from international students that accrues to majority boards. It cannot close schools to create standalone surplus buildings to lease to private entities or to develop schools for international students.

[1423] Majority boards also have access to School Site Acquisition Charges. These have been a boon to SD36-Surrey, for example. Like the CSF, SD36-Surrey needs to acquire many school sites. Because it has access to those charges, it has been able to acquire sites more rapidly without the types of challenges that can arise when waiting for funding in a Capital Planning Cycle. The CSF also needs ready access to funds to acquire schools sites; it therefore lacks an advantage available to other growing majority boards.

[1424] The Ministry's policy rationale for not allowing the CSF to levy those charges is a reasonable one: The funds are meant to ensure there is space to build a school to serve new housing developments. Given the very small linguistic minority that exists in British Columbia, it is reasonable to assume that new housing developments will need majority, not minority schools. Regardless, the funding

source gives majority districts flexibility to move to acquire sites quickly, which the CSF does not have.

[1425] There are, of course, some funding sources that are available exclusively to the CSF. Most of those are neutral. I do not consider it relevant that the CSF benefits more than the majority boards from the Unique District Factors in the Enrolment-Based Funding Formula. Each of the Unique District Factors is linked to an actual cost differential that arises out of operating a school district with a certain characteristic. While the CSF is very well-funded on the operating side, its increased operating funding is designed to compensate the CSF for the actual increased cost pressures it faces because of its unique circumstances.

[1426] The 15% Francophone Supplement falls in the same category. In every year since about 2006, the CSF has received considerable funding pursuant to the 15% Francophone Supplement: about \$5.6 to \$9 million each year. While this is an advantage that majority boards do not have, it is an advantage that recognizes the unique operating cost pressures that the CSF incurs to deliver the linguistic and cultural aspects of its programming. As a result, it should not be weighed against the capital advantages available to majority school boards.

[1427] As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority received. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts. And well it should-- the CSF has seen significant enrolment increases on a *per capita* basis between 2001/02 and 2014/15 while most other districts were experiencing declining enrolment. It has also been attempting to move from leased to owned space. Given that the Ministry did not implement a Capital Envelope specific to the CSF's needs

when it was first created, the Ministry is rightfully still working to ensure that the CSF acquires homogeneous facilities where the numbers so warrant.

[1428] The CSF also benefits from leases paid by the Province. The defendants rely in particular on the CSF's leases from private entities. By my calculation, in 2012/13, those leases were expected to come to \$204.775 for 2014/15. While this is a benefit to the CSF that majority school boards do not have, in my view, it is essential that the Ministry fund those leases. The Ministry has an obligation to ensure that the CSF has space to accommodate rightsholders, and to provide education on the basis of equality to the majority where the numbers warrant it. École Élémentaire La Vérendrye (Chilliwack) does not have a gymnasium, which is an important component of an educational experience. All districts operate some form of school board office: the Ministry has an obligation to ensure the CSF has some sort of board office space, too. Given that École Élémentaire Rose-des-Vents (Vancouver (West)) is severely overcrowded and that École Élémentaire de la Vallée de Pemberton (Pemberton) and École Élémentaire La Passerelle (Whistler) were both pushed out of their leased SD48-Sea-to-Sky facilities, the Province properly funds leases with private entities to provide rightsholders with facilities.

[1429] The most significant benefits that accrue to the CSF that do not accrue to majority boards are federal funds. Those are the ones that the defendants press most strenuously.

[1430] I do not consider it appropriate to weigh the \$21 million in funding the CSF received pursuant to the Start-Up Agreement against the benefits that accrue to majority school boards. Those funds were applied to help move the CSF from the point of non-existence closer to equality with the majority.

[1431] OLEP Operating funds are in a similar category. Those funds are designed to compensate the CSF for the additional costs associated with delivering minority language education in British Columbia. When the CSF prepared the Funding Requirements Request detailing its request for additional funds from the Ministry, it identified federal dollars from the OLEP Agreements that it could apply to its

proposed linguistic and cultural programming. The Province reviewed the CSF's Funding Requirements Request and looked for duplication between Federal and Provincial dollars, and reduced the amount it would pay to help the CSF to meet its additional financial burden accordingly. As a result, I do not consider that the approximately \$4.5 million the CSF receives annually pursuant to the OLEP Agreements for operating purposes is properly counted as a benefit that the CSF receives that the majority does not.

[1432] On the other hand, the CSF has had access to \$16.2 million pursuant to the Special Agreement and the OLEP Complementary Funding Provisions for capital funding. In my view, this amount fully offsets the revenues from surplus spaces that accrue to majority boards.

[1433] In some ways, these funds also help to offset the fact that the CSF also does not have access to the same capital reserves and School Site Acquisition Charges that majority boards do. Mathematically, it certainly does. However, the federal capital funds do not assist the CSF to have capital projects approved or to have funding readily available to access sites. Federal funds are typically requested and made available after the Minister supports a project and it is underway. Since the Special Agreement expired, there is no guarantee those funds will continue to be made available. By contrast, Local and Restricted Capital Reserve amounts as well as School Site Acquisition Charges are available prior to project approval, and can help a district create a business case to persuade the Minister to move its projects forward. It can also help a district to move quickly to acquire a site when it becomes available. Federal capital funds do not play that role.

[1434] I conclude that the CSF is in a better position than majority boards, mathematically. That is appropriate. The CSF has higher expenses than majority boards do. It receives more than majority school boards do to give rise to true substantive equality. As I see it, the CSF receives sufficient funding to bring it to the point of substantive equality with majority school boards.

[1435] However, the CSF faces added challenges with respect to the public funds made available to it for minority language educational facilities that majority school boards do now. In particular, the sources of capital funding available to the CSF do not give it the same flexibility majority school boards have to move forward with its capital projects expeditiously.

[1436] However, I do not find that the disadvantages are sufficient to ground a breach of s. 23 of the *Charter* on its own. To ground such a claim, the disadvantages must deprive the CSF of its right to management and control or rightsholders of the facilities they are entitled to. That is because the disadvantages can be counterbalanced in many ways. The evidence shows many instances of the Ministry accounting for this difference and making exceptions to account for the CSF's disadvantaged position. For example, from time to time the Ministry accelerated funding for the CSF to acquire a site in Vancouver (West) when no site had been identified. That would allow it to move quickly to seize an opportunity despite its lack of Local and Restricted Reserve Capital.

[1437] Thus, as I see it, the disadvantages the CSF faces are primarily relevant to the question of causation. The evidence shows examples of the Ministry counterbalancing these forces in some ways, such as by accelerating funding. In other instances, the evidence shows that the CSF has been hurt by the different funding sources available to it. So, when assessing the Community Claims, I will consider the extent to which the CSF's disadvantaged position caused rightsholders to be deprived of the minority language educational facilities they are entitled to.

[1438] The CSF's financial position will also be relevant to the question of justification, as it sheds light on what the system yields for the CSF. I will also have regard to the CSF's financial position when considering the extent to which the Ministry's capital funding system adequately responds to the CSF's needs: particularly the plaintiffs' challenge to the Ministry's method of approving Expansion Projects (Chapter XXXVI, Expansion Projects and the Enrolment Driver), Building Condition Projects (Chapter XXXVII, Building Condition Projects and the Building

Condition Driver) and School and Site Acquisition Projects (Chapter XXXVIII, Site and School Acquisition Projects).

XIII. THE ANNUAL FACILITIES GRANT

[1439] School boards are responsible for maintaining school buildings over the course of their economic lives. They do so with the Annual Facilities Grant (“AFG”): a targeted funding envelope provided to school boards by the Ministry to allow them to maintain school facilities. The plaintiffs raise two types of issue with the AFG: theoretical issues concerning its failure to account for the CSF’s unique needs, and practical issues with how it has been calculated for the CSF. I address each of those sets of arguments after describing how the AFG operates.

A. The AFG

1. History of the AFG

[1440] Mr. Miller recalled that the Minister began allocating funds to school districts for building maintenance in about 1988. At that time, the funding was known as the Annual Capital Allowance. Over time, the Annual Capital Allowance became known as the Annual Capital Grant, before becoming the AFG. Once entirely an allocation of capital funding, the Ministry now considers the AFG to be a mix of operating and capital funding.

[1441] In the 1990s, Mr. Miller recounted, the Annual Capital Allowance or Grant was calculated based on the actual amount of educational space operated by a school district, and its age and replacement cost. This is consistent with the Resource-Cost Funding Model that was in place at the time.

[1442] Districts also had access to some capital funds for maintenance through Capital Planning Cycles. Historically, projects worth up to \$1.5 million were treated as minor capital projects. School boards could fund those projects using their Annual Capital Grant, or they could apply for minor capital project funding in a Capital Planning Cycle.

[1443] In June 2002, the Ministry announced that it was eliminating funding for minor capital projects from the Capital Planning Cycle process and rolling it into the AFG. The Ministry also eliminated funding for emergent projects through Capital Planning Cycles and asked school boards to establish reserves for emergent health and safety expenditures. Government also eliminated the requirement for school boards to seek the Minister's approval for their minor capital expenditures. School boards were free to spend their AFG at their discretion on permitted projects. Mr. Miller explained that the change was designed to give districts more autonomy around capital maintenance, much like the move to the Enrolment-Based Funding Model at the same time.

[1444] At the same time as this change was made, the Ministry increased province-wide funding for the AFG from \$50 million to \$100 million. The Ministry increased Province-wide funding to \$110 million at some point, where it stayed until about 2008.

[1445] According to Mr. Miller, the Ministry always expected districts to also use a portion of their operating allocation to maintain facilities. The Resource-Cost Funding Model included a function for operating and maintenance expenses, which was in excess of \$100 million for all school districts. Those funds were rolled into the new Enrolment-Based Funding Model. The increased AFG funding was not intended to replace those funds.

[1446] The AFG policy changed again in 2008/09. At that point, Government once again began requiring boards to submit lists of projects for which they intended to use their AFG funds. Further, in 2009/10, noticing that boards were accumulating AFG funds year over year, the Ministry began taking a "use it or lose it" approach to AFG funds to eliminate idle cash sitting on school board balance sheets.

2. The AFG Formula

[1447] When the Ministry created the AFG in 2002, it changed its model for calculating it. Prior to 2002, the Annual Capital Grant allocated funds on a per-

school basis, consistent with the Resource-Cost Funding Model. In 2002, the Ministry implemented a formula based on square-metres-per-student, modified based on the average age of facilities, their replacement cost and local geographic factors related to the operation of schools. Mr. Miller explained that the new formula was meant to encourage districts to close and consolidate schools operating under capacity to improve efficiencies. He acknowledged the change favoured districts with growing enrolment.

[1448] In 2002/03, the Ministry planned to recalculate the AFG annually, based on district enrolment. This continued every year until 2008/09. Mr. Miller's evidence was that this, too, would tend to favour growing districts.

[1449] According to Mr. Miller, the starting place for calculating the AFG is enrolment and the space per student allowed by the Area Standards. The Ministry uses the Area Standards to determine the amount of space that a district ought to use to accommodate its enrolment. Based on those factors, the Ministry determines a notional amount of space, or an "imaginary building", for every district.

[1450] From there, the notional square footage in the imaginary building is converted to a replacement cost value using the Unit Rates. That amount is then adjusted pursuant to a number of factors to recognize the uniqueness of each school district.

[1451] Some adjustments relate to the buildings that the district actually owns. An adjustment is made to recognize the average age of a school board's facilities, as well as their actual replacement cost. This is intended to recognize that older buildings are more costly to maintain. The age of facilities can result in an adjustment up to 10%.

[1452] Other adjustments relate to the school district's location. Among them, the AFG allocations are adjusted to take account of school districts that cannot close and consolidate rural schools even if they are operating below their capacity. So, where a school is eligible for the "small community" supplement under the

Enrolment-Based Funding Model, half of the surplus capacity in the remote school is included in its enrolment count.

[1453] Mr. Miller's evidence is that in 55 districts, the replacement value of the imaginary building is multiplied by a factor of 1.0 or 1.3-- up to a 30% increase-- to account for location factors. He noted, however, that there are about five outliers: SD87-Stikine, for example, has a multiplier closer to about 1.75.

3. Eligible Expenditures

[1454] According to Mr. Miller, school districts use the AFG to maintain their buildings and to perform minor capital renovations. The AFG policy sets out 12 categories of expenditures for which districts may use their AFG funds. They are:

- Roof Replacements
- Mechanical System Upgrades
- Electrical System Upgrades
- Facility Upgrades
- Loss Prevention Projects
- Functional Improvements
- Technology Infrastructure Upgrades
- Site Upgrades
- Disable Access
- Asbestos Abatement
- Health and Safety Upgrades
- Site Servicing

[1455] Mr. Miller recalled that these categories have remained relatively constant over time, subject to two amendments. In around 2008, the Ministry began allowing districts to purchase play equipment to address safety issues. When the Ministry began requiring PIRs in 2009/10, the policy was amended to allow school districts to use AFG funds to complete feasibility work.

[1456] The AFG policy also gives examples of projects that are not to be pursued with AFG funds: Expansion Projects, building acquisitions, site acquisitions and

acquisition of equipment, furnishings, computers and vehicles. Mr. Miller specifically mentioned that a district could not build a gymnasium with its AFG funding.

B. Theoretical Suitability of the AFG Formula to the CSF

[1457] The plaintiffs raise a series of issues with the AFG formula, and its theoretical ability to take into account the CSF's unique needs. In particular, they take issue with the fact that the AFG cannot be used for Expansion Projects, and that the rationale for the AFG-- promoting efficiency by encouraging school consolidations-- does not apply to the CSF.

1. Expansion Project Ineligibility

[1458] The plaintiffs argue that the CSF is disadvantaged in the construction of new Expansion Projects worth less than \$1.5 million due to the confluence of the AFG formula and the CSF's need for school sites. The plaintiffs argue that due to the limits in the AFG policy, it cannot use its AFG to finance Expansion Projects worth less than \$1.5 million. The plaintiffs did not direct the Court to any Expansion Projects worth less than \$1.5 million that it was unable to pursue because it was not eligible for Capital Planning Cycle funding.

[1459] The plaintiffs say that they are disadvantaged by the fact that the AFG funds cannot be spent on Expansion Projects because they do not have the same ability as majority boards to generate Local Capital Reserves to apply to Expansion Projects. In my view, that disadvantage does not arise out of the AFG; it is a disadvantage related to the CSF's lack of an asset base. No districts are able to use their AFG funds for Expansion Projects because they are targeted to a wholly different purpose.

[1460] In this instance, the equal application of the AFG policy to all school districts does not have an adverse or disproportionate impact on the CSF. What appears to be a disproportionate impact-- the CSF's outstanding need for Expansion Projects-- is wholly divorced from the issue of the AFG, and relates only to the CSF's need for

more funding. Indeed, if the CSF had sufficient assets, the problem would be wholly remedied.

[1461] If anything, a revised AFG formula might be a way of taking into account that the CSF cannot generate Local and Restricted Capital Reserve. However, if that change were made, it would only create a new disadvantage for the CSF: a lack of funding for building maintenance. This reinforces the view that the problem the plaintiffs cite is wholly unrelated to the AFG. While the CSF may want to use its AFG for Expansion Projects, the fact that it cannot is not the cause of its lack of funding to pursue Expansion Projects.

2. Rationale for the AFG

[1462] The evidence is clear that the policy reason for amending the AFG formula in 2002 was to build cost incentives into the funding system for school boards to become more efficient by closing and consolidating schools in light of declining enrolment.

[1463] The plaintiffs argue that this policy objective does not apply to the CSF. They note that the CSF does not have a sufficiently large and proximate asset base to close and consolidate schools. They argue that the CSF had growing enrolment, was seeking new assets and was attracting new students in 2002, and thus differed from majority boards, which had acquired school facilities over many years before experiencing declining enrolment.

[1464] The plaintiffs go further and argue that a model that encourages school closures and consolidations is incompatible with the CSF's circumstances and mission, does not meet the positive obligation on the Province to preserve and promote minority language education, and is therefore contrary to s. 23 of the *Charter*. They argue that due to the regional nature of the CSF's schools and travel times between communities, the CSF cannot close and consolidate schools. They say that since the CSF cannot do what the AFG model was designed to encourage

school districts to do, it has necessarily resulted in underfunding the CSF's maintenance and renovation needs.

[1465] I agree that the policy rationale for moving the AFG to a per-pupil funding model does not apply to the CSF. The revised AFG aims to encourage school consolidations and closures by moving to a per pupil operating formula. It created a financial disincentive to operating schools that were under capacity. It did not create a positive incentive that the CSF was deprived of. Because the CSF was a growing district, it was not hurt by the policy in the way that districts experiencing enrolment decline were. Thus, the mere fact that the AFG Policy created a burden that, in theory, would not apply to the CSF, is not a rationale for concluding that the policy is contrary to s. 23 of the *Charter*. The Ministry can-- indeed, it must-- develop policies that have rationales not specifically targeted to the CSF.

[1466] The plaintiffs also urge that many CSF schools are closed majority schools that are larger than the Area Standards would allow given the CSF's enrolment. The plaintiffs argue that the CSF must maintain those large facilities, regardless of the number of students enrolled in them. They give the example of École des Pionniers (Port Coquitlam), which the CSF acquired in 2000. The plaintiffs argue that the CSF acquired a large school, and despite increasing enrolment, "the AFG formula has consistently funded less than the actual cost of maintaining the École des Pionniers facility, because the formula in place since 2003/04 determines the amount of AFG funding based on enrolment, not on the amount of educational space operated."

[1467] While this is an interesting argument, the plaintiffs have not led the facts to establish it. It is an argument that the AFG policy has adverse effects on the CSF because it operates schools that are larger than the school's enrolment would call for based on the Area Standards. However, the plaintiffs did not provide any argument or analysis of how the space the CSF operates compares to the Area Standards. While the CSF makes a vague reference to underfunding the cost of maintenance at École des Pionniers (Port Coquitlam), the plaintiffs do not provide any information about the cost of maintenance at that school as compared to the

amount of AFG funding it received relative to enrolment at that school. Moreover, the Ministry funded millions of dollars of renovations to École des Pionniers. Further, they do not take into account that the CSF was generating lease revenues from leasing surplus space at École des Pionniers to an independent school for many years, which it could have applied to the maintenance of the building.

[1468] Finally, the plaintiffs say that to the extent the AFG model purposefully underfunded school maintenance to encourage school consolidations and closures, it is inconsistent with the Province's positive obligation to promote minority language education and construct its infrastructure. I do not understand that the AFG Policy intentionally underfunded school maintenance; it merely funded maintenance appropriately based on the amount of space that the Ministry thought it appropriate for school districts to operate based on their enrolment and the Area Standards.

C. Calculation of the CSF's AFG Allocation

[1469] The plaintiffs also challenge the manner in which the AFG formula has been applied to the CSF. They take the position that the defendants have made numerous decisions related to AFG that have disadvantaged the CSF and failed to take into account its unique circumstances.

1. AFG Funding Freeze

[1470] Mr. Stewart explained that in June 2009, the Province was beginning to experience some budgetary pressure related to a global economic recession. The Ministry was directed to look for expenditures that could be deferred without breaching any legal commitments.

[1471] Mr. Miller advised that around this time, depending on whether one looked at financial circumstances in March or June of 2009, three or six districts had AFG deficits. School districts also had reserves of \$76.4 to \$98 million in their AFG accounts. Mr. Miller acknowledged that since AFG spending tends to be cyclical, whether a district showed as being in a reserve or deficit might relate to where they were in their spending cycle of maintenance and expenditures.

[1472] The CSF was among those districts that had an AFG surplus. The evidence shows that in Mr. Bonnefoy's time as Secretary-Treasurer, the CSF consistently had a surplus in its AFG account. Those surpluses are set out below:

School Year	Accumulated Surplus
2004/05	\$1,441,704
2005/06	\$1,385,602
2006/07	\$1,335,040
2007/08	\$899,660
2008/09	\$403,747

[1473] Mr. Bonnefoy's evidence was that the CSF's AFG surpluses were not surpluses in the traditional sense. Rather, he implemented a programme whereby the CSF spent its AFG in three-year cycles. Some maintenance costs, like roof replacements, could prove very costly, so in his view, it was better to save for those projects over a three year period so as not to forgo completing other needed maintenance projects. I infer from the fact that the CSF's AFG savings were less than a third of their peak in 2004/05 that the CSF was at the end of one of its spending cycles.

[1474] In 2008/09, Government reduced AFG funds. Initially, the grant was not provided, and school boards were asked to fund projects out of their reserve accounts and surpluses. By the end of 2009/10, some funds became available, and about half of the normal AFG funds, \$50 million, were provided to school boards. In 2010/11, \$55 million was allocated to boards. Thus, the Ministry spread one year's AFG allocation over two years. The annual allocation was restored to \$110 million for 2011/12.

[1475] According to Mr. Bonnefoy, the CSF did not consider that it had any unspent AFG funds at that time. He acknowledged that the CSF showed an AFG surplus in 2008/09. However, the CSF had already made commitments to renovate École Victor-Brodeur (Victoria) and École Élémentaire Océane (Nanaimo), and to do some

roof replacements. Mr. Bonnefoy expected that the CSF would find itself in a shortfall, and would have to compensate by using its operating funding.

[1476] The plaintiffs argue that the Ministry's conclusion that cutting the AFG would have little to no impact on school district operations was wrong with regard to the CSF. They point to Mr. Bonnefoy's evidence that the CSF had no AFG reserves in 2009/10 that it did not plan to spend.

[1477] The defendants take the position that although Mr. Bonnefoy stated he had a plan in place, he could not give specifics. They also note that even if the CSF did not have any AFG funds set aside, in that year the CSF had an operating surplus of \$4.7 million. Thus, the defendants say there was no impact to the CSF.

[1478] In my view, the evidence does not support that the Ministry's decision not to provide the entire AFG allocation in 2009/10 and 2010/11 disproportionately impacted the CSF. It is within the Province's jurisdiction to determine funding for the education system so long as it does not trench on the CSF's right to management and control over matters going to language and culture and ensures that rightsholders receive what they are entitled to.

[1479] The plaintiffs have not pointed to any facilities that rightsholders were deprived of due to the Ministry's decision, including the right to substantive equality at the provincial level. The funding cut to the AFG in 2009/10 and 2010/11 was certainly an inconvenience for the CSF. It was an inconvenience for all school boards. The evidence does not establish that the CSF was any worse off than other districts because of the decision, or that it had any particular adverse impact on the CSF because of its role delivering minority language education.

[1480] Further, in the particular context of the type of work that is typically performed with AFG funding-- roof replacements and other projects designed to extend a building's economic life-- I do not consider that a decision to withhold funding trenched on the CSF's right to management and control over matters going to language and culture.

2. Modification Based on Leased Space

[1481] The plaintiffs argue that the application of the AFG formula to the CSF is flawed because the Ministry does not take into account the age of the CSF's leased facilities.

[1482] I find that the CSF receives AFG funds for its enrolment in leased facilities. While Mr. Bonnefoy maintained that he thought the CSF did not, he conceded he might be wrong. I note that in the spring of 2010, Mr. Cavelti confirmed to Mr. Allison that the CSF's AFG was calculated based on a district-wide enrolment count, including students in leased space.

[1483] However, the evidence reveals that the Ministry does not take into account the age of CSF schools in leased facilities. As I explain above, the AFG formula modifies the amount that school districts receive based on building age to recognize the additional cost of maintaining older facilities. The age of a facility can account for up to a 10% increase in a district's AFG allocation. Mr. Miller testified that the CSF receives a 5% increase, placing it in the "middle of the pack". Mr. Miller had never calculated how the CSF's AFG funding would change if the age of its leased facilities were taken into account.

[1484] Of course, the CSF is also very hesitant to use its AFG on leased space. Mr. Bonnefoy advised that when he was Secretary-Treasurer for the CSF between 2004 and the end of 2009, the CSF did not use its AFG to renovate or improve leased space. While Mr. Bonnefoy knew that the CSF was not restricted from using the AFG funds on leased space, it was his view that the funds should not be spent on facilities that the CSF did not own. Mr. Allison acknowledged that he, too, avoids spending AFG funds on leased buildings.

[1485] Despite the general policy, the CSF has used its AFG funds on leased facilities from time to time. As I note in Chapter XXII, École Élémentaire Entre-lacs (Penticton), the CSF has recently used its AFG funds to renovate the leased, homogeneous facility in that community.

[1486] The plaintiffs argue that many of the leased school facilities the CSF operates are old, closed majority schools. As a result, they say that there are increased costs associated with maintaining them. They note that some of the oldest schools in which the CSF operates are leased, including École Élémentaire du Pacifique (Sechelt) and École Élémentaire Entre-lacs (Penticton). They suggest that it is inappropriate to calculate the AFG for the CSF in a manner that ignores the age of those facilities, as that has a negative impact on the quality of a CSF education.

[1487] The plaintiffs argue it is reasonable for the CSF to avoid investing its AFG in leased buildings that belong to the majority. They reject the notion that the CSF could have applied its AFG funds to remedy any of the issues in the claim.

[1488] The evidence reveals that the average age of the CSF's owned schools is about 36 years. The average age of the CSF's leased schools is 37 years. Of course, the average age of the CSF's leased homogeneous schools tends to be lower than the average age of its leased heterogeneous schools. Leased homogeneous schools are, on average, about 46 years old, while leased heterogeneous facilities are an average of 30 years old. Even so, I find that the evidence falls short of establishing that the CSF's leased facilities are substantially older than its owned facilities.

[1489] I also agree with the defendants that there is no discernible difference between the quality of the CSF's leased and owned facilities. The average FCI score for CSF leased facilities is 0.29. The average FCI score for all the CSF's owned facilities is likewise 0.29. I also note that the average FCI of buildings across all districts (excluding the CSF) is 0.38; since a lower FCI score indicates a newer building, the CSF's facilities tend to be in better condition than the provincial average. Twenty of 37 CSF facilities are in better condition than the provincial average, and 17 are in worse condition.

[1490] I acknowledge that the average FCI score and average age for the CSF's leased facilities is improved by the fact that it includes many relatively new schools

where the CSF operates in heterogeneous space like Duchess Park Secondary (Prince George; 4.8 years old, FCI of 0.00), Penticton Secondary (SD67-Okanagan Skaha, 6.4 years old, FCI of 0.02) and Spring Creek Community (Whistler, 21 years old, FCI of 0.05). Its leased homogeneous schools tend to be older and in worse condition, for example Kilgour Elementary (Richmond, 43 years old, FCI of 0.59) and Nkwala Elementary (Penticton, 47 years old, FCI of 0.51). However, if the CSF wants its leased facilities to be taken into account when modifying its AFG, it must be prepared to take the good with the bad.

[1491] In my view, the evidence does not establish that the CSF's AFG funding would have been substantially different if the amount the CSF received per student had been modified to take into account the age and condition of its leased facilities. The deciding factor for calculating AFG allocations is enrolment. The CSF received funding for every student in its district, including those in leased space. As I see it, there is no substantial difference between the average age of the CSF's leased and owned facilities. Even if the plaintiffs had proven a substantial difference, the greatest increase the CSF would be entitled to would be a 5% increase to its AFG funding. As I see it, the marginal difference between the average age of the CSF's leased and owned facilities would not entitle the CSF to substantially more than it already receives.

[1492] Moreover, I do not find it appropriate that the CSF has refused to spend its AFG funds on leased, homogeneous space. The CSF receives funding for every student in its leased facilities. Its majority board landlords do not. Many contracts, like the CSF's lease of Kilgour Elementary (Richmond), specify that the CSF is responsible for maintaining leased homogeneous facilities in appropriate condition, even if the CSF must do so using majority-board employees. Since the CSF is receiving the maintenance funding associated with students in its leased homogeneous schools and is responsible for maintenance, it must use its AFG funds to maintain those facilities.

3. The AFG Rural Factor

[1493] Mr. Miller explained that in about 2003/04, one year after it changed the AFG formula, the Ministry added a factor to the AFG formula to recognize excess capacity in rural schools (the “AFG Rural Factor”). It was designed to recognize that some rural schools could not be closed and consolidated, and would therefore sometimes have to operate below capacity. Pursuant to the new AFG Rural Factor, if a rural school operated below its capacity, the district received credit for 50% of the students that could be accommodated in that excess space.

[1494] According to Mr. Miller and Mr. Lebrun, the AFG Rural Factor initially did not apply to the CSF even though the CSF was eligible for the Small Community Supplement. Mr. Miller attributed this to the fact that most of the CSF’s population was located in urban areas. The CSF schools outside urban areas were located in leased, shared space. While the CSF received funding for students enrolled in leased heterogeneous schools, the Ministry did not adjust the CSF’s formula based on those schools because the majority boards were largely responsible for their maintenance. Mr. Miller confirmed there was much discussion about the issue by Ministry staff, but that it was a “grey area”.

[1495] Over time, Mr. Miller recounted, the CSF acquired and built more schools in rural areas. By 2012, the Ministry recognized that the CSF had excess capacity in many of those schools, and could not close and consolidate them. So, in 2012/13, the Ministry made the AFG Rural Factor applicable to the CSF.

[1496] The evidence shows that Ministry staff began contemplating this change in about 2009. In a June 2009 letter to Mr. Cavelti and Mr. Dan Butler, Regional Manager responsible for the CSF, Mr. Lebrun suggested that as the CSF moved from leased to owned space, it could be difficult for the Ministry to continue to treat the CSF differently in the calculation of the AFG Rural Factor. Mr. Lebrun calculated that if the AFG Rural Factor applied to the CSF, it would be eligible for a further \$556,000. That amount would need to be found or reallocated from other school

boards. As a result of the reallocation, majority boards would each lose between \$1,500 and \$56,600 from their annual AFG allocations.

[1497] Notably, Mr. Lebrun's calculations coincided with the period in which the Ministry decided not to fund the AFG, in 2009/10 and 2010/11.

[1498] Mr. Lebrun explained that he went on to seek instructions from Mr. Stewart, who directed him to continue to calculate the CSF's AFG allocation in the same manner as it had been calculated in previous years.

[1499] Mr. Stewart's evidence was that he gave Mr. Lebrun those instructions based on the fact that "[i]t was felt at the time that the Ministry was not able-- or not ready to make the adjustment." He confirmed that "it was felt by senior ministry officials at the time that we were not able to make the change."

[1500] When pressed further on cross-examination, Mr. Stewart confirmed that he raised the question with the Minister and Deputy Minister of the day. Part of the discussion included that a change in the calculation would involve shifting some \$500,000 in funds from majority boards to the CSF. It was considered that it would not be appropriate to make the change until the Minister could secure more funding to devote to the AFG.

[1501] Mr. Lebrun recalled that between 2009/10 and 2012/13, the AFG was not recalculated based on enrolment; it was held constant for all districts. For the 2012/13 year, the total envelope for AFG across all districts increased by nearly \$500,000. Prior to calculating the AFG allocations for the 2012/13 year, a senior Ministry official directed Mr. Lebrun to begin applying the AFG Rural Factor to the CSF. The entire increase in the AFG envelope went to the CSF. Mr. Lebrun confirmed that the increase in the total envelope allowed the Ministry to increase the CSF's AFG funding without affecting the AFG allocations to majority boards.

[1502] In March 2012, Mr. Allison received a letter from Mr. Stewart, confirming that the CSF would receive about \$1.3 million in AFG funding for 2012/13, which

represented a dramatic increase. Unsure about the reason for the change, he asked Mr. Cavelti, who explained that the Ministry had begun applying the AFG Rural Factor to the CSF.

[1503] Mr. Allison asked for the amendment to be made retroactive, since he thought there had been no significant change to the CSF's facilities in recent years. Mr. Stewart advised that the Ministry refused that request because there was no funding available to make that payment; the Ministry could not redistribute a previous year's funding envelope.

[1504] The plaintiffs argue that as of 2003/04, the rationale for the AFG Rural Factor applied to the CSF, as it could not close and consolidate schools. They also note that there was little change between the proportion of students enrolled at schools in the Lower Mainland as compared to the rest of the province between 2002/03 and 2012/13. In 2003/04, 59.9% of CSF students were enrolled at schools in the Lower Mainland and southern Vancouver Island, while 64.9% of CSF students attended those schools in 2012/13. The plaintiffs therefore argue that the Province ought to have put in place a cost-based AFG formula for the CSF in 2002/03, and that the defendants' failure to do so was contrary to its constitutional obligations to support and encourage minority language education.

[1505] In the plaintiffs' submission, it was also unreasonable for the Ministry to decide not to reallocate AFG funds from the majority to the CSF in 2009, when the issue was raised. They take the position that the loss to majority boards was insignificant in comparison to the \$556,000 shortfall to the CSF. They note that in 2011/12, SD36-Surrey received more than \$11 million in AFG funds. A reallocation of about \$56,600 to the CSF would have represented a loss of about half of one percent of its funding. By contrast, the CSF's total AFG funding around that time was about \$810,920. A \$556,000 shortfall for the CSF represented about a 40% shortfall of the \$1.4 million the CSF would have received if had been eligible for the AFG Rural Factor.

[1506] The plaintiffs also take issue with the defendants' decision not to retroactively correct the shortfall in the CSF's AFG funding. They take the position that the Province's internal financial organization cannot excuse a failure to provide the CSF with the funds it needs to properly maintain and renovate its school facilities.

[1507] The defendants stated that they could not recall counsel for the plaintiffs putting it to Mr. Miller while he was under cross-examination that it was not logical that the change was not made retroactive. In their view, Mr. Miller pointed to a logical reason related to the heterogeneous space the CSF was operating in. They say that while the Ministry discussed that a need would become necessary soon, the situation was evolving, and the decision to actually make the change came later.

[1508] In my view, the Ministry recognized in about the summer of 2009 that the CSF was incurring an AFG shortfall as it moved from leased heterogeneous space to owned homogeneous space, and became responsible for maintaining those facilities over the course of their economic lives. While the Ministry recognized this, it did not take action at that time because of economic circumstances and because it did not want to take funds from the majority districts and reallocate it to the CSF. I note that shortly prior to this, the Ministry had asked the school boards from which the CSF leased space to provide the CSF with space free of charge for one year due to economic circumstances, which I discuss in Chapter XXXV, Leases, causing SD38-Richmond, at least, to take exception.

[1509] Thus, the CSF missed out on about \$500,000 per year in AFG funds in 2011/12, and \$250,000 per year in each of 2009/10 and 2010/11. In that instance, and that time period, the Ministry recognized that the CSF had additional needs, treated it in a manner differently from majority school boards, and chose not to take action to remedy the situation.

[1510] I conclude that the Ministry's failure to treat the CSF consistently with the majority in this instance is contrary to s. 23. Section 23 requires that the majority be provided with minority language educational facilities, and a right to management

and control at the district level on the basis of equality where the numbers so warrant. The CSF is entitled to the highest measure of management and control at the Provincial level, as Mr. Justice Vickers decided in *Vickers #1*. The Minister treated the CSF differently than the majority with respect to the calculation of its AFG after 2009 although it had recognized that the CSF's circumstances were changing and that it might not be appropriate to do so. Through that action, the Ministry failed to provide the CSF with equitable public funds to deliver minority language education.

[1511] I do not consider that the formula ought to have been calculated differently for the CSF extending back to 2002/03. The plaintiffs' argument that it should places undue emphasis on the division between the CSF's rural and urban schools. The Ministry did not apply the AFG Rural Factor to the CSF sooner because the CSF was operating in leased heterogeneous space and majority boards would have been responsible for the upkeep and maintenance on those facilities. Indeed, the CSF refused to spend any AFG funds on leased facilities-- even leased homogeneous facilities-- during that time. In or around 2009, the CSF had opened or was constructing three new schools, and was moving from heterogeneous leased to homogeneous owned space in those communities: École Secondaire Jules-Verne (Vancouver, opened in 2008), École Élémentaire Mer et Montagne (Campbell River, opened in 2011), École Au-cœur-de-l'île (Comox, opened in 2011). In 2008, the Province also acquired École Élémentaire Anne-Hébert (Vancouver (West)) for the CSF, a homogeneous school that the CSF had previously leased from SD39-Vancouver. In my view, it was that aspect of the CSF's operations and change in circumstances that the Ministry was focused on when it was considering whether the AFG Rural Factor should apply to the CSF.

4. AFG Recalculation Based on Enrolment

[1512] The primary driver of the AFG formula is enrolment. Mr. Miller's evidence is that the formula therefore benefits districts with growing enrolment. The plaintiffs

take issue with the fact that the Ministry has ceased annually re-calculating the AFG based on enrolment.

[1513] The evidence confirms that the Ministry has not recalculated AFG allocations based on enrolment on an annual basis since about 2008/09. As a result, the 55 school districts with declining enrolment are protected from annual declines in their AFG. Mr. Miller conceded this change benefits districts with declining enrolment.

[1514] The CSF's AFG entitlement between 2008/09 and 2011/12 remained fixed at \$810,920. That amount was based on the CSF's enrolment in 2008/09, which was 4,221 students. It increased in 2012/13 based on the re-calculation of the AFG Rural Factor, and since then, it has remained fixed at \$1,306,508. By 2014/15, enrolment in CSF schools had reached 5,382 students. Thus, the CSF's AFG allocation did not increase along with its 27.5% enrolment growth between 2008/09 and 2014/15.

[1515] The plaintiffs argue that the CSF's AFG allocation should increase annually to account for its growing enrolment. They note that the AFG Rural Factor gives the CSF a 50% allocation for each student by which it is under capacity. The plaintiffs' position is that as a student is added to the school, the CSF should move from receiving 50% of that student's allocation to 100% of the allocation. They also point out that in Vancouver and Victoria, the CSF's schools are adding enrolment beyond their capacity. The plaintiffs therefore argue that they are disadvantaged by the Ministry's decision not to allow the AFG funding formula to operate as it was intended.

[1516] Due to the CSF's enrolment increases, if the Ministry re-calculated AFG allocations annually, then the CSF would receive more AFG funding today than it did when the AFG was last recalculated. However, the CSF is not entitled to any specific funding allocation system-- the funding framework is within the Province's purview so long as it does not interfere with the CSF's right to management and control over language and culture and ensures that school boards receive

appropriate minority language educational facilities where the numbers so warrant. The CSF has not pointed to any maintenance projects that it has been unable to perform due to a lack of funding causing rightsholders to be deprived of the facilities they are entitled to. The system treats the CSF in a manner equivalent to other districts with growing enrolment. Nor is there evidence that AFG funds are essential to the CSF's exercise of control over language and culture-- the funds are for building maintenance.

[1517] The CSF is not adversely affected because of its role as a minority language school board. Although its absolute numbers remain small, it is in the same position as other school districts that are experiencing rapid enrolment growth, like SD36-Surrey. In my analysis, it is the Province's jurisdiction to decide how to best balance the needs of school districts with growing and declining enrolment, which extends to deciding how frequently it will recalculate the AFG.

D. Justification

[1518] I conclude that the Province breached s. 23 by continuing its policy of not applying the AFG Rural Factor to the CSF in 2008/09, 2009/10 and 2010/11. The Ministry treated the CSF differently from majority boards despite recognizing the rationale for doing so was dissipating. The remaining question is whether the breach is justified pursuant to s. 1.

[1519] I set out the framework for s. 1 justification in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". Here, the particular infringing measure-- the policy of not applying the AFG Rural Factor to the CSF-- was also intended to fairly and rationally allocate public funds.

[1520] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. When examining the rational connection, I will have regard to the objective and the scheme for achieving that objective.

[1521] I find that there is a rational connection between fairly and rationally expending public funds and a measure that did not apply the AFG Rural Factor to the CSF. The policy refrained from providing the CSF with increased funding when it was operating out of many leased, heterogeneous schools and was not paying for the maintenance work on those facilities. By doing so, more funds were available for the majority school boards responsible for the maintenance work, which was a fair and rational allocation of funds. Further, after about 2008, the continued application of the policy to the CSF reduced the harm to the in a period where the Ministry was providing only half of districts' overall AFG funding in each year. The Ministry chose to wait until there were more funds to distribute before it made the AFG Rural Factor applicable to the CSF.

[1522] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[1523] In my view, the failure to make the change in 2008 was minimally impairing. The CSF continued to receive about 60% of the AFG funding that it would ultimately be entitled to. The CSF's new programmes where it moved from leased to owned space opened in 2008 and then 2011, so the CSF's need for the additional funds were not urgent in 2009. Moreover, since the CSF was not spending its AFG funds

on leased space, including leased homogeneous space, it was in practice operating at an advantage with respect to AFG funds.

[1524] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[1525] At the local level, the salutary effects of the policy of not applying the AFG Rural Factor to the CSF are straightforward: the Ministry did not have to deal with the political consequences of taking from the majority to give to the minority in a period when it had just done so. It also had the effect of protecting majority boards from small additional AFG losses in years when they were already only receiving half of what they were used to receiving. The Ministry did not save any funds it could have reallocated from the majority to the minority.

[1526] The deleterious effects are more challenging to quantify. The Ministry has always maintained that school boards ought to be spending part of their operating funds on facility maintenance. The CSF had operating surpluses of more than \$5,793,403 in 2008/09, \$4,242,349 in 2009/10 and \$1,853,493 in 2010/11. The CSF did not point to any projects that it was unable to complete due to a deficiency of AFG funds in this period. I note that in more recent years, starting in 2013/14, the CSF deferred a Heating, Ventilation and Air Conditioning (“HVAC”) system replacement at École Élémentaire Anne-Hébert (Vancouver (East)) due to insufficient AFG funds. It is possible that the CSF may have been able to proceed with a project like that sooner if the Ministry had begun applying the AFG Rural Factor to the CSF in 2008/09. However, that is unlikely because the CSF was coping with the reduced AFG funding being provided to all districts in those years. At most, I find that if the Ministry had applied the AFG Rural Factor to the CSF sooner, it would have reduced the financial burden on the CSF.

[1527] Weighing those effects together, I find that the salutary effects outweigh the deleterious effects. All school boards were undergoing challenging economic times in 2008/09 and 2009/10, particularly regarding their AFG. The CSF’s need for the

AFG Rural Factor was only just beginning to materialize in those years, and was not fully realized until 2011, after its programmes had moved from leased heterogeneous to owned homogeneous space. The CSF was also operating from a position of relative advantage at that time because of its decision not to spend its AFG funds on leased space even though it was receiving funds for students enrolled in those schools. The CSF also had considerable operating surpluses. As soon as the Ministry was able to secure more funds for its AFG funding envelope, it allocated all of those funds to the CSF. In light of those factors, and the deference owed to the Ministry's assessment of the best ways of balancing the needs of the majority and the minority, I conclude that the deleterious and salutary effects are balanced, and the breach passes the proportionality test.

E. Remedy

[1528] Since I find that the breach of s. 23 associated with the AFG is justified, it is not necessary for me to consider an appropriate remedy. Had I found that a remedy were necessary, I agree with the plaintiffs that since the harm to the CSF was monetary, financial compensation would be appropriate. The CSF missed out on about \$550,000 per year in AFG funds in 2011/12, and \$275,000 per year in each of 2009/10 and 2010/11. Thus, in my view, the appropriate remedy would have been about \$1.1 million in damages.

F. Conclusion

[1529] Most of the plaintiffs' complaints concerning the AFG have no merit. In my view, the CSF is not disadvantaged because it cannot fund Expansion Projects using its AFG. The real issue is the lack of funding for Expansion Projects generally, which is wholly divorced from the purposes the AFG serves. I also find that the CSF does not suffer because the rationale for the AFG funding model- encouraging school closures and consolidations- does not apply to it. As a growing district, the CSF did not experience the policy burden that the funding formula imposed on districts with declining enrolment, particularly once the AFG Rural Factor began applying to it. I am also satisfied that the CSF was not disproportionately harmed by

the AFG funding freeze in 2009/10, the failure to modify the CSF's AFG allocation based on the age of the CSF's leased facilities and the decision not to recalculate the AFG annually.

[1530] In connection with the application of the AFG Rural Factor to the CSF, though, I find that the Ministry treated the CSF differently than the majority after 2009 even though it had recognized that the CSF's circumstances were changing and that it might not be appropriate to do so. Through that action, the Ministry failed to provide the CSF with equitable public funds to deliver minority language education. I therefore find that the Province breached s. 23 by failing to apply the AFG Rural Factor to the CSF in 2008/09, 2009/10 and 2010/11. However, I find that the policy is one that is reasonably justified in a free and democratic society.

XIV. TRANSPORTATION

[1531] The plaintiffs take the position that the defendants have historically and chronically underfunded the CSF's transportation system through arbitrary funding mechanisms that do not account for the CSF's unique needs. In response, the defendants say that the factor in the Enrolment-Based Funding Model most related to transportation-- the Student Location Factor-- is not meant to completely indemnify the CSF for its transportation costs, and that the CSF can use other aspects of its operating grant to fund transportation services.

[1532] The plaintiffs' claim in connection with transportation relates to what it sees as a transportation funding deficit that it has incurred since at least 2002. Additionally, the plaintiffs claim for the costs that the CSF would incur if it were to reduce all bus ride times in the Province to less than 30 or 45 minutes.

[1533] Below, I begin with a discussion of the role transportation plays in context of s. 23, before outlining the specifics of the CSF's transportation system. I then turn to the plaintiffs' allegation that the CSF is disadvantaged by the funding system and incurs a transportation deficit, as well as the submissions concerning the CSF's plan to reduce bus ride times.

A. Transportation in the Minority Language Context

[1534] The plaintiffs' position is that the minority language context makes transportation services particularly important to the CSF's operations. After reviewing the pertinent legal context, I discuss and the evidence concerning travel times for British Columbia's minority language schools.

1. Legal Context

[1535] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that a minority language school board's right to management and control gives it a measure of control over those aspects of educational facilities that pertain to the minority language and culture.

[1536] In *Arsenault-Cameron*, the Court considered whether the location of minority language instruction and facilities fell within the cultural and linguistic authority of the minority board. In concluding that it did, the Court found that the Minister ought to have deferred to the school board's judgment concerning what number of students were required to make a programme pedagogically appropriate (at para. 48) and what travel times were appropriate (at paras. 49-50). The school board's right to management and control also included the geographic boundaries for assembly of students (at para. 57).

[1537] The Court also commented on the importance of accessibility and transportation services in the minority language context. In particular, given that students eligible to attend a minority language school face an option between a locally-accessible school in the majority language and a less accessible school in the minority language, long travel times can discourage students from attending the minority language school. The same disincentive does not apply to the majority. Moreover, the travel disincentive has an impact on assimilation of minority language children; travel has no cultural impact for the majority. Thus, the Court held that "[f]or the minority, travel arrangements were in large measure a cultural and linguistic issue" (at para. 50).

[1538] Mr. Justice Willcock also emphasized the importance of accessibility in the minority language context in *Association des-parents- BCSC*. Citing *Arsenault-Cameron*, he suggested that appropriate transportation arrangements for the minority may differ from what is provided to the majority. He found that longer travel times may be appropriate to allow students to take advantage of the types of amenities that are available at larger schools (at para. 153):

As noted above, the constitutional requirement that minority language students receive educational facilities where their numbers warrant implies that those facilities will be accessible to the students. Accessibility is a complex question. First, in addressing the “numbers warrant” question, it will be necessary for the courts to define the area in which the population of rights-holders is estimated. In instances where there is a school board exercising management and control on behalf of the rights-holders, it will usually be appropriate to leave the description of relevant catchment areas to the board. Using the board’s definition of the catchment area, the court should then apply the sliding scale described in the case law in addressing challenges to the adequacy of the instruction or facilities provided. In *Arsenault-Cameron*, the Supreme Court of Canada recognized, at paras. 49-50, that the pedagogical requirements of the minority need not be met in an identical way to those of the majority. That is as true of transportation arrangements as it is of physical facilities. The nature and extent of the facilities afforded to students will have some impact upon transportation arrangements. Minority language boards, like majority language boards, may decide that it is preferable to have students travel long distances to a larger and better-equipped facility or, in some instances, to have students travel shorter distances to smaller facilities, such as the [SD39-Vancouver] annexes, where they may have less options and limited facilities. Minority language students in remote locations may prefer to be included within the catchment area of a particular school rather than find themselves in a situation where their numbers do not warrant a dedicated facility. It may be for that reason that in *Arsenault-Cameron* the Court held that travel times that may be reasonable for official language minority students in some circumstances cannot absolutely govern what is appropriate in other circumstances. In *Arsenault-Cameron*, the Court was only required to consider whether the Minister had breached the *Charter* rights of the parents of minority language students by failing to adopt the recommendation and decision of the minority language school board. The board had therefore exercised its judgment and made a determination with respect to appropriate travel times. The Minister was held to have acted improperly in substituting his decision for the board’s and applying a standard that was not appropriately driven by pedagogical considerations. [Emphasis added.]

[1539] Thus, the right to determine what transportation times are appropriate falls within the minority’s jurisdiction in most instances. The CSF is in the best position to

determine whether it is pedagogically appropriate to educate students in a larger school, resulting in longer transportation times. The CSF is also best positioned to determine when transportation times are too long, and when it is appropriate to establish smaller programmes with fewer amenities to reduce travel times.

[1540] On the other hand, the CSF's jurisdiction is not unrestricted. The Minister is entitled to develop institutional structures and regulations governing the minority's right to management and control. The linguistic minority is not entitled to any particular design of the education system. So long as the Province's framework does not interfere with the minority's linguistic and cultural concerns and meets the Province's positive obligation to provide facilities to the appropriate standard where the numbers warrant, the minority must exercise its right to management and control consistently with that framework.

2. The Transportation Context in British Columbia

[1541] The rationale for the concept that the minority may have different transportation needs than the majority is borne out in the evidence. There is no question that the vast majority of CSF students live closer to the nearest majority school than they do to the nearest CSF school. The Court had the benefit of maps of catchment areas for each of the Community Claims. The maps show the location of students' homes and all CSF and majority schools in the catchment area. Those maps clearly show that CSF students tend to live farther from CSF schools than they do from majority schools. The Province accepts this general proposition.

[1542] The CSF also provided affidavit evidence from Mr. Pierre Berleur, the CSF's Payroll Supervisor and Financial Analyst, and supporting affidavits from other CSF staff, about the travel times from student homes to CSF and majority schools.

[1543] For each CSF school, the affiants present a table that states the distance and driving time from each student's home to the nearest CSF school, as well as the distance and driving time to the nearest majority school. The tables also provide the student's address, grade level, bus stop route number and location, and the length

of time each student travels by bus to the CSF school. Together, I refer to these as the “Transportation Tables”.

[1544] In their affidavits, the affiants provide some detail about the data sources they relied on to complete the Transportation Tables. Student addresses and grade levels were derived from BCeSIS, the enrolment database used by the CSF and the Ministry.

[1545] Data concerning the bus pick-up points, their addresses, and the time the students spent travelling by bus were drawn from reports from Edulog, a computer programme the CSF uses to manage bus routes. Those reports came before the Court as appendices to the affidavits of Mr. Kelly Grittner, the CSF’s transportation consultant.

[1546] Distance and travel times between the students’ homes and CSF schools were created using the “Directions” function of Google Maps, which allows users to calculate the distance between two locations. For many communities, the distance between the students’ homes and the nearest majority schools were drawn from a school locator programme available on school district websites. Where that programme was not available, the affiants found the elementary school closest to the student’s home using Google Maps. The parties have entered into an agreement that the “directions” function of Google Maps provides approximate distances and drive-times, by car, between specified locations.

[1547] Mr. Berleur explained that he supervised the other affiants. He conducted a number of spot-checks to ensure that the data in the Transportation Tables were accurate. He also compared the distances and travel times to ensure nothing appeared anomalous.

[1548] Mr. Berleur was cross-examined in connection with the Transportation Tables. In the course of that cross-examination, it was shown that there were some differences between the data noted by Ms. Johanne Ross, the CSF’s now-retired transportation coordinator, and the data found by Mr. Berleur in the course of

replicating Ms. Ross's work. (I note parenthetically that the CSF does not seek to rely on Ms. Ross's work.) Mr. Berleur suggested that Ms. Ross might have relied on an earlier iteration of the source material, although he swore in his affidavit that they both relied on the same source material.

[1549] Based on the information in the Transportation Tables, Mr. Berleur created graphs and summaries to illustrate how travel times by car from students' homes to CSF schools compared to travel times by car to the closest majority schools. He also prepared graphs to show how travel times by school bus from students' homes to CSF schools compare to travel times by car to the nearest majority schools. I will refer to these paragraphs and figures, which are found in paragraphs 419-421 and 424-426 of Mr. Berleur's fourth affidavit, as the "Summary Section".

[1550] Mr. Berleur prepared the Summary Section by creating a comprehensive Microsoft Excel table that included data for every CSF school. The comprehensive table was not put before the Court. On cross-examination, Ms. Wolfe, counsel for the defendants, illustrated that some of the percentages and calculations in Mr. Berleur's summaries did not match the data in his figures. In many, but not all, cases, those discrepancies favoured the CSF. Mr. Berleur related those discrepancies to the technical trappings of the Excel program.

[1551] The defendants objected to the admission of the transportation affidavits on the basis that they are irrelevant and unnecessary, unreliable, and contain inadmissible opinion. On February 11, 2015, I ruled the affidavits were relevant. However, I determined that the Summary Section was unreliable and unnecessary, and was inadmissible. I also found that the defendant's argument that the information in the Transportation Tables was unreliable would go to weight rather than threshold admissibility.

[1552] Over the course of the defendants' cross-examination of him, Mr. Berleur was taken to 10 discrepancies between work included in his fourth affidavit, and work he had performed in an earlier test-case affidavit that was also tendered as an exhibit at trial. Mr. Berleur admitted that the sources and methodologies were the

same, so he would have expected the results to be the same. He agreed that there was an error in one of the two sets of calculations, but could not say which was in error. Further, he admitted that his spot-checks for correctness in the affidavits prepared by others were not comprehensive.

[1553] As a result of these problems, there is a concern about the reliability of the data in the Transportation Tables. They must be treated with some care. The specific data points within the Transportation Tables cannot be taken to be exact. However, they can present an overall, general estimate of the order of magnitude of how far student homes are from CSF schools in comparison to majority-language schools.

[1554] The plaintiffs have tabulated some of the raw data in Mr. Berleur's affidavit, and presented argument based on its analysis of the distances. The plaintiffs focus on communities where the catchment area can be divided into a central zone with surrounding municipalities: Kelowna, Sechelt, Nanaimo, Penticton and Nelson. As would be expected, students living outside the central municipality live at a much greater distance from the CSF school as compared to the local majority school. CSF students living outside the municipality of Kelowna, for example, live about 20 kilometres from École L'Anse-au-Sable, and about 5 kilometres from the closest majority school. CSF students living outside Sechelt live an average of about 17 kilometres from École Élémentaire du Pacifique and an average of about 3 kilometres from the closest majority school.

[1555] The facts to be drawn from the Transportation Tables are not earth shattering. CSF students are highly dispersed in their catchment areas, more so than students attending majority-language schools. This is to be expected given the very small Francophone community in British Columbia. As a result, the vast majority of students live much closer to a majority school than a CSF school. This is natural: majority schools are neighbourhood schools. Homogeneous minority schools in British Columbia tend to be regional to allow students to take advantage of the greater amenities that can be offered in a larger school. The CSF has chosen

to offer larger programmes with more amenities; the result is that transportation times are long, particularly for children who live in the outskirts of the communities the schools serve. The difference in distances is particularly stark in those communities where the CSF has chosen to draw a very large catchment area that includes surrounding municipalities where the numbers are otherwise unlikely to warrant a homogeneous Francophone programme.

[1556] The results of the differences are straightforward: for the majority of CSF students, it will take less time to travel to a majority school than it would for them to travel to a CSF school. Because of the manner in which the CSF has chosen to structure its education system, travel times to homogeneous Francophone schools will inevitably be longer than travel times to majority schools.

B. Overview of the CSF's Transportation System

[1557] To understand the CSF's claim in connection with transportation, it is essential to begin with an appreciation of the transportation services that the CSF provides.

[1558] The CSF determines what level of transportation services it will provide independent of the Ministry. Mr. Miller's evidence is that the Ministry has minimal involvement in operational decisions of that nature. The Ministry takes the view that school districts are best placed to assess their own needs and how they should be addressed. Thus, the Ministry's policy is one that rightfully leaves transportation decisions with the CSF, respecting its right to management and control of matters going to language and culture. The question is whether the Province provides sufficient public funds for the CSF to deliver the transportation facilities that the numbers warrant.

[1559] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all spoke to the CSF's transportation system. Additional evidence came from Mr. Grittner. As the CSF's Transportation Consultant, Mr. Grittner has assisted the CSF on a variety of transportation matters, with a focus on improving the system's efficiency, cost and

bus ride times. To that end, he has assisted the CSF with the management of its transportation tender process, the negotiation and implementation of its transportation contracts, the preparation of its transportation budget estimates and the oversight of its bus routes.

1. Nature of the CSF's Transportation Services

[1560] The CSF has always treated its transportation system as a high priority. Dr. Ardanaz advised that from the beginning, the CSF saw it as essential to student recruitment to provide high-quality transportation, free of charge.

[1561] Mr. Grittner described the CSF's transportation system. He explained that the CSF has specified walk limits around its schools. Students living within those zones are not entitled to receive transportation services due to their proximity to the school. The elementary school walk limits range from one to three kilometres depending on the nature of the community where the school is located. The secondary school walk limit is three kilometres.

[1562] Students who do not walk to school-- the vast majority of CSF students-- are transported by bus. In Dr. Ardanaz's time, the CSF provided door-to-door bus transportation services from students' homes to school. Now, CSF students are transported to school from centralized group pick-up points. Students living within specified walk-to-stop zones are transported from those pick-up points. The walk-to-stop zones are limited to one to three kilometres, consistent with the CSF's walk limits. However, many students live within 500 meters of a local pick-up point. According to Mr. Grittner, in rural areas, it is sometimes more convenient to provide door-to-door service due to the dispersion of the student population.

[1563] The CSF does not own a fleet of buses due to the complexity and cost of managing fleets in a number of communities in the Province. Instead, the CSF contracts with third-party bus service providers and majority school boards to deliver transportation services. The CSF does whichever is more cost-effective.

[1564] Mr. Grittner explained that in 2014/15, the CSF's five third-party bus service providers operated 148 to 150 buses in 21 communities: Chilliwack (École Élémentaire La Vérendrye), Kamloops (École Élémentaire Collines-d'or), Langley (École Élémentaire des Voyageurs), Squamish (École Élémentaire Les Aiglons), Richmond (École Élémentaire des Navigateurs), Surrey (École Gabrielle-Roy), Delta (École Élémentaire du Bois-Joli), Vancouver (École Élémentaire Anne-Hébert, École Élémentaire Rose-des-Vents, École Secondaire Jules-Verne), Port Coquitlam (École des Pionniers), Penticton (École Élémentaire Entre-lacs, Penticton Secondary Francophone Programme), Mission (École Élémentaire Deux-Rives), Powell River (École Élémentaire Côte du Soleil, Brooks Secondary Francophone Programme), Kelowna (École L'Anse-au-Sable), Prince George (École Élémentaire Franco-Nord, Duchess Park Secondary Francophone Programme), North Vancouver (École André-Piolat), Nanaimo (École Élémentaire Océane, Nanaimo District Secondary Francophone Programme), Victoria (École Victor-Brodeur), Comox (École Au-Coeur-de-l'île), Campbell River (École Élémentaire Mer et Montagne, Carihi Secondary Francophone Programme), Port Alberni (École Élémentaire des Grands-cèdres) and Revelstoke (École Élémentaire des Glaciers).

[1565] Mr. Grittner explained that third-party bus service providers develop bus routes with minimal involvement by the CSF. However, Mr. Grittner reviews and suggests efficiencies for many bus routes and by assists the third-party providers resolving specific issues. Further, Mr. Grittner may become involved if it becomes necessary to create new bus routes, such as when the CSF experiences a surge in enrolment at a particular school.

[1566] In six communities the CSF contracted with majority school boards to provide transportation services: Nelson (SD8-Kootenay Lake, École Élémentaire des Sentiers-Alpins); Rossland (SD20-Kootenay-Columbia, École Élémentaire des Septs-Sommets); Whistler (SD48-Sea-to-Sky, École Élémentaire La Passerelle); Fernie (SD5-Southeast Kootenay, École Élémentaire Sophie-Morigeau); Terrace (SD82-Coast Mountains, École Élémentaire Jack-Cook); and Sechelt (SD46-

Sunshine Coast, École Élémentaire du Pacifique and Chatelech Secondary Francophone Programme).

[1567] In addition to school bus services, the CSF provides secondary students at École Secondaire Jules-Verne (Vancouver) complementary public transportation passes to travel to school.

[1568] Finally, where the CSF determines that extending bus service to a given area would unduly lengthen an existing bus route, it may choose to financially compensate parents who drive their children either to school or to the nearest group pick-up point.

[1569] At one time, the CSF also incurred the cost of housing students who wanted to attend a minority programme but lived in a community where there was no local programme available. The CSF has not done this for several years.

2. CSF Transportation Policy

[1570] The CSF decides what transportation services to provide in a given area, to what group of children, based on its internal transportation policy. The most notable revisions to those policies occurred in 2009 and 2013.

a) 2009 Transportation Policy

[1571] The CSF's transportation policy was revised June 29, 2009 (the "2009 Transportation Policy"). That policy provides the following "Statement of Policy", which recognizes the importance of transportation due to the distance between students' homes and minority language schools, and the need to manage transportation in light of a number of factors, including student and school needs, cost efficiency and bus ride times:

The Conseil Scolaire francophone (CSF) recognizes that a vast proportion of the students enrolled in the Francophone Program reside far from the school they attend in their region. Consequently, the CSF offers transportation services to the students residing outside of the walk limits and inside of the Transportation Zones as defined in this policy. The following possibilities are offered to students who are eligible for transportation:

- a) transportation by school bus according to the applicable legislation;
- b) distribution of public transit passes in metropolitan areas; and
- c) payment of financial assistance to parents to subsidize transportation.

The management of transportation will be based upon the following factors:

- d) students' safety;
- e) curricula's needs (teaching hours, etc.);
- f) most efficient means for students' transportation;
- g) need to reduce to the minimum the length of bus trips; and
- h) financial support from the Ministry of Education.

[1572] The 2009 Transportation Policy introduced the concept of a "school Transportation Zone". Where a Transportation Zone is used, it sets a geographic area around a school within which students will be transported to school. Currently, the CSF uses Transportation Zones in Penticton, Kelowna, North Vancouver, Victoria and Nanaimo. Notably, all these communities have very large catchment areas that encompass multiple cities.

[1573] The 2009 Transportation Policy also spoke to ideal bus ride times. Section 2(c)(i) of the policy provided that, "[w]henver possible, school transportation services by bus will be organized in such a way as to limit transportation time to 45 minutes, while recognizing this objective may be impossible to reach in some localities."

[1574] The 2009 Transportation Policy also set out cases where the CSF would provide transportation assistance to parents of students who would otherwise be eligible for transportation services, but to whom it is difficult or impossible to provide bus services. To those parents, the CSF would pay up to \$0.40 per kilometre per day, to a maximum of \$10 per day per family. Mr. LeBrun advised that the Ministry set a \$10 per day maximum payment for reimbursements of transportation assistance under a transportation funding supplement that no longer exists. The Ministry, however, would only reimburse districts at \$0.20 per kilometre; the CSF reimburses parents more.

b) 2013 Transportation Policy

[1575] The CSF's next major amendment to its transportation policy took place in 2013, and resulted in the promulgation of the "2013 Transportation Policy". The predominant change removed reference to the CSF's intent to reduce travel times to less than 45 minutes. Instead, the CSF endeavours to organize school bus transportation in such a way that "travel times are equivalent to the travel times of students attending a majority school in the same catchment area as the CSF school, whether they walk or are driven by car or by bus" (s. 2)(c)(i)).

[1576] Mr. Grittner confirmed that while he was generally aware of the changes in the 2013 Transportation Policy, he had never been shown the policy, was never asked to and has never attempted to organize the CSF's bus routes in such a way that the bus ride times are equivalent to those in the relevant majority district. He testified that he would find it hard to implement.

[1577] While he was under cross-examination, Mr. Allison maintained that he believed the CSF's goal of reducing travel times to that level was realistically achievable, but not for every student. Later, he seemed to concede that given that majority language schools are typically neighbourhood schools, and the CSF operates regional schools, fully realizing the new policy "seemed to be impossible". Mr. Allison conceded that regardless of the 2013 Transportation Policy, the CSF uses its former 45-minute threshold as a "red flag" for routes that might be too long.

[1578] In connection with Mr. Grittner's lack of knowledge of the policy change, Mr. Allison took the unreasonable stance that Mr. Grittner ought to have understood what was meant by the policy change, even if he did not see the policy and the CSF did not show it to him. At this point, Mr. Allison was highly argumentative, as he was in most of his cross-examination.

3. Cost of the CSF Transportation System

[1579] The CSF incurs proportionately higher transportation and housing costs than majority school boards.

[1580] The Court received evidence of the actual amounts school districts spend on transportation from school district revenue and expenditure tables. The evidence confirms that districts keep these records and provide them to the Ministry while they are under an obligation to do so. I am satisfied they are admissible as business records.

[1581] In most recent years, the CSF has spent nearly 10% of its operating budget on transportation. In 2011/12, the CSF spent \$6,179,156 for transportation and housing expenditures, or 9.6% of its operating budget. In 2012/13, the CSF spent \$6,029,090 for transportation and housing, representing 9.2% of its operating budget. In 2013/14, the CSF spent \$5,966,976 on transportation and housing, representing 8.8% of its operating funding allocation.

[1582] Across the province in each of those years, all districts (including the CSF) spent an average of 2% of their operating expenditures on transportation and housing. Excluding the CSF, the amounts spent by majority boards in any given year ranged from a high of nearly 9% (SD87-Stikine) to a low of 0.3% (SD44-North Vancouver).

C. The Transportation Funding Mechanism

[1583] Since the CSF's inception, the Province's model for funding transportation and housing funding has gone through several iterations: a cost-based reimbursement model; a frozen but unrestricted annual allocation in the Operating Block; and an unrestricted per-student allocation in the Operating Block based on student location.

[1584] The plaintiffs argue that the latter two iterations of the Province's funding model disproportionately disadvantaged the CSF and failed to take into account its unique needs. They also suggest that the CSF has incurred a substantial transportation funding deficit. The defendants counter that the Operating Block grants the CSF receives are sufficient for the CSF's needs, pointing to evidence of the CSF's surpluses.

[1585] Below, I review the Operating Block with specific reference to transportation. Then I discuss each of the iterations of the factor that funds transportation and the plaintiffs' allegations that the CSF has incurred a substantial transportation funding deficit.

1. Operating Block Funding

[1586] The Province allocates funding to school districts for operating purposes by way of its Operating Block. I explain how the Operating Block Grants are calculated in detail in Chapter XII, Public Funds. To summarize, the Ministry allocates the Operating Block to school boards using its Enrolment-Based Funding Model. Once districts receive their operating grants, they make all decisions with respect to programme delivery, including admission, educational and transportation programmes.

[1587] The Operating Funding Model went through significant changes in about 2002, when it moved from a Resource-Cost Funding Model to an Enrolment-Based Funding Model. Under the former model, the Ministry funded specific aspects of school programmes. With the move to an Enrolment-Based Funding Model, districts receive a basic allocation for every student in the district, as well as supplements to recognize Unique Student Factors (special needs, aboriginal, vulnerability), changes at the district level (enrolment and funding decline) and supplements to recognize Unique District Factors (small community supplement; low enrolment supplement; rural factor; climate factor; sparseness factor; student location factor; and a salary differential).

[1588] The evidence shows that the CSF benefits the most from the Unique District Factors. Recently, it was allocated about \$17 million pursuant to these factors. The next closest district received \$10 million, and the supplements declined from there.

[1589] A final factor is specific to the CSF. The CSF receives a 15% funding premium on all of its funding coming out of the Operating Block: the 15% Francophone Supplement.

[1590] Although the CSF and other districts are not restricted with respect to how they spend their operating grants, each of the Unique District Factors and the 15% Francophone Supplement are linked to an estimate of the actual cost differential of associated with a given district characteristic.

a) The 15% Francophone Supplement

[1591] Beginning in about 2006, the CSF began to benefit from a 15% Francophone Supplement: a special supplement that applies only to the CSF, which I describe in Chapter VIII, Entitlement. That supplement takes the entirety of the CSF's operating grant-- from the basic enrolment-based amount, to all the Unique District Factors-- and adds to them a supplement of 15%.

[1592] The parties disagree about whether the 15% Francophone Supplement was intended to compensate the CSF for any of its transportation costs. The plaintiffs take the position that it does not, while the defendants argue that it does. For that reason, I review the negotiations leading to the 15% Francophone Supplement here as well, to the extent that they relate to transportation.

[1593] In early September 2004, Mr. Bonnefoy wrote to Mr. Miller in connection with the CSF's transportation needs. This immediately preceded the negotiations leading to the 15% Francophone Supplement. Shortly thereafter, Ministry staff prepared a briefing note to Deputy Minister Dosdall, which highlighted that the CSF reported significant cost increases for student transportation, and that the funding shortfall for the CSF was significantly larger than for any other district.

[1594] In his October 12, 2004, response to Mr. Bonnefoy, Mr. Miller noted that the Technical Review Committee was reviewing the funding of student transportation, and was proposing a new formula based on distances between schools and individual student homes. Mr. Miller stated that he anticipated that supplement would remedy many inequities.

[1595] As negotiations between the Ministry and the CSF proceeded, the CSF provided the Ministry with the Operating Funding Report. It identified transportation

costs as one of the unique cost pressures facing the CSF. The authors wrote that it might not be appropriate for the CSF to apply walk limits similar to those used historically to calculate student transportation grants for majority school districts due to the dispersion of its population and a corresponding lack of safety in number of children walking to and from school. Among its recommendations, the Operating Funding Report suggested that Provincial grants in support of student transportation be adjusted to reflect the CSF's actual enrolment increases and be based on lower walk limits than those applied to the majority.

[1596] After receiving the Operating Funding Report, on July 22, 2005, Ministry staff prepared a draft briefing note to the Minister. It referred to the CSF's concern with transportation funding, while highlighting that a general review of transportation funding was expected to be introduced for 2006/07. Ministry staff suggested the CSF would receive a significant increase in funding with the new supplement, and made no recommendations in connection with transportation funding for the CSF. However, the draft was never sent to the Minister.

[1597] With the assistance of Trillium, the CSF prepared the Funding Requirements Request to detail the CSF's funding needs. The CSF suggested that the Provincial component of its request would cost between \$10.6 and \$12.5 million each year. The CSF asked for a 25% supplement to its Operating Block each year, which it would apply to expand its programmes. That would provide it with about \$9 million each year. While that would fall short of the estimated cost of delivering its new programmes, the CSF planned to fund the rest by finding operational efficiencies.

[1598] Among its proposed expanded programmes, the CSF requested additional funding to establish efficient bus routes and shorter walk limits. The CSF stressed that the characteristics of a provincial school district made the provision of transportation services complex. The CSF specifically requested \$1.6 million to \$1.9 million annually to make improvements to its transportation system. Thus, transportation programming formed about 15% of the cost of the CSF's planned

additional programmes. Costs related to transportation constituted about 20% of its \$9 million annual funding request.

[1599] Mr. Miller was involved in the review of the Funding Requirements Request. On review, Ministry staff identified \$5.4 million, or 60% of the initial \$9 million request, that was specifically targeted to language and culture (including transportation), and was non-duplicative. Thus, transportation (a cost that I find was not duplicative of others) would have formed about 30% of the additional costs that the Ministry was prepared to fund.

[1600] Ultimately, the analysis led Ministry staff to conclude that a 15% funding supplement, retroactive to the previous school year, would be appropriate. Mr. Miller advised that on July 25, 2006, Ministry staff prepared a briefing note for a decision by Minister Bond in connection with CSF funding. Unlike the first note, this note was actually sent to the Minister. Staff recommended providing a 15% supplement, and both Deputy Minister Dosdall and Minister Bond agreed.

[1601] On October 10, 2006, Deputy Minister Dosdall wrote to Mr. Watters, the CSF's Superintendent, to advise that Ministry staff had carefully reviewed the Funding Requirements Request, as well as additional transportation requirements and other factors germane to the CSF. He confirmed that the Minister would provide the CSF with a supplement equal to 15% of its final annual operating grant allocation, beginning with and retroactive to the 2005/06 school year. Mr. Miller confirmed his understanding that the 15% supplement was also designed to address the CSF's transportation needs.

[1602] In my view, the preponderance of evidence suggests that the 15% Francophone Supplement was intended, in part, to address the CSF's transportation needs. Ministry staff knew that transportation costs were a problem for the CSF in the discussions immediately preceding the negotiation of the 15% Francophone Supplement. The CSF clearly identified transportation projects among those it wanted to pursue with additional funding.

[1603] While initial conversations at the Ministry proposed focusing on cultural factors at the expense of transportation projects, it seems that position was never put forward to the Minister, and that Ministry staff moved away from that recommendation. At first, Ministry staff considered a 10% supplement; the Minister eventually agreed to a 15% supplement. In the July 2006 Briefing Note that went to the Minister, staff rejected the CSF's proposed 25% supplement due primarily to duplication, not because of a decision not to fund transportation projects.

[1604] Most importantly, in his letter to the CSF informing it of the decision to implement a 15% supplement, Deputy Minister Dosdall explicitly stated that the Ministry reached its conclusion based on its review of factors including the CSF's transportation requirements.

b) The CSF's Operating Funding and Surpluses

[1605] As I explained in Chapter XII, Public Funds, the defendants prepared a series of charts showing the average per pupil operating funding that all districts received at three points: 2000/01, 2009/10 and 2013/14. In 2000/01, the CSF's per pupil operating allocation came to \$10,300. The CSF received \$12,759 per student in 2009/10 and \$13,066 per student in 2013/14. The provincial averages in those years were \$6,262, \$8,182 and \$8,690 respectively. The CSF has always been in the top 10 (of 60) school districts.

[1606] In Chapter XII, Public Funds, I also describe that the CSF has been generating surpluses since about 2005. The evidence shows that by 2009, the CSF showed net accumulated operating surplus funds of \$5.7 million. Mr. Bonnefoy explained that these surpluses related to the funding received as part of the 15% Francophone Supplement and were earmarked for spending over the course of the CSF's five-year strategic plan. Thus, part of those surpluses was targeted to transportation.

[1607] The CSF continued to generate, and then deplete its operating surplus during Mr. Allison's time as Secretary-Treasurer, which began in 2010. In June

2010, the CSF had an accumulated operating surplus of about \$4 million. Since that time, the accumulated operating surplus has decreased to about \$1 million.

[1608] Notably, between 2010 and January 2015, the CSF spent more than \$12 million on legal fees associated with this litigation. Mr. Allison took the position that the CSF cut educational programmes to fund the litigation; he maintained that the \$12 million would not have formed part of an operating surplus. The evidence confirms that this is the case. However, Mr. Allison also agreed that once this litigation concludes, the CSF will be able to begin applying the funds it spends on this litigation to transportation if the CSF so chooses.

2. Transportation Funding

[1609] The Province funds transportation services using the Ministry's Operating Block grants, then allows school boards to provide transportation services or not in their discretion.

[1610] The supplement that most closely relates to transportation today is the Student Location Factor. Here, I describe the predecessor to that supplement, the Supplement for Transportation and Housing, how the new factor was developed and what it is intended to recognize.

a) Pre-2002: The Resource-Cost Funding Model and Transportation

[1611] Mr. Miller's evidence was that prior to 2002/03, the Resource-Cost Funding Model funded transportation services by way of a Supplement for Transportation and Housing. Districts with their own bus fleets received a supplement calculated by multiplying audited transportation costs by kilometre by the number of kilometres on their approved routes. Districts that contracted bus services received a supplement equal to their audited costs from the prior year. Districts were only eligible for transportation funding for students that lived outside Ministry-set walk limits of 4-5 kilometres (depending on grade level).

[1612] The Supplement for Transportation and Housing was calculated in the same manner for the CSF as it was for other school districts. This was the case even though the CSF provided transportation services to students living within the Ministry's 4 to 5 kilometre walk limits. The CSF also provided door-to-door transportation services in many instances.

[1613] The evidence shows that the Ministry's funding system did not recognize all of the CSF's transportation costs in those early years. The Ministry and the CSF had insufficient data to demonstrate the CSF's actual transportation costs and distances travelled. So, to provide its exceptional transportation services, the CSF used some Federal Start-up Funds. When those funds expired, it began incurring a transportation deficit.

[1614] As I explained in Chapter XII, Public Funds, starting in about 1999, the CSF began incurring an operating deficit. The CSF and the Review Team attributed about \$1 million of the CSF's \$2.4 million deficit to transportation.

[1615] The Review Team addressed transportation in its report. The Review Team expressed concern that the Supplement for Transportation and Housing was not satisfactory for the CSF. The Review Team observed that the Province funded transportation based on reported costs two years in arrears and eligible kilometres one year in arrears. The Review team stated that those arrangements prevented the CSF from expanding its transportation services as the CSF's enrolment increased. Further, the Review Team noted that although the Ministry increased the 1999/00 allocation for student transportation when the CSF's jurisdiction expanded to the entire province, the adjustment still fell short of the true costs of the CSF's transportation services.

[1616] The Review Team recommended that the CSF reduce student transportation programmes, and bring its transportation policy in line with the Ministry's walk limits. Dr. Ardanaz explained that the CSF Board of Trustees did not accept or implement that recommendation. While the Ministry assisted the CSF to

retire its deficit, none of the additional funds the CSF received related to transportation.

[1617] Shortly thereafter, the operating funding model was revised in a way that gave the CSF significant benefits. It benefits more than any other district from Unique District Factors to account for its provincial jurisdiction. Several years after that, it began receiving the 15% Francophone Supplement, which was specifically designed to compensate the CSF for some of its increased transportation costs.

b) 2002-2012: Transportation Funding Freeze

[1618] When the operating funding model changed to the Enrolment-Based Funding Model in 2002/03, the funding allocation system included almost all of the elements that continue in the funding formula today: a basic allocation per student, supplements for districts undergoing change, all but one of the Unique Student Factors and many of the Unique District Factors.

[1619] Mr. Miller explained that the Supplement for Transportation and Housing was the one holdover from the previous funding formula. So, the Student Location Factor and Supplemental Student Location Factor were not introduced in 2002/03. Instead, the Operating Grants Manuals from 2002/03 through 2011/12 describe the Supplement for Transportation and Housing: a supplement to support the transportation of students to and from school, and funding for special housing arrangements as approved by the Minister.

[1620] Mr. Miller's evidence was that even though the Supplement for Transportation and Housing carried through to the Enrolment-Based Funding Model, the supplement ceased to be restricted. The Ministry eliminated its walk limits and allowed school boards to determine whether and how to use the funds from that supplement. Mr. Grittner confirmed that was his experience, and that the districts he worked for supplemented their transportation costs using operating funding.

[1621] According to Mr. Miller, funding for the Supplement for Transportation and Housing was frozen at 2001/02 levels through 2009/10: about \$85.7 million divided

between the 60 school districts. In 2010/11, the Supplement for Transportation and Housing for all districts increased by 2.58% when some extra funds became available due to the expiration of a collective agreement. The supplement was frozen at that level in 2011/12.

[1622] The Operating Grants Manuals for that period show that the CSF's Supplement for Transportation and Housing was frozen at the funding it received pursuant to its audited transportation costs for 1999/00: \$3,400,440. The CSF also received the small increase that all districts received in 2010/11, bringing its annual funding to \$3,488,298.

[1623] Additionally, for the first several years after the Enrolment-Based Funding Model was introduced, the amount the CSF was receiving for each student decreased due to overall funding cuts. In 2002/03 the amount the CSF received for each student decreased from \$10,162 to \$10,126. It continued to decrease to \$9,868 in 2003/04, and to \$9,782 in 2004/05.

[1624] On the other hand, due to its increasing enrolment, the total amount that the CSF pursuant to its Operating Block Grant was increasing. Of course, this also created an added cost burden related to transporting more students. Between 2002/03 and 2012/13, the CSF's enrolment grew from 2,943 students to 4,742 students. In the same period, the CSF also opened several new programmes, requiring new transportation contracts and systems.

[1625] As a result, the CSF's actual transportation costs came to more than the \$3.4 million it received pursuant to the Supplement for Transportation and Housing. In that period, the CSF regularly spent in excess of \$4.1 to \$4.2 million each year.

[1626] Mr. Miller confirmed that the Ministry was aware as early as 2004 that the CSF was spending in excess of its Supplement for Transportation and Housing by about \$1 million. He agreed that the funding freeze would have caused challenges for the CSF as it added programmes and students. However, Mr. Miller also advised that the Ministry was receiving complaints about the frozen transportation funding

from all districts, not just the CSF. He suggested the CSF's enrolment increases were resulting in more overall funding for the CSF due to the Enrolment-Based Funding Model. With the new model, Mr. Miller explained, the Ministry intended to move away from targeted funding for transportation and allow school boards to use whatever it wanted from their overall Operating Block grants to fund whatever transportation services they believed to be necessary.

[1627] With funding frozen, by the summer of 2005 the CSF determined to make new efforts to create a more efficient transportation system. This was one of the programmes it had planned to implement with its 15% Francophone Supplement. Mr. Grittner, Mr. Bonnefoy and Mr. Allison were all involved in, and gave evidence about, the CSF's efficiency improvements between 2004 and 2009. The programme involved moving to a local pick-up point system, using larger school buses, and improving the tendering process.

[1628] Mr. Bonnefoy explained that in 2006/07 the CSF began a three-year transportation review designed to improve the CSF's system by moving from door-to-door service to central pick-up points. In the first year of the review, the CSF engaged Mr. Grittner to use a software programme to set optimum bus routes. At the start of the second year of the review, on August 19, 2007, the CSF issued a bulletin to parents explaining the CSF's process.

[1629] Mr. Bonnefoy also signaled that the CSF would be developing new policy and regulations in connection with bus routes in the future. In 2009, Mr. Allison and Mr. Bonnefoy revised the CSF's previous transportation policy and officially moved to a group pick-up point policy. In July 2009, the CSF sent a letter to parents informing them of the policy change, which would take effect in September 2009.

[1630] Once the new school year was underway, the CSF received many phone calls and questions from parents. Mr. Grittner confirmed that because the policy was implemented when school was not in session there was no way to ensure that all parents were informed of the changes. He thought that if the policy had been completed sooner, the CSF would have had fewer complaints.

[1631] As a result of the timing issues, in September 2009, the CSF sent another letter to parents, prepared by Mr. Grittner, which acknowledged that the CSF's communications about the new policy had "not been adequate in helping parents understand the changes contemplated by the new transportation policy".

Mr. Grittner then responded to common parent concerns.

[1632] Mr. Allison assisted with responses to parent queries. He told the Court that minimal complaints related to the walking zones. In his view, parents' primary complaints related rules around drop-offs at a secondary address (like a daycare) in the afternoon. Mr. Grittner's evidence was that by 2010, most parent complaints related to bus travel times in instances where a route that had previously operated as two small routes had been merged into one longer route with a larger bus.

[1633] Mr. Grittner's evidence was that by January 2011, he had formed the view that the 2009 Transportation Policy had been implemented well. There were no "hot spots" of problems, and the complaints about ride times, walk to stop distances and stop locations were minimal. There were very few issues in two or three locations across the Province. The 2009 Transportation Policy had been more difficult to implement where there was a history of door-to-door service. He confirmed that 95% of his problem-solving time was spent on 5% of families.

[1634] With the 2009 Transportation Policy, the CSF also introduced the idea of Transportation Zones limiting the area in which the CSF will provide transportation, making the overall system more efficient. Mr. Allison decides whether a Transportation Zone will extend to a certain area based on whether there are "a lot of kids living in a certain area or not".

[1635] The CSF has deviated from its 2009 Transportation Policy in a very small number of cases. In September 2010, one parent with three children attending École L'Anse-au-Sable (Kelowna) complained that the central pick-up point was a long distance from the family's home outside Kelowna. The parents threatened to withdraw their children unless the students were dropped off closer to home.

Mr. Allison agreed to extend the route to the students' home because the stop was

last on the route and would not affect other students. Also, he considered that those students earned the CSF \$30,000 in operating funding. Notably, even though Mr. Allison wrote in a contemporaneous email to Mr. Grittner that his decision was based on the funding the CSF received for those students, while he was under cross-examination he became very evasive and refused to say that the funding was the most important reason for his decision.

[1636] Mr. Grittner explained that the CSF has also been gradually moving from operating small buses (seating between 20 to 24 passengers) to medium buses (seating 25 to 30 passengers) and large buses (seating between 31 and 72 passengers, depending on passenger age).

[1637] Mr. Grittner acknowledged there is no significant difference between the operating costs for small, medium and large buses. However, using more larger buses can reduce the cost of a transportation system because they allow more students to travel on a single bus route. That has the effect of reducing the number of buses required across the system. He confirmed that was the case in both urban and rural areas. On the other hand, large school buses also result in longer bus ride times for students picked up early on the route, who must travel while the bus picks up the remaining students.

[1638] Mr. Grittner recalled that when he began working with the CSF in 2006, it operated mostly small- and medium-sized buses, which are better suited to providing door-to-door transportation services in residential neighbourhoods. As the CSF implemented the 2009 Transportation Policy, it began to use larger buses to improve efficiencies and to accommodate increasing enrolment. Mr. Grittner gave the example of a change in the number of buses in Prince George from eight small buses to four large buses, resulting in annual net cost savings of \$162,850. He also decreased transportation costs in Kamloops by \$43,444 by moving from three smaller to two larger buses.

[1639] Mr. Grittner manages the CSF's third-party bus service provider bidding process. Starting in 2006, he began synchronizing the expiration dates of all the

CSF's transportation contracts so he could group service areas together for bidding purposes, and generate more economical bids. The synchronization process was complete by 2011/12, and applied to bids for the 2012/13 school year.

[1640] Mr. Grittner confirmed that the group tendering process allowed the CSF to negotiate lower prices for buses, generating savings of about \$250,000 in 2012/13 over 2011/12. This led to a significant decrease in the overall cost of the CSF's bus transportation service.

c) 2012: Student Location Factor

[1641] Although the Ministry initially carried the Supplement for Transportation and Housing forward into the Enrolment-Based Funding Model, it always planned to replace it with an enrolment-based factor. Beginning in about 2005, the Technical Review Committee proposed a formula based on the location of students' homes in relation to local schools. Ultimately, the Ministry implemented the Student Location Factor, which is based on population density.

i. The Student Location Factor

[1642] Since the Ministry always intended to replace the Supplement for Transportation and Housing, the 2003/04 Operating Grants Manual included a note that the Supplement for Transportation and Housing was under review, and new guidelines would be in place for 2005/06. As the work proved more onerous than expected, the 2004/05 Operating Grants Manual moved the implementation date forward by one year.

[1643] The 2005/06 Operating Grants Manual referenced a proposed revised formula for transportation based on student and school location (the "2005 Location Supplement Proposal"). The 2005 Location Supplement Proposal would allocate funding based on a number of components: home-to-school distances, student dispersion, weighting for road surfaces, weighting for winter weather conditions, funding amounts for special needs students and a capital component for the purchase of vehicles.

[1644] As of the 2005/06 Operating Grants Manual, the new formula was scheduled for implementation in 2007/08. However, with the 2006/07 Operating Grants Manual, the implementation schedule was pushed forward one year.

[1645] The proposed formula required the Ministry to gather information about the distance between students' homes and the nearest school. The Technical Review Committee initiated a pilot project to test the data collection process. Mr. Lebrun's experience was that the pilot project revealed that collecting data for the 2005 Location Supplement Proposal would be incredibly data-intensive due to the need to compile and submit student addresses to the Ministry. Additionally, the Ministry lacked the staff time and expertise to calculate home-to-school distances for every student. As a result, the Ministry did not move ahead with a change to the Supplement for Transportation and Housing at that time. Mr. Miller's evidence confirmed Mr. Lebrun's experience.

[1646] By the time of the 2007/08 Operating Grants Manual, the Ministry had abandoned the 2005 Location Supplement Proposal, and made no mention of any plan to replace the Supplement for Transportation and Housing. The plan was put on hiatus from 2007/08 through 2010/11. Through that time, funding for the Supplement for Transportation and Housing remained frozen as well.

[1647] The 2012/13 Operating Grants Manual eliminates reference to the Supplement for Transportation and Housing and introduces two new Unique District Factors: the Student Location Factor and Supplemental Student Location Factor. Mr. Lebrun advised that he developed those supplements with a view to capturing student-to-school distances without inconveniencing school districts.

[1648] Mr. Miller explained that the Student Location Factor provides an amount per student that is weighted based on school-age population density. Districts with lower density receive more funding than those with high density to recognize the increased costs associated with delivering education to a highly dispersed population.

[1649] The Ministry begins its analysis with “community clusters” representing communities within districts. Wherever more than five kilometres separate elementary schools in a district or more than 25 kilometres separate secondary schools, the Ministry treats the cluster of schools at distance from others as a separate community. The Ministry then determines the density of the community cluster using census data. According to Mr. Miller, the Ministry is interested in density as a proxy for home-to-school distances.

[1650] The Ministry weights enrolment in each community cluster based on population density and whether the regional centre or a district is eligible for a rural index or small community supplement. Subject to some exceptions, districts are provided a dollar amount for every weighted elementary and secondary FTE student.

[1651] The weighting of every student based on population density and eligibility for the rural index and small community supplement is set out in the following table:

School-Age Population Density		Regional Centre or a District not eligible for Rural Index (1)	Eligible for Small Community Supplement (2)	Neither (1) nor (2)	Both (1) and (2)
Greater or equal to	Less Than				
0	18	1.5	4	4	4
18	50	0.5	1	1	1
50	85	0.25	1	0.5	0.5
85	200	0.05	1	0.1	0.1
200	1,000	0.02	0.5	0.04	0.04

[1652] Mr. Miller acknowledged that weighting enrolment based on density has a significant impact on funding that districts receive pursuant to the Student Location Factor. With weights ranging from 0.02 to 4, weighting can affect funding by a factor of 200. Where only one of the rural index or small community supplement applies ((1) or (2)), population density alone affects the weighting of the funds received by a factor of 100.

[1653] The Ministry introduced two other factors along with the Student Location Factors. The Supplemental Student Location Factor provides districts with additional funding for every special needs student in the district. The Ministry also created a temporary three-year Student Location Factor Transition Supplement to assist districts experiencing an unexpected drop in their transportation funding.

[1654] When the new factors were introduced, the Ministry continued to work with the funding envelope that it already had for the Supplement for Transportation and Housing, in addition to about \$15 million in new funds intended to “benchmark” the supplement to the actual transportation costs reported by districts. In 2012/13, the Ministry allocated a total of \$78,856,925 to districts pursuant to the Student Location Factor. That made it the single largest allocation out of all the Unique District Factors. The Ministry allocated districts a further \$19,435,000 pursuant to the Supplemental Student Location Factor, and \$3,965,587 in transitional funding.

[1655] Mr. Miller’s evidence was that, like the other supplements in the Operating Block, the Ministry takes the view that individual school districts can decide how to spend funds allocated by the Student Location Factor, and whether to spend those funds on transportation. According to Mr. Miller, school districts provide transportation services as their discretion; the student location factor amount does not vary based on service level or cost.

ii. The Student Location Factor and the CSF

[1656] Mr. Lebrun confirmed that when the Ministry calculated the Student Location Factor for the CSF, it became clear that the formula generated less funding for the CSF than it had received previously pursuant to the Supplement for Transportation and Housing. To account for this, the Technical Review Committee decided to multiply the CSF’s allocation by some factor to increase the CSF’s allocation.

[1657] As a result, the Student Location Factor is calculated differently for the CSF than it is for other districts. After the Ministry calculates the CSF’s Student Location Factor allocation, the Ministry multiplies the result by five to recognize the CSF’s

unique circumstances and the fact that it has a highly dispersed population. This additional step is not performed for any other school district; it is a modification unique to the CSF.

[1658] Since the Student Location Factor is otherwise calculated the same for the CSF as it is for other districts, Mr. Miller believed that it is not based on the density of school-aged students eligible to attend a CSF school; it is based on overall population density. This has the effect of overstating the density of students eligible to attend CSF schools. For example, funding for the CSF's enrolment in Vancouver was weighted by 0.04 based on the City of Vancouver's overall population density of about 658 children per square kilometre. Mr. Miller agreed that since only a portion of those students are eligible to attend CSF schools, it is fair to say that the density of students eligible to attend CSF schools is lower.

[1659] Mr. Miller confirmed that the Ministry has never calculated the population density of students eligible to attend CSF schools. While Mr. Lebrun was under cross-examination, he advised that the Technical Review Committee did not consider assigning different density values to the CSF's community clusters.

[1660] Under the new factors, in 2012/13, the CSF received \$3,829,925 for the Student Location Factor, and a further \$84,000 for the Supplemental Student Location Factor, for a total of \$3,913,925. That represented an increase of \$425,627 over the \$3,488,298 the CSF received in 2011/12: an increase of about 12%.

d) Consultations with the CSF

[1661] The Technical Review Committee was responsible for determining how to incorporate the Supplement for Transportation and Housing into the Enrolment-Based Funding Model. The CSF has never had formal representation on the Technical Review Committee. Nor could Mr. Lebrun remember the CSF appearing before the Technical Review Committee to make representations.

[1662] In October 2003, Mr. Miller responded to a request by the CSF to participate on the Technical Review Committee. He suggested that the CSF contact the BCSTA and the BCASBO and seek representation through those bodies.

[1663] Mr. Bonnefoy sought to make representations on transportation to the Technical Review Committee again in September 2004, with a goal of dispelling a myth that the CSF offered “Cadillac” bus transportation services. However, he was not invited to comment. Notably, he did not seek formal representation on the committee through BCASBO, even though he was a member of that organization.

[1664] Although the CSF was not formally represented on the committee, Mr. Stewart recounted that he and Mr. Miller, who participated in the Technical Review Committee, ensured that the committee considered the interests of districts not directly represented, including the CSF.

[1665] In 2004, the Technical Review Committee began its pilot project to collect data for the 2005 Location Supplement Proposal. Mr. Lebrun explained that the pilot project used a sample of seven school districts. Some districts were included in the pilot project because they had relatively sophisticated data to contribute. Most were included because they had representatives sitting on the Technical Review Committee. The CSF was not included in the Pilot Project. Mr. Lebrun’s evidence was that no member of the Technical Review Committee suggested including the CSF in the case study.

[1666] There is one reference to the CSF in the Technical Review Committee’s Terms of Reference for 2005. That year, the Technical Review Committee was tasked with providing advice regarding funding adjustments for the CSF. However, Mr. Lebrun could not remember any work being done by the committee on that question. Further, in its discussions on the topic, Mr. Lebrun could not recall whether the Technical Review Committee noted whether the CSF’s transportation expenditures were in line with its transportation revenues, or how the proposed funding formula would impact the CSF’s level of transportation funding. Mr. Lebrun

could not recall whether the Technical Review Committee discussed how the formula would apply to the CSF given that it had both urban and rural aspects.

[1667] Although the CSF was not specifically discussed at the Technical Review Committee, deliberations by Ministry Staff around the 15% Francophone Supplement reveal that staff expected that the new formula would result in significant benefits to the CSF.

[1668] In about October 2009, Mr. Lebrun presented the Technical Review Committee with the idea of the Student Location Factor. At that time, and through December 2009, the formula was similar to what was eventually implemented, although the precise weighting figures were not finalized. Members of the committee agreed in principle to the new arrangement.

[1669] Based on comments from the Technical Review Committee, Mr. Lebrun revised the weighting formulae, and gave members information to explain some of the outliers that would see large variations in their transportation funding. In accordance with usual practice, the Technical Review Committee did not inform those outliers of its proposals, nor were they invited to make representations; the members of the Technical Review Committee were expected to represent all districts. Thus, the CSF was not invited to comment on the formula.

[1670] Minutes of the Technical Review Committee's deliberations about the Student Location Factor in the fall of 2009 refer to the CSF. Someone on the committee directed Mr. Lebrun that there must be an adjustment to the formula to provide additional recognition for the CSF, although Mr. Lebrun could not recall who. He confirmed that the idea of multiplying the results of the formula by some factor arose at the Ministry level; he could not recall the committee discussing how large or small that factor should be.

[1671] Overall, the Technical Review Committee did not spend much time-- if any-- specifically considering how the Student Location Factor would apply to the CSF.

They did not spend much time considering how the factor would apply to any districts: they were focused on the bigger picture.

3. Alleged Transportation Deficit

[1672] The plaintiffs prepared a chart detailing the CSF's transportation costs and funding received in each year between 2001/02 and 2014/15. They use that table to argue that the CSF has incurred a substantial transportation deficit. The defendants take issue with many aspects of that table.

[1673] The plaintiffs arrive at a total spent on transportation and housing by adding CSF costs in several categories: total amounts paid to third-party and majority-district bus providers; amounts spent compensating parents for driving their children to school; expenditures for housing students attending secondary school outside their community in past years; and the salaries of district-level transportation and housing personnel.

[1674] The defendants say that the amounts spent compensating parents for transporting children to school is not a proper transportation cost because the CSF is effectively funding transportation to communities where the numbers are too small to warrant instruction. The defendants also say it is not appropriate to include salaries of transportation and housing personnel in the calculation.

[1675] I do not consider that it is inappropriate to include amounts spent compensating parents in the CSF's overall transportation costs. The CSF bases its compensation programme on a Ministry formula that was in place under the Resource-Cost Funding Model for compensating parents who transport their children to school in rural areas. It is within the CSF's right to management and control to decide to transport students to larger schools rather than providing them with limited instruction due to low numbers. The CSF may decide that it is most cost-effective to rely on parents to provide transportation services. The personnel amounts, however, are the costs associated with district-level school board staff that administer the CSF's transportation services. Those amounts are included in a

different Ministry budget reporting category, and should not be included in the CSF's transportation costs.

[1676] The plaintiffs go on to calculate the CSF's shortfall for transportation funding in every year of the CSF's existence. The CSF deducts its total expenditures from the amount the CSF received pursuant to the Supplement for Transportation and Housing or the Student Location Factor and Supplemental Student Location Factor. To account for the 15% Francophone Supplement, the CSF also adds 15% to the Supplement for Transportation and Housing in every year after 2007/08.

[1677] The plaintiffs' method for dealing with the 15% Francophone Supplement is erroneous. It is based on the idea that the only funding the CSF could use on transportation and housing came from that supplement and the portion of the 15% increase that arose out of that supplement. However, the CSF receives a 15% premium on every aspect of its funding. Some aspects of its operating grant are not specifically related to language and culture; the 15% premium on those amounts was intended to be spent on matters detailed in the CSF's Funding Requirements Request. The CSF may spend all of the supplement on matters going to language and culture-- including transportation-- at its discretion.

[1678] I conclude that it is more appropriate to calculate the CSF's overall available funding for transportation by including a proportion of the 15% Francophone Supplement. The question is what proportion to include. The CSF spends about 10% of its operating budget on transportation; it is appropriate to add at least 10% of the amount received pursuant to the 15% Francophone Supplement to the CSF's transportation funding.

[1679] In the Funding Requirements Request, the CSF's plans for transportation amounted to about 20% of the CSF's requested \$9 million per year. The planned transportation programme amounted to about 30% of the non-duplicative programmes that the Ministry was prepared to fund.

[1680] I arrive at very different accounts of the CSF's historic deficit depending on whether 10%, 20% or 30% of the CSF's 15% Francophone Supplement is included in the CSF's total transportation funding.

[1681] When recalculating the CSF's transportation funding and spending in that way, the picture is slightly different; the CSF did not incur as substantial a deficit as it states it did.

[1682] If 10% of the 15% Francophone Supplement is included as part of the CSF's overall transportation funding, between 2002/03 and 2011/12, when the Supplement for Transportation and Housing was frozen, the CSF incurred average annual deficits of \$1.4 million, for a total cumulative deficit of about \$14.2 million. In the two years that the Student Location Factor has been in place, the CSF incurred an average deficit of about \$1.1 million per year, for a cumulative deficit of \$2.2 million.

[1683] If 20% of the 15% Francophone Supplement is included as part of the CSF's overall transportation funding, between 2002/03 and 2011/12, when the Supplement for Transportation and Housing was frozen, the CSF incurred average deficits of about \$1 million each year, for a cumulative deficit of about \$10 million. However, once the Student Location Factor came into force, the CSF incurred less than \$500,000 in annual deficits. In 2013/14, its deficit would have been only about \$150,000 dollars.

[1684] If 30% of the 15% Francophone Supplement is included as part of the CSF's overall transportation funding, between 2002/03 and 2011/12, when the Supplement for Transportation and Housing was frozen, the CSF incurred average deficits of about \$610,000 per year, for a cumulative deficit of about \$6 million. Once the Student Location Factor came into force, the CSF began incurring transportation surpluses of more than \$400,000 each year.

[1685] The CSF also attempts to calculate the cost per student of its transportation system to compare it to the amount it receives pursuant to the Student Location Factor and the Supplemental Student Location Factor. In doing so, the CSF leaves

out all the funding it receives pursuant to the 15% Francophone Supplement. In my view, at least 10% of the 15% Francophone Supplement was meant to compensate the CSF for some of its incrementally higher transportation costs. As a result, a proportion of the amounts the CSF received pursuant to the 15% Francophone Supplement must be included in any calculation of the total funding the CSF received per student pursuant to the transportation supplement. If 10% of the 15% Francophone Supplement is included in the CSF's overall transportation supplement, while the Supplement for Transportation and Housing was frozen, the CSF incurred an average deficit of about \$360 per student per year. That deficit would have been about \$260 per student per year if 20% of the 15% Francophone Supplement is included, or \$170 per year if 30% of the supplement is included in the CSF's transportation funding.

[1686] Once the Student Location Factor was introduced, though, things changed for the CSF. If only 10% of the 15% Francophone Supplement is included in transportation funding, the CSF incurred average deficits of about \$230 per FTE per year. If 20% of the 15% Francophone Supplement is included in transportation funding, the CSF's deficit is negligible: about \$60 per student per year. If 30% of the 15% Francophone Supplement is counted as transportation funding, the CSF has in fact operated at a surplus of more than \$110 per student per year since the Student Location Factor was introduced.

4. Discussion

[1687] The plaintiffs argue that the CSF has incurred a transportation deficit. The defendants have consistently taken the position that the CSF is well-funded, and has sufficient operating funds for its transportation system. The defendants also argue that the CSF's suggestion that it runs transportation "deficits" rings hollow given that the CSF has incurred substantial surpluses.

[1688] In Chapter XII, Public Funds, I find that although the Enrolment-Based Funding Model was designed to remove funding targeted to particular purposes, all of the Unique District Factors were originally designed to compensate districts for

actual cost differentials. The Supplement for Transportation and Housing, while it was retained, was no different. Similarly, when the Student Location Factor was introduced, the Ministry added another \$15 million to “benchmark” the pool of funds to reported transportation costs.

[1689] Considering those aspects of the Enrolment-Based Funding Model that are designed to target transportation-- the Student Location Factor, the Supplemental Student Location Factor, and a portion of the CSF’s 15% Francophone Supplement-- I am satisfied that the CSF did incur a transportation deficit in the period when the Supplement for Transportation and Funding was frozen.

[1690] However, in my view, the transportation deficit is not as substantial as the plaintiffs claim it is. The CSF’s transportation system was cumbersome for many years. It lacked efficiency and provided an exceptionally high level of service, even taking into account the CSF’s unique role as a minority language school board operating regional schools. Mr. Bonnefoy and Mr. Grittner were able to achieve considerable cost savings between 2004 and 2011. During Mr. Bonnefoy’s tenure, the CSF began implementing group pick-up points where it was safe to do so instead of offering door-to-door transportation services, and made that an official policy in summer of 2009. With group pick-up points, the CSF was also able to shift to operating larger buses, which resulted in significant cost-savings. While parents were initially disappointed by the move to group pick-up points in 2009, I am satisfied that the controversy was in part caused by the way that the CSF’s communicated the changes to parents.

[1691] By 2012/13, the CSF was also able to regroup its bus tendering process into group service areas. Doing so resulted in annual cost savings of about \$250,000. When that change is taken together with the move to the Student Location Factor, the CSF’s transportation deficit reached a new low, and may even be showing a surplus.

[1692] I also take into account the conclusions I reach in Chapter XII, Public Funds, concerning the CSF’s operating surpluses. The CSF began acquiring significant

surpluses once it began receiving the 15% Francophone Supplement. Those surpluses increased until 2006/07, when the CSF began depleting them every year until 2011/12. I accept Mr. Bonnefoy's evidence that the CSF set aside funds required for its enhanced Francophone programming and then depleted it over the course of the implementation of its strategic plan. Some of those funds, though, should have been spent on transportation.

[1693] As a result, I am satisfied that the CSF has incurred a transportation deficit since 2001/02. While the Supplement for Transportation and Housing was frozen, the accumulated deficit reached somewhere between \$6 million and \$14 million. However, given that the CSF was operating an inefficient and overgenerous system, not all of its costs were reasonable ones.

[1694] In any event, though, the system that exists today results in a fair outcome for the CSF. Due to the efficiencies that the CSF has created in its system and the move to the Student Location Factor, I am satisfied that the CSF is being properly indemnified for its transportation system. The CSF is being fully compensated, and is likely generating a surplus.

[1695] The plaintiffs raise three specific arguments in connection with the Ministry's transportation funding mechanism. First they say that they were disproportionately disadvantaged by the funding freeze while it was in place. They also argue that the Student Location Factor is inadequate and does not account for the CSF's actual transportation costs. Finally, they say that the Ministry did not take the CSF's needs into account when crafting the transportation funding system.

[1696] The plaintiffs say that the CSF was disproportionately impacted by the freeze of the Supplement for Transportation and Housing. They say that since funding was frozen at 1999/00 levels, the CSF was at a particular disadvantage when the freeze took hold. The plaintiffs also argue that the CSF's disadvantage was compounded by the enrolment growth the CSF was experiencing during the freeze. The plaintiffs say that the CSF brought its concerns about the adequacy of

the Supplement for Transportation and Housing to the Ministry's attention many times, but the Ministry did not respond to the CSF's needs.

[1697] In response, the defendants note that although the Supplement for Transportation and Housing was frozen between 2002 and 2012, the CSF's overall operating funding was increasing significantly.

[1698] The CSF's Supplement for Transportation and Housing Funding was frozen at the amount it spent on Transportation and Housing in 1999/00 between 2002/03 and 2011/12, subject to a small increase after 2010/11. In those years, the Supplement for Transportation and Housing therefore provided the CSF with between \$3.4 million and \$3.5 million annually.

[1699] I find that the Ministry's Resource-Cost Funding Model fell short of meeting the CSF's reasonable transportation cost needs when the freeze was implemented. Thereafter, the CSF's enrolment grew and it opened new programmes. Its cost of delivering transportation services on a per student basis was increasing, too, as the CSF moved from leased heterogeneous to owned homogeneous schools and had to start new transportation systems.

[1700] It is true that after 2002/03, the CSF had greater flexibility to use other parts of its operating funding to pay for transportation services. The evidence establishes that the CSF is a very well-funded school district. Its operating grants are consistently in the top 10 of 60 districts. Those districts that receive more than the CSF are remote and rural and therefore have their own challenges and costs associated with delivering educational services.

[1701] Although the CSF has no restrictions on how it spends its operating funding, all of the elements of the Enrolment-Based Funding Model are based on estimates of the actual costs arising out of certain unique district characteristics. As a result, it is understandable that the CSF considers that its transportation costs were underfunded because they exceeded the Supplement for Transportation and Housing during the time of the freeze.

[1702] When the CSF brought its concerns about transportation funding to the Ministry's attention, the Ministry acted: since 2006/07, the Ministry has recognized the CSF's additional transportation costs with the 15% Francophone Supplement. Unfortunately, it has since become clear that those funds were not sufficient to meet the CSF's needs.

[1703] Overall, I am satisfied that the CSF was disadvantaged by the funding freeze between about 2001/02 and 2011/12. As a result, despite the 15% Francophone Supplement, during the time of the freeze the CSF accumulated an actual deficit of between \$6 million and \$14 million.

[1704] The frozen Supplement for Transportation and Housing and the resulting freeze is problematic from the perspective of s. 23. The Province is required to provide the CSF with minority language educational facilities out of public funds where the numbers so warrant. The Province achieves that by offering the CSF public funds for operating purposes, and allowing the CSF to deliver the facilities. By failing to appropriately fund the CSF in that period, the CSF had to use funds that could have been devoted to other minority language educational facilities. It could have, for example, supplemented its Local Capital, performed maintenance on its buildings or otherwise offered more services and support in the classroom. Thus, the frozen Supplement for Transportation and Housing hurt the CSF's ability to achieve its mandate in that period.

[1705] However, prior to about 2009, in particular, the cost of the CSF's transportation system was unreasonably high. Thus, the defendants should not be liable for the entire deficit.

[1706] The plaintiffs' second argument is that the Student Location Factor does not adequately account for the CSF's transportation costs. The plaintiffs argue that the Student Location Factor was intended to reflect transportation costs by using school-age population density as a proxy for the distance between students' homes and the nearest school. The plaintiffs argue that the use of that proxy ignores distance

traveled and cost as a variable. Thus, they say that the formula does not account for the CSF's unique need to transport a highly dispersed student population.

[1707] The plaintiffs also take issue with specific aspects of the Student Location Factor. They argue that the population densities the Ministry uses do not reflect that the population of rightsholders' children is less dense than the total population. The plaintiffs further argue that the Ministry chose to multiply the CSF's allocation by an arbitrary factor to correct the discrepancy. They urge me to infer that the multiplier was chosen to maintain funding under the new supplement at a level similar to that generated by the frozen Supplement for Transportation and Housing.

[1708] In response, the defendants take the position that it was reasonable for the Minister to reject the 2005 Location Supplement Proposal and its focus on home-to-school distances because it was too data-intensive. In the defendants' submission, grounding the Student Location Factor in density is a sensible solution.

[1709] In the defendants' view, it was reasonable for the Ministry to choose to increase the CSF's allotment under the supplement by a factor of five to account for the different densities of majority and minority students. They also take issue with the idea that the factor was chosen to ensure that the CSF's funding under the old and new formula stayed the same, noting that the CSF benefited by about \$500,000 when the Student Location Factor was introduced. Since the plaintiffs seek damages in connection with \$500,000 in missed AFG funding, the defendants say that even the CSF sees \$500,000 as a significant sum of money.

[1710] The defendants argue that the only reason the CSF faces constraints in its operating budget today is this litigation. They say that once the litigation is over, the CSF will have ample room in its operating budget to offer the additional transportation services it seeks. The plaintiffs counter that any funding being spent on the litigation should be considered only with extreme caution so as not to deter parties acting in good faith to pursue what they see as a violation of their rights.

[1711] As I outline in Chapter VI, The Respective Roles of the Province and the CSF, the Province has the jurisdiction under s. 93 of the *Constitution Act, 1867* to establish the framework for delivering education funding. The CSF is not entitled to any specific funding formula. The funding system is valid so long as it does not interfere with the CSF's right to management and control and ensures rightsholders receive the funding they are entitled to.

[1712] It might very well be that if the Province had implemented a system that traced student homes and the distances to the nearest school it would have benefited the CSF more. Such a formula might also have yielded less for the CSF. There is no way to know.

[1713] The Province determined that it would be too time-consuming and challenging to implement a system that tracks student homes and distances travelled to school. Instead, they implemented a system that considers population density. The Province recognizes the unique density of CSF students by multiplying the CSF's allocation by a factor of 5. Doing so yields a significant benefit to the CSF: Its transportation funding increased by about 12%. Its deficit per student dropped to such an extent that any deficit it faces is negligible-- it may even be incurring a surplus. Given the CSF's history of surpluses, and even taking into account that much of those surpluses and that those surpluses related to the 15% Francophone Supplement and transportation costs, I am satisfied that the Student Location Factor as well as the CSF's other transportation funding allow the CSF to deliver an appropriate level of transportation services.

[1714] It is my view that when the Technical Review Committee designed the Student Location Factor, it intended to reallocate funds while benchmarking it to actual spending. The Technical Review Committee looked for a formula that would prevent large discrepancies in what districts were receiving, and implemented transitional funding for the few districts that were likely to lose funds. I infer that the multiplier chosen for the CSF was designed to provide it with a modest increase over what it was receiving before, without any undue impact to majority school boards.

[1715] The Ministry's choice was simultaneously intended to bring the CSF's actual funding pursuant to the supplement closer to its actual expenditures. It had that effect. While the factor the Ministry chose is arbitrary, it remedied the CSF's transportation deficit going forward, particularly given the savings the CSF generated by improving its tendering process.

[1716] Finally, the plaintiffs argue that the CSF's needs were not properly considered by the Technical Review Committee. The plaintiffs argue that the Technical Review Committee was never properly equipped to address the CSF's unique transportation needs because it excluded the CSF and was comprised only of majority board representatives incapable of understanding the CSF's situation. The plaintiffs urge that representation of the minority by the majority is not a substitute for management and control by the minority of matters going to language and culture.

[1717] With reference to the pilot project connected to the 2005 Location Supplement Proposal, the plaintiffs suggest that the Technical Review Committee "missed a prime opportunity to review the Conseil's transportation funding needs and ensure that any future funding model respond to these needs." The plaintiffs also argue that in 2004, the Technical Review Committee discussed aspects of the formula in which the CSF had a vested interest, such as home-to-school distances, without reference to the CSF. In connection with the deliberations on the Student Location Factor, the plaintiffs point out that the Technical Review Committee never deliberated on whether a factor increase was appropriate for the CSF, or what factor should be applied.

[1718] The plaintiffs' argument is tantamount to an argument that there was a breach of a duty to consult with them. They have not pleaded that a duty to consult exists pursuant to s. 23 that is similar to the one that exists under s. 35 of the *Constitution Act, 1982*. While the majority cannot be expected to appreciate all the unique interests of the minority, that fact does not give the CSF the right to be

consulted about all aspects of the funding framework across the Province. In my view, the fact that the CSF was not consulted does not breach s. 23.

D. CSF Transportation Times

[1719] The plaintiffs argue that the CSF requires more transportation funding to reduce long transportation ride times. The plaintiffs propose that the CSF add 54 buses to its transportation system to split bus routes to make them shorter.

1. Travel Times and School Choice

[1720] The plaintiffs suggest that long travel times deter parents from registering their children at CSF schools. They point to the evidence from Mr. Gauthier, who concluded that the distance from home to school is an important factor that parents consider when selecting a school for their children. In Chapter VIII, Entitlement, I concluded that the most that I can take from Mr. Gauthier's expert evidence is that rightsholders with a high degree of connection to the French language and culture are more likely to enrol their children in a minority language school. However, it is clear to me based purely on reason and logic that some parents would find long travel times unattractive when making enrolment decisions for their children.

[1721] The plaintiffs also point to evidence from four parents:

[1722] Ms. Isabeau Iqbal is a parent of two children, one of whom attended École Élémentaire Rose-des-Vents for several years. Ms. Iqbal gave evidence about the impact the École Élémentaire Rose-des-Vents (Vancouver (West)) transportation system had on her family.

[1723] Ms. Iqbal and her family live in the West Point Grey area of Vancouver, to the west side of the École Élémentaire Rose-des-Vents catchment area. Her son, Luke, attended École Élémentaire Rose-des-Vents for several years. According to Ms. Iqbal, she found the École Élémentaire Rose-des-Vents transportation system to be very convenient when Luke was in Kindergarten, and received door-to-door transportation services. Then the CSF moved to a centralized pick-up point. As a result, Luke had to wake up earlier to walk to the school bus pick-up point.

[1724] The transportation times also grew longer. When Luke was in Kindergarten, he was dropped at home about 30 minutes after school let. By the time Luke was in second grade, he arrived home about 45 minutes to one hour after school. Ms. Iqbal grew concerned about bus transportation times and complained to the principal of École Élémentaire Rose-des-Vents and the bus contractor.

[1725] When Ms. Iqbal contacted Mr. Allison, she threatened to move Luke from École Élémentaire Rose-des-Vents to a French immersion school. Initially, Ms. Iqbal implied in her evidence that the CSF did not make any changes in response to her complaints. However, on cross-examination she admitted that the central pick-up point was moved closer to her home.

[1726] Although the CSF had responded to her concern about the pick-up point, Ms. Iqbal continued to have concerns about the transportation system. In November 2008, she wrote to École Élémentaire Rose-des-Vents staff several times to express concern about bad behaviour by students on the bus. She was anxious that her son was being bullied. She admittedly used strong language about the bullying; stronger than she had used to describe the length of bus ride times. She began driving Luke to school more often.

[1727] Ms. Iqbal eventually decided to move Luke to a French immersion programme at Queen Elizabeth Annex, which is about 3.5 kilometres from the family's home. She stated this was partly because of the transportation times, but had "something to do" with the bullying of her son on the bus.

[1728] The following year, Luke moved with his cohort to Jules Quesnel Elementary, which is very close to the family's home. When it came time to enrol her daughter in Kindergarten, Ms. Iqbal enrolled her at Jules Quesnel Elementary as well. She described the benefits of sending her son to a neighbourhood school, including her ability to volunteer at the school.

[1729] The plaintiffs suggest that Ms. Iqbal's testimony shows that she removed her son from École Élémentaire Rose-des-Vents because of the long bus ride. The

defendants counter that Ms. Iqbal's pattern shows an unwillingness to travel at all to have her children attend a minority school. She chose preschool services based on their proximity to her home. She also admitted that the bullying and behavioural issues on the bus- in addition to the length of time on the bus ride- contributed to her decision to withdraw her son from École Élémentaire Rose-des-Vents.

[1730] I find that Ms. Iqbal's decision only partially turned on long transportation times. While long transportation times were one factor, her decision was also influenced by the fact that her son was being bullied. Moreover, her ability to be involved in the life of a neighbourhood school has since reinforced her decision.

[1731] The plaintiffs also point to the evidence of Ms. Mee-Len Dickie, a rightsholder parent from Nelson. I describe Ms. Dickie's evidence in Chapter XXI, École Élémentaire des Sentiers-Alpins (Nelson). There, I explain how Ms. Dickie moved away from Nelson to a rural community, Winlaw, and École Élémentaire des Sentiers-Alpins moved outside Nelson, to Six Mile. At that point, Ms. Dickie ceased sending her son to École Élémentaire des Sentiers-Alpins and decided not to enrol her daughter at that school. Transportation was not provided from Winlaw to École Élémentaire des Sentiers-Alpins. Ms. Dickie advised that to drive her daughter to École Élémentaire des Sentiers-Alpins would take about two hours each day.

[1732] Ms. Dickie's evidence shows the difficulties that arise because of the catchment area that the CSF has drawn around École Élémentaire des Sentiers-Alpins. By all accounts, the catchment area is rural and large. Ms. Dickie's nearest majority-language school, Winlaw Elementary, is 62 kilometres away from École Élémentaire des Sentiers-Alpins. Winlaw is a rural community at a distance from Nelson, in a community where the numbers do not warrant minority language instruction. Indeed, the neighbourhood school, Winlaw Elementary, itself is a very small school, with capacity for only 79 students. While the CSF chooses to allow children from that area to enrol at École Élémentaire des Sentiers-Alpins, it must accept that given the distance, it would be very unlikely for any parents in that area to enrol their children at École Élémentaire des Sentiers-Alpins. In that area, it is not

so much an absence of transportation that is at issue: it is the fact that the numbers in many small communities are too small to warrant Francophone instruction.

[1733] The plaintiffs also point to the evidence from Ms. Claire Bossavit, a rightsholder parent from Burnaby who chose to enrol her children in a neighbourhood school rather than École des Pionniers. I describe her evidence in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam). There, I find that Ms. Bossavit decided against a CSF school -- as well as a French immersion school -- because of convenience, which is understandable for a working parent.

[1734] Finally, the CSF relies on the evidence of Mr. Stéphane Perron, a plaintiff and rightsholder parent from Squamish, who testified that he would not enrol his son at École André-Piolat (North Vancouver) for secondary school because it is too far to travel.

[1735] Overall, I am satisfied that for many parents, distance between their home and the nearest CSF school is a factor that they would take into account when making enrolment decisions for their children. Where the CSF is able to minimize transportation times, in some cases, it might make a programme more appealing to rightsholder parents. However, distance is a high hurdle for the CSF to overcome. While travel times are important to parents, the distance itself can be a deterrent. The rightsholder population in British Columbia is highly dispersed, and the psychological distance between a neighbourhood school and a regional minority language school can only be partly overcome by reduced transportation times.

2. Long Ride Times

[1736] The CSF has a history of responding to parent complaints about transportation. Mr. Bonnefoy explained that as early as 2004 (when the CSF was offering door-to-door transportation in many instances), the CSF faced parent complaints about the length of some bus travel times. The Court was shown an

example of a letter from parents in Kamloops who were concerned about travel times. Mr. Bonnefoy addressed the most serious complaints.

[1737] In 2006, as the CSF was moving to group pick-up points prior to the implementation of the 2009 Transportation Policy, a parent of students at École L'Anse-au-Sable (Kelowna) wrote and suggested that she planned to withdraw her children and enrol them at a majority-language school due to lengthy bus transportation times. In that instance, despite the complaint, Mr. Bonnefoy refused to change the transportation system because it would have added too much time to the itinerary, to the detriment of other students.

[1738] Under the 2009 Transportation Policy, the CSF worked to reduce travel times to below 45 minutes wherever possible. In April 2010, Mr. Grittner prepared a report to the CSF Board of Trustees concerning the implementation of the 2009 Transportation Policy. His analysis showed that in the Lower Mainland/Fraser Valley region, 21 of 89 bus runs exceeded 45 minutes. Only students travelling from the first few stops of those bus routes would experience those long travel times. Nine buses had trips longer than 45 minutes from the second stop, and four of had a third stop within the 45-minute run time. Three of those buses travelled from Chilliwack and Mission to École Gabrielle-Roy (Surrey), which meant that little could be done to shorten the route. Based on those numbers, Mr. Grittner concluded that very few students in the Lower Mainland and Fraser Valley regions had ride times longer than 45 minutes. He confirmed that was his view at the time.

[1739] The Report also showed that outside the Lower Mainland and Fraser Valley, 33 of 48 runs exceeded 45 minutes; 15 had a ride time of greater than 45 minutes from the second stop to the school.

[1740] When asked about this report while under cross-examination, Mr. Grittner confirmed that he thought the CSF was doing decent work to achieve the 45-minute ride time limit in the 2009 Transportation Policy, although he thought that there were some remaining problematic areas. In his view, by the spring of 2010 the CSF was

close to achieving the 45-minute ride limit wherever it was possible to do so.

Mr. Allison agreed with Mr. Grittner's analysis.

[1741] In January 2011, Mr. Grittner reported to Mr. Allison again on the implementation of the 2009 Transportation Policy. He pointed to two recent studies that had shown that where reasonable and possible, routes were within the preferred 45-minute ride time. In some areas ride times were much longer, but that was due to the physical addresses of the students in relationship to the location of the school.

[1742] In 2014/15, the CSF operated 152 buses through bus contractors. The CSF has added five bus routes per year since 2012/13. To keep its transportation costs stable, the CSF has switched to operating some larger buses, which, according to Mr. Allison, has increased travel times for some students.

[1743] A series of tables prepared by the plaintiffs show that as of 2012/13, 407 CSF students spent more than 45 minutes on the bus: about 7.5% of CSF students. About 1,326 students spent 30 minutes or longer on the school bus: about 24% of CSF students.

[1744] According to Mr. Allison, despite Mr. Grittner's success, the CSF cannot add enough buses to shorten all bus routes to bring them within the times stipulated in its current transportation policy. Of course, that policy seeks to reduce travel times until they are equivalent with the travel times for the majority. As the jurisprudence has recognized many times, given the dispersion of the minority language student population and the value of educating children in larger facilities, it is appropriate for the minority to endure longer travel times than the majority. The CSF's efforts to arrive at travel times equivalent to those of majority boards is not realistic.

3. CSF's Proposed New Bus Routes

[1745] Mr. Grittner and Mr. Allison explained that the CSF attempts to resolve problems with long bus ride times by splitting very long routes into two routes. Mr. Allison explained that the CSF focuses on routes that display factors that could indicate that a bus route is particularly lengthy: those bus routes where travel times

are longer than 45 minutes, there are 30 or more students on a bus, the route has 12 or more pick-up points, or an urban route is longer than 25 kilometres.

[1746] When one bus route is very long, the CSF splits the route by adding another bus that begins part way through the bus route, and follows the former route. Students on the latter portion of the trip do not typically have long ride times. Students picked up on the first half of the bus trip, who do experience long ride times, proceed through the original route until the point where the route is split and the new bus begins, and then proceed directly to school. The “express” service through the latter half of the trip has the effect of lessening their ride times.

[1747] For example, in 2012/13, the CSF addressed a long route that transported students from north-west Burnaby to École des Pionniers (Port Coquitlam). By adding a bus, the CSF was able to split the route, reducing travel times for students on that bus route and several others. The CSF did the same thing in 2014/15, by splitting a route taking students from Okanagan Falls to École Élémentaire Entre-lacs (Penticton). By splitting the route, the CSF was able to create an “express route” that shortened the ride for Okanagan Falls students, and students on one other route.

[1748] The CSF wants to add 54 buses to its 2012/13 school bus routes to split routes and reduce travel times. The plaintiffs prepared a table that identifies long bus ride times, being those where students travel for more than 30 or 45 minutes to school, with a view reducing the number of students who spend more than 30 minutes on the bus. As an average bus in 2012/13 cost \$39,309, the estimated cost of implementing the proposal is about \$2,122,686 each year.

[1749] The CSF’s proposal would result in only 638 to 675 students spending more than 30 minutes on the bus. It would also reduce the number of students who spend 45 minutes on the bus from 407 to 107 students.

[1750] For example, one route serving École Victor-Brodeur (Victoria) (BRO-006) takes at least 40 minutes to complete although some children live six kilometres or

less from the school. Since that bus picks up 57 students, the CSF proposes that the route would be better served by two buses making fewer stops. The plaintiffs argue that it does not have adequate transportation funding to pay for an additional bus to split that route.

[1751] Although the plaintiffs state that the CSF has limited funds to split routes and add new buses each year, Mr. Grittner confirmed that he had never been told that the CSF did not have sufficient funding to add a new bus route when he thought it would reduce ride times.

4. Discussion

[1752] The defendants take issue with the plaintiffs' split-route scenario. In their view, s. 23 cannot justify a minimum bus ride time; there must be some analysis of costs and benefits, and some limit to the amount that ought to be spent on transportation. The defendants' position is that the deterrent factor posed by the distances between student homes and minority schools simply cannot be remedied for most rightsholders. The defendants point to the evidence of Mr. Berleur, which suggested that about 87% of students are within the bounds of the CSF's Transportation Policy as it was prior to this litigation.

[1753] The defendants' position is that at a certain point, students are so far from the school that it becomes disproportionate to transport them to school. The Province has left the decision of where that cut-off should be to the CSF. However, the defendants say that leaving the decision to the CSF does not mean that the CSF should be fully indemnified for whatever level of service they choose to provide.

[1754] I agree with the defendants that it is inappropriate to establish an absolute limit on appropriate travel times. Mr. Justice Willcock addressed that issue in *Association des parents- BCSC*. He was not prepared to conclude that "transportation afforded to students at Rose-des-vents is inadequate in every instance where it takes a student more than 45 minutes to get to school" (at para. 157). Rather, he found it reasonable to provide transportation services to

ensure access to minority language education, and that the decision about whether to operate smaller schools with shorter travel times or larger schools with longer travel times was a decision best made by educators (at para. 156). I agree.

[1755] Moreover, very few of the CSF's students face disproportionately long transportation times. The evidence establishes that only 7.5% of CSF students have longer bus ride times than were permitted pursuant to the CSF's 2009 Transportation Policy. I accept Mr. Grittner's evidence that by about 2011, travel times had been reduced to manageable levels wherever it was possible to do so. The evidence falls short of proving that transportation times have grown longer since then. The CSF has favoured building larger regional schools to provide students with the benefit of homogeneous instruction and the amenities that can be provided to larger groups. That will inevitably result in some long bus ride times.

[1756] I am also concerned that if I were to order the Province to fund the plaintiffs' split route proposal, it would result in double recovery for the CSF. The CSF plans to divide catchment areas in a number of communities in order to reduce transportation times and provide a local option for students: Kelowna, Victoria, Vancouver, Burnaby and the Fraser Valley. I conclude it is within the CSF's jurisdiction to start those programmes. If the CSF follows through its plan, then it will not need funding to split bus routes.

[1757] Moreover, I am not persuaded that the CSF would require additional funding to establish new transportation systems in those communities. Because the CSF plans to divide catchment areas, the buses that currently serve those areas will be reassigned to the new schools. Given that the CSF organizes its bus tenders by region, in most communities its existing bus contractors will be able to serve the new schools. As enrolment grows in the new programmes, the CSF will receive more transportation funding pursuant to the Student Location Factor and the 15% Francophone Supplement for those students.

[1758] I therefore do not find it appropriate to order the funding the plaintiffs seek to split routes to reduce long travel times. The CSF's bus ride times have reached a

reasonable level wherever it is possible in light of geography. If the CSF wants to use its operating funding to provide an even better level of transportation service, it has the ability to do so. However, the defendants should not be expected to provide the CSF with even more transportation funding to pursue that objective.

E. Summary

[1759] In the Province's submission, since 2002, the Ministry has never intended to indemnify districts for their transportation costs. Rather, the Province provides an overall block of operating funding that districts can spend at their discretion. In the Ministry's view, transportation service levels are discretionary and best left to the decisions of individual school boards.

[1760] The plaintiffs argue that it is not appropriate to provide the CSF with a block envelope of funding to budget at its own discretion. In the CSF's submission, due to its unique circumstances, its operating funds must reflect the true costs associated with providing minority language education. It takes the position that it must offer transportation services to fulfill its constitutional mandate, and a funding formula that treats its transportation services as discretionary will never adequately capture its unique needs.

[1761] In my view, the CSF's right to management and control includes the right to make decisions about how best to spend its operating funding. The CSF is in the best position to determine what funds ought to be spent on transportation services. By implementing a system that leaves transportation funding decisions to the CSF, the Ministry is enhancing the CSF's ability to exercise management and control.

[1762] However, the CSF's transportation system was chronically underfunded pursuant to the frozen Supplement for Transportation and Housing between 2002/03 and 2011/12. The CSF was in a different position from majority boards when funding was frozen and the new factor was introduced. The CSF experienced a transportation deficit of between \$6 million and \$14 million between 2002/03 and 2011/12, when the supplement was frozen. However, because the CSF's

transportation funding system lacked efficiency for many years, it would be unfair for the Province to be liable for that entire deficit.

[1763] I am not, however, persuaded that the CSF is disadvantaged by the Student Location Factor. Once that system was introduced and the CSF added efficiency to its system by coordinating tenders, the CSF ceased incurring a deficit. If it incurs any deficit, it is negligible; its funding more likely generates a surplus for it.

[1764] I do not consider it appropriate to make a financial award to the plaintiffs to allow it to split its routes. If I were to make such an order, it would likely result in some double recovery because the CSF plans to divide catchment areas to reduce travel times. The CSF has to make the hard decisions about when long travel times are appropriate to give students access to larger schools, and when those times should be reduced by creating smaller neighbourhood schools. That question falls squarely within its right to management and control over matters going to minority language education.

F. Justification

[1765] I conclude that the CSF has been disadvantaged by the Ministry's funding system for transportation, contrary to s. 23. That breach is caused by the policy in the Capital Plan Instructions that froze the Supplement for Transportation and Housing between 2002 and 2011. The remaining question is whether the breach is justified pursuant to section 1.

[1766] I set out the framework for s. 1 justification in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply.

[1767] The plaintiffs suggest that s. 1 should be treated differently regarding bus transportation. Transportation funding is determined by the operating funding system, not the capital funding system. I agree that is the case-- the purpose and

effects of the operating funding system differ somewhat from the purpose and effects of the capital funding system.

[1768] The plaintiffs recognize that the operating funding system is prescribed by law. They argue that the objective of the operating funding system is pressing and substantial, as long as it is worded as ‘a fair and rational allocation of public funds’.

[1769] I agree that the Ministry’s frozen Supplement for Transportation and Housing was designed to fairly and rationally allocate public funds. I would add to that an additional purpose, which all the defendants’ witnesses spoke to: the operating funding system, particularly regarding transportation funding, is also designed to further school district autonomy. In the context of Canada’s public law system, the goal of ensuring that statutory bodies like school boards act autonomously from government furthers the rule of law and is therefore pressing and substantial.

[1770] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. When examining the rational connection, I will have regard to the objective and the scheme for achieving that objective.

[1771] In the plaintiffs’ submission, the operating funding system with connection to transportation, as a measure limiting s. 23 rights, is not rationally connected to its objective. In their view, the evidence establishes that it ignores the CSF’s actual school transportation funding needs, and purports to treat CSF school bus transportation as optional despite the fact that it operates regional schools. In their view, there is no rational connection because the failure to take specific account of the CSF’s needs is not “fair” or “rational”. Here, the plaintiffs’ argument focuses unduly on the aspect of the regime that specifically limits the CSF’s rights, thus intruding into the minimal impairment stage of the test.

[1772] The focus here is on ensuring that the operating funding system for transportation is not arbitrary. In my view, an operating funding system that allocated a frozen amount of transportation funding to school boards to spend in their discretion is rationally connected to the objective of fairly and rationally allocating public funds. When the Minister froze the Supplement for Transportation and Housing, most school boards were being compensated based on their actual transportation costs, and were experiencing declining enrolment. The Minister froze and allocated operating funds to school boards to allow them to continue to provide transportation services pending the creation of a new formula. It furthered school board autonomy by allocating blocks of funding that school boards could spend on transportation, or not, in their own discretion.

[1773] The plaintiffs also argue that the operating funding regarding CSF transportation funding is not minimally impairing or proportionate in its effects. They suggest that any funding system that takes account of the CSF's unique needs would be less impairing than the Ministry's current formula. With regard to proportionality, the plaintiffs urge that the political benefits to the Province from being able to claim it treats all districts alike is not a valid salutary effect.

[1774] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[1775] I am satisfied that the measure that froze the Supplement for Transportation and Housing was minimally impairing. The Minister took a number of steps in that period to mitigate the effect of the funding freeze on the CSF and rightsholders. Although the Province froze the supplement, the Minister began allocating the CSF the 15% Francophone Supplement beginning in about 2006 to recognize the CSF's

transportation funding needs. The Minister also began working toward a formula based on student home-to-school distances, which would have been of great assistance to the CSF. This helped to tailor the frozen supplement to the CSF's actual needs, while still encouraging the CSF to find needed efficiencies in its transportation system. The Minister is also entitled to some deference in his determination that the measure was tailored to the CSF's situation because the CSF was receiving a significant sum pursuant to the Unique District Factors.

[1776] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[1777] As I see it, the salutary effects of freezing the Supplement for Transportation and Housing relate to time. The Minister was given some time to craft a new, enrolment-based funding supplement better suited to the Province's goal of making the system more efficient by devolving more responsibility to school boards. The measure also had the salutary effect of encouraging the CSF to find much-needed efficiencies in its transportation system. I also take into account the salutary effects of the operating system as a whole on the CSF: the fact that it allocates more to the CSF pursuant to the Unique District Factors than any other school district.

[1778] The deleterious effects are more severe. The CSF is the only provincial school district in the Province. Unlike other school boards, it must establish entire transportation systems in a great number of communities at some distance from one another. Because of the dispersion of Francophone students, it has greater transportation needs than majority school boards do. To provide students with the benefit of the amenities that can be provided at larger schools, the CSF transports its students to regional schools. The distance between home and school deters some parents from sending their children to a minority language school. Transportation plays a small role lessening that deterrence, and thus helps to delay assimilation.

[1779] Because the CSF continued to provide transportation services as it opened new programmes, the deleterious effects also include that the CSF necessarily had to make hard decisions about what was more important: getting students to school or providing services within those schools.

[1780] I also consider the deleterious impact on children. A number of CSF students-- some as young as four and five years old-- spent upwards of an hour on the bus every day. While certainly, some of those children lived at great distances from the minority school, some did not. The Court heard evidence from Ms. Bernier, the current principal at École Victor-Brodeur (Victoria) about her children travelling about 40 minutes by bus despite living only about 3 kilometres from school. There is a real impact on the lives of a small number of rightsholders' children.

[1781] In my view, weighing all the factors together, the deleterious effects of the frozen supplement for Transportation and Housing outweigh its salutary effects. While the Ministry is entitled to some deference to its approach, it did not take the time to consider the CSF's actual transportation needs. While it tried to tailor its approach to recognize the CSF's needs, it did not adequately account for the CSF's needs, and how they would change as the CSF opened new programmes. The lack of transportation funding had a real impact on children's day-to-day lives, and prevented the CSF from compensating for the distances between students' homes and schools to the extent that is possible. As a result, I find that the defendants have not justified the frozen Supplement for Transportation and Housing as it applied to the CSF.

G. Remedy

[1782] The plaintiffs seek a declaration that the CSF is entitled to receive funding for transportation based on the true cost of offering a service level that ensures that the fewest possible students spend more than 30 minutes, or in the alternative 45 minutes, traveling to and from school by bus. They also ask for an order requiring the Province to grant the CSF funding to eliminate its transportation deficit and to add such additional routes as are required to meet the 30- to 45-minute goal.

[1783] As I explained previously, I do not consider it appropriate to make that declaration. The appropriate length of travel times will vary given the particular context of the community at issue. Moreover, given the CSF's plans to start new programmes to resolve problems with long transportation times, funding the CSF's split route plans might lead to double recovery for the CSF.

[1784] In the alternative, the plaintiffs seek an order requiring the Province to review the CSF's transportation funding system. The plaintiffs suggest that the CSF should have a direct role in that review. In my view, those declarations are not appropriate because the only breach of s. 23 relates to the now-spent frozen Supplement for Transportation and Housing and the resulting transportation deficit the CSF incurred between about 2002/03 and 2011/12. The current transportation funding system, the Student Location Factor, adequately responds to the CSF's needs once the 15% Francophone Supplement is taken into account.

[1785] As I explain in Chapter X, Remedies, the usual remedy for an unconstitutional law or policy is a declaration under s. 52 of the *Constitution Act, 1982* that the infringing measure is of no force and effect. Since the frozen Supplement for Transportation and Housing was a law or policy, that declaration would normally be the appropriate remedy. However, given that the frozen Supplement for Transportation and Housing no longer exists, that remedy would have no meaning and would not provide the plaintiffs with an appropriate remedy.

[1786] In this instance, I am satisfied that *Charter* damages are an appropriate and just remedy. I describe my approach to *Charter* damages in Chapter X, Remedies. Following *Ward*, I am satisfied that *Charter* damages would serve the goal of compensation in this instance. The Province had a positive duty to provide the CSF with the public funds it needed to deliver minority language educational facilities. By freezing the CSF's funding for transportation while it was experiencing enrolment growth, the Province caused a financial loss to the CSF that should be remedied. An award of damages is clearly the most appropriate way of putting the CSF in the position it would have been in but for the Province's failure to provide those funds.

[1787] In this case, I am satisfied that the Minister only acted in good faith. Indeed, the Minister attempted to respond to the CSF's additional transportation costs by way of the 15% Francophone Supplement. In Chapter X, Remedies, I explain that in many instances where the government is acting in good faith pursuant to an unconstitutional law or policy, countervailing factors concerning the "public good" will tend to negate the plaintiffs' claims for *Charter* damages. This ensures that government actors will continue to enforce laws without fear of retribution if they are later found to be invalid.

[1788] In this instance, though, there is little risk that the government will not enforce laws out of a fear of retribution. I do not foresee that damages will chill the legislative and policy-making functions of government. Thus, in my view, the *Mackin* principle does not apply to this case.

[1789] That leaves the question of quantum. I find that the CSF's actual transportation deficit was somewhere between \$6 million and \$14 million. However, the CSF operated an inefficient transportation system. The defendants should not be liable for the CSF's entire deficit.

[1790] I therefore assess the appropriate quantum of damages at \$6 million. I find that amount will substantially place the CSF in the position it would have been in had it received sufficient public funds for its transportation facilities between 2002/03 and 2011/12. The Province will be required to devote those funds to the CSF to assist it with its transportation programme over 10 years: the approximate time of the transportation freeze.

H. Conclusion

[1791] In my view, the plaintiffs' right to management and control includes the right to make decisions about how best to spend its operating funding. The CSF is in the best position to determine what funds ought to be spent on transportation services, and what transportation times are too long.

[1792] However, the CSF's transportation system was chronically underfunded pursuant to the frozen Supplement for Transportation and Housing. The Ministry

knew as early as 1999 that the system was not responding to the CSF's transportation needs, yet it chose to freeze funding at 1999 levels. The Ministry provided more funding to the CSF for transportation starting in 2006. Nevertheless, as the CSF continued to grow and open new programmes through the late 2000s, it had insufficient transportation funding to meet its needs.

[1793] I find that the frozen Supplement for Transportation and Housing resulted in the CSF incurring a deficit of between \$6 million and \$14 million over the course of about 10 years. As a result, the Province failed to provide the CSF with sufficient public funds for its minority language educational facilities. To restore the CSF to the position it would have been in but-for the breach, I consider that an award of *Charter* damages amounting to \$6 million is appropriate. That amount accounts for the fact that the CSF was operating an inefficient system, and that the defendants should not be liable for the entirety of the CSF's deficit.

XV. LINGUISTIC AND CULTURAL PROGRAMMING

[1794] The plaintiffs urge that rightsholders are entitled to three "key requirements" for the CSF to preserve and promote the French language and culture in BC: sufficient operating funding for the CSF to offer linguistic and cultural programming; early learning programmes to begin socializing children at the proper age; and an admissions policy that fosters the development of the French-language community and redresses past injustices. I have already addressed the question of the Expanded Admissions Policy in Chapter VII, The Number of Children. Here, I will address the extent to which the CSF is also entitled to funding for linguistic and cultural programmes and space for early learning programmes.

[1795] The plaintiffs argue that when deciding what programmes the CSF is entitled to, the particular context of the situation in British Columbia must be taken into account. To that end, they point to what they see as the Province's initial delay implementing s. 23 in the 1980s; the Province's failure to heed the Minority Language Education Task Force's recommendations; the Province's failure to present a model for French-language education that passed constitutional muster

four years later; and the general lack of capital support for French-language education over the past two decades.

[1796] Most of these allegations have been addressed in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. There, I conclude that many of the issues that arise in this claim were in the mind of the Minority Language Education Task Force in 1990 and 1991, and that knowledge was passed on to the Ministry. However, I also conclude that the Task Force was not a formal representative body, and it was open to and reasonable for the Province to engage in broader consultations. The Province was unsure about the best method of implementing s. 23 in the Province, and explored different ways of doing so before settling on a single school board model.

[1797] The combined result is that, after *Mahe* was decided in 1990, the Province studied how to implement s. 23 of the *Charter* for about five years before establishing the FEA in 1995. Following two constitutional challenges, the FEA was reconstituted as the CSF by way of legislation rather than regulation, its jurisdiction was extended to include the entire Province, it was given greater rights to funding and powers to acquire property, and a dispute resolution process (the *Education Mediation Regulation*) was created to assist the CSF and majority boards to resolve disputes. All of these processes were in place by about 1999. I conclude that the Province was justified in proceeding slowly when initially implementing s. 23.

[1798] Since then, the CSF has been able to expand its programmes considerably. The Province has funded the CSF's acquisition of about 18 schools, and renovations and replacements of around half of them. The CSF also leases about 19 facilities, and the Province pays those leases. As I outlined in Chapter XII, Public Funds, the *per capita* value and space in the CSF's asset base is within the range of what majority school boards have access to. I also find that Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more substantially more funding *per capita* than the majority receives.

[1799] Against that backdrop, I address the plaintiffs' argument for funding for linguistic and cultural programming and space for early learning programmes.

A. Linguistic and Cultural Programming

[1800] The plaintiffs stress the importance of the CSF's linguistic and cultural programming because of the important role minority language schools play fostering transmission of the French language and Vitality. Below, I highlight Dr. Landry's evidence on the topic of cultural pedagogy, before outlining the programmes the CSF offers and funding it receives for its linguistic and cultural mandate.

1. Dr. Landry

[1801] Dr. Landry considered the educational mission of minority schools. He noted two components of their mission. First, the minority school must offer educational programming to ensure the actualization of the human potential of students by building Francophone identity in its students ("Actualization Pedagogy"). Second, unlike majority schools, minority schools must offer programming concerned with the preparation of a new generation of community leaders ("Community-Building Pedagogy"). To that end, Dr. Landry's view is that minority schools should emphasize a positive relationship with and active enculturation in the French language and culture, self-determination of language use, conscientization concerning the minority status of Francophones, and community involvement, community leadership and mastery of learning outcomes.

[1802] For Dr. Landry, the ability to implement such a pedagogical approach requires minority control over its educational mission. He takes the view that governments are rarely able to prepare a school curriculum adapted to the minority's needs.

2. Cultural Pedagogy

[1803] The CSF's strategic planning initiatives have focused on implementing cultural pedagogy in its regular K-12 programming. With its 2010 Strategic Plan, the CSF began implementing a model it refers to as "Pedagogie 2010".

[1804] Ms. Picard, a CSF educator who works in Sechelt, explained that *Pedagogie 2010* has three components. Through its teaching component, *Pedagogie 2010* aims to identify and share between educators teaching strategies that promote learner success in the minority language context. Second, the plan asks teachers to model and foster in students a cultural identity, against the challenge of BC's minority setting, where many families do not share the same background and history. Finally, *Pedagogie 2010* focuses on integrating technology into the classroom to improve access to resources and connect students to the Francophone community outside British Columbia.

[1805] *Pedagogie 2010* identifies a number of strategic focuses for CSF schools. One of those is placing schools at the heart of the community. Ms. Picard explained that this requires minority schools to be used by the Francophone community to gather and share in the French language and culture.

[1806] Ms. Picard explained that since the CSF implemented *Pedagogie 2010*, students seem more aware of why they attend a minority language programme. Ms. Chagnon, the current principal at *École Élémentaire Rose-des-Vents* (Vancouver (West)) who was the principal of the CSF's programmes in Comox when *Pedagogie 2010* was implemented, noticed a move toward innovative, individualized teaching.

3. Francisation

[1807] In addition to cultural pedagogy, the CSF must also focus on French-as-a-second-language services, or Francisation. Because the vast majority of CSF students come from Exogamous households, many do not have strong French skills when they begin school. Francisation services are designed to improve students' French-language proficiency.

[1808] Ms. Chagnon worked on the CSF's Francisation programme in 1996/97. She advised that the CSF uses a story- and play-based Francisation programme designed for students in Preschool and Kindergarten called "Polly Suzanne". The

Ministry purchased the programme, arranged for it to be modified to suit the context in British Columbia, and trained teachers to use it.

[1809] Most CSF educators gave evidence about the effectiveness of the Francisation programmes at the schools where they worked. Most CSF students in Kindergarten do not speak French and receive Francisation services. One educator from the CSF's Okanagan programmes, Mr. Blais, went so far as to say that Kindergarten is Francisation. However, in larger centres, like Vancouver, more students in Kindergarten are proficient in French.

[1810] By December of their Kindergarten year, most CSF students are able to understand French; they can speak the language by June. In Grade 1, students are reasonably competent, but a smaller proportion of students continue to receive Francisation services. The number of students receiving Francisation diminishes each year, such that after Grade 4 almost no students receive Francisation services.

4. Discussion

[1811] For CSF schools to have the best possible impact on Vitality and assimilation, they need programmes to socialize children into the French language and culture. The CSF has implemented those programmes in the form of the Pedagogie 2010 model, and its Francisation programme.

[1812] As I describe in Chapter XII, Public Funds, the CSF receives the 15% Francophone Supplement to recognize the unique funding requirements associated with its linguistic and cultural mandate. As I conclude there, in 2004 and 2005 the CSF and the Ministry cooperated to ensure that the CSF's unique cost pressures were met. The CSF provided detail about its added costs, and the Ministry considered the CSF's request. The Ministry acted quickly by providing a \$3 million advance to meet the CSF's needs, avoiding the negative impact that delay might have on rightsholders. The Ministry also immediately began funding the CSF's need to offer Francisation services.

[1813] The events and circumstances that gave rise to the 15% Francophone Supplement show that it was designed to fund a number of aspects of the CSF's Linguistic and Cultural Programming needs: higher staff costs to provide English language arts and to limit split classes; teacher recruitment; employing cultural coordinators; promoting the CSF to the Francophone community; improving its transportation services; implementing a technology and laptop programme; and providing before- and after-school care. The CSF also receives, in addition to the 15% Francophone Supplement, added funding for Francisation instruction.

[1814] The plaintiffs acknowledge that the Ministry provides support for the cultural aspects of the CSF's curriculum and for Francisation services, and that it furthers the CSF's mandate under s. 23 of the *Charter*. They do not seem to be arguing for more operating funding for linguistic and cultural programming than the CSF already receives, except insofar as transportation is concerned.

[1815] Overall, in my view, the CSF has adequate operating funding to allow it to meet its linguistic and cultural mandate. With its *Pedagogie 2010* and Francisation services, it provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia.

[1816] These services, and the role that the CSF plays in the Francophone community, are factors that a reasonable rightsholder parent would find very attractive when making enrolment decisions for their children. I will take it into account when evaluating whether the global educational experience at CSF schools meets a sufficiently high standard.

B. Early Learning Programmes

[1817] In addition to the requirements associated with the regular K-12 programme, the plaintiffs urge that the CSF must be able to offer early learning programmes. The plaintiffs plead that CSF schools must have sufficient space to accommodate minority language early childhood learning programmes their importance to an early linguistic foundation. In response, the defendants acknowledge that early childhood

learning programmes are helpful to children, but deny there are constitutional or other grounds that entitle the CSF to space for those programmes.

[1818] Dr. Landry and another of the plaintiffs' expert witnesses, Dr. Johanne Paradis, spoke to the role that early learning programmes play in language acquisition. After addressing that evidence, I provide some information about the types of early learning programmes offered by the CSF and the Province's interest in early learning programmes. Then, I discuss early learning in the context of s. 23, addressing the CSF's argument that s. 23 includes a right to space for early childhood programmes.

1. Expert Evidence

a) Dr. Landry

[1819] Dr. Landry explained that recruitment of students to minority language schools is the most important action necessary to improve community Vitality in British Columbia. He urged that daycare centres, preschools and after-school care services are essential because they assist to recruit students and reinforce enculturation and Additive Bilingualism. Dr. Landry stressed that children from Exogamous households should be recruited early so children can acquire sufficient language skills to be successful. This, he opined, could be achieved by French-language daycare and preschool services, which are easier to organize within the schools than outside them.

b) Dr. Johanne Paradis

[1820] Dr. Paradis holds bachelor's and master's degrees in linguistics from the University of British Columbia, and a Ph.D. in psychology from McGill University. She is a professor of linguistics at the University of Alberta, and an Alberta Innovates Health Solutions Health Scholar. For the past 20 years, her research has focused on bilingual development in childhood. Dr. Paradis was asked to address two questions:

1. What is the optimal age for children to learn a language in order to have full proficiency in that language?

2. What are the factors determining whether children successfully learn a language in a minority setting?

[1821] Dr. Paradis was not cross-examined on her report. Her opinion is unchallenged.

[1822] Dr. Paradis stressed the importance of two factors for full language proficiency: learning the language from early childhood and receiving sufficient quality exposure to the language. Given that French is a minority language in BC, she emphasized the importance of French-language daycare or preschool programmes as a complement to a K-12 minority language education.

[1823] Dr. Paradis stressed the importance of age of onset of second-language learning to long-term language proficiency. She noted that the ability to learn a language to native-speaker proficiency declines across a person's lifespan. Based on research into the question, Dr. Paradis concluded that the optimal period to begin learning a second language is sometime between birth and around six years of age.

[1824] Dr. Paradis went on to explain how children that speak mainly English at home or at a daycare perform when entering minority language schools. First, since they typically have not acquired sufficient proficiency in French before the optimal period for language learning ends, they could have features of a foreign accent in French in both the short and long term. Second, a lack of exposure to French during the optimal language-learning period can have an impact on early academic achievement. Third, the lack of language skills can have an impact on literacy.

[1825] In connection with the factors relating to the successful development of language skills in a minority setting, Dr. Paradis explained the importance of exposing children to a depth, breadth and variety of words and sentences. Since French is a minority language in BC, Dr. Paradis opined that opportunities to hear and use the French language outside the home are limited, making structured programmes in French highly important for consistent and sustained exposure to the minority language outside the home. The importance of school and preschool for

exposure is reinforced by the fact that the home is not always a rich source of minority language exposure due to the high prevalence of Exogamy.

[1826] Against that backdrop, Dr. Paradis explained that support for the minority language in the preschool years would lead to children having a more secure foundation for long-term development and maintenance of the minority language. Dr. Paradis concluded that consistent and sustained exposure to French in preschool could reinforce the French language children are exposed to at home, provide parents who need childcare with a French-language option, and ensure early exposure to French for children from English-dominant homes.

2. Early Learning Programmes in CSF Schools

[1827] There are a variety of minority language early learning programmes located at CSF schools. They range from daycares and preschools to Francophone Strong Start programmes. Additionally, where schools do not offer such programmes, the school may undertake other pre-Kindergarten initiatives, such as a programme used in Squamish called “Tiens-moi la main, J’embarque”. The court received evidence that suggests these programmes have a positive impact on CSF schools.

a) French-language daycares and preschools

[1828] Ms. Michelle Marsan, the Early Childhood Network Coordinator for the PPFCEB, gave evidence about minority language preschools and daycares in BC. She advised that there are six preschools in CSF schools. They are found at École Élémentaire Rose-des-Vents (Vancouver (West)), École Élémentaire Bois Joli (Delta), École Élémentaire La Vérendrye (Chilliwack), École Élémentaire André-Piolat (North Vancouver), École Élémentaire Entre-lacs (Penticton), and École L’Anse-au-Sable (Kelowna). Students in those programmes attend for no more than four hours per day.

[1829] Additionally, there are a number of minority language group childcare centres, or daycares, around the province. Children attending those programmes can be any age from birth to school aged, depending on the society’s license.

[1830] Generally, parents enrol students and pay for minority language daycare and preschool services. All activities take place in French.

[1831] The CSF and the FPFCEB's have a long-standing interest in early learning programmes. Mr. Gignac, who has a lengthy history with the FPFCEB's early childhood initiatives, explained that when he moved to BC in 1990 or 1991, minority language preschools were limited. It was offered as a private service in Vancouver. There were also Francophone preschools at École Victor-Brodeur (Victoria) and École André-Piolat (North Vancouver).

[1832] Because preschool services were not readily available elsewhere, the FPFCEB began promoting it starting in about 1993. The FPFCEB assisted parents' organizations by helping them to incorporate as societies and begin providing preschool services. The FPFCEB also sought extra funding from the Province for minority preschool services, and funding eventually became available by way of a Federal/Provincial agreement. Often, the preschools found space within Francophone schools.

[1833] Once the FEA was created in the mid-1990s, the FPFCEB began working with the FEA and parents to develop preschool spaces, and later daycares, in minority language schools.

[1834] Early learning was also a priority for the CSF in those early years. The CSF worked on its first strategic plan in about 1996. While the CSF's top priority was acquiring places to teach, it was also focused on implementing early childhood education programmes. Ms. Chagnon explained that the CSF prioritized this because the CSF believed early intervention would support children entering Kindergarten, and reinforce French culture.

[1835] According to Mr. Gignac, the CSF and FPFCEB continued working together on early learning for many years, and recommitted to the project in 2006 or 2007, after the CSF began receiving the 15% Francophone Supplement. Around that time, Mr. Gignac recalled, the FPFCEB and the CSF signed an early learning agreement

which confirms the CSF's commitment to using its surplus space for early learning programmes. According to Mr. Gignac, that agreement continues to this day.

[1836] The CSF maintains an April 2009 Policy on Support for Early Learning Services. Pursuant to that policy, early learning services are to be the first to benefit from a surplus of space (emphasis added) in a CSF school. Provided that early learning services are managed by a non-profit society that operates in French, the space may be leased for a notional annual fee of one dollar. The CSF bears the costs of the normal maintenance of the space. Further, except in cases where it is impossible to do otherwise, the CSF may not reallocate space used for an early learning service without agreement from the society managing the service.

b) Franc-Départ or Strong Start centers

[1837] In addition to preschool and daycare services, some CSF schools also include a Franc-Départ centre. Franc-Départ is the French-language equivalent of a majority-language, Ministry-sponsored programme, called Strong Start. These programmes operate as free early learning drop-in centres for children and caregivers.

[1838] Ms. Marsan explained that the CSF has Strong Start centres in six schools: École Élémentaire Anne-Hébert (Vancouver (East)), École Élémentaire du Bois-joli (Delta), École Élémentaire des Sentiers-Alpins (Nelson), École Élémentaire Franco-Nord (Prince George), École Élémentaire Entre-lacs (Penticton) and École Élémentaire des Pionniers (Port Coquitlam). All the programmes operate three days per week, except for the programmes at École Élémentaire Anne-Hébert and École Élémentaire du Bois-joli, which both operate five days per week.

[1839] Mr. Gignac advised that the CSF and FPFCB added Franc-Départ to their early learning agreements. The FPFCB assisted to find space for the programmes, recruit certified early childhood educators, hire and supervise staff, and collect data. According to Mr. Gignac, demand for Franc-Départ is high. The centres have not been implemented more broadly because there is insufficient space in CSF schools.

c) Tiens-moi la main, j'embarque

[1840] Where there is no daycare, preschool or Strong Start at a CSF school, the CSF has delivered creative programming to prepare young children for minority language Kindergarten.

[1841] Ms. Drapeau, a principal and educator at École Élémentaire Les Aiglons (Squamish), gave evidence about the programme she runs in that regard at her school. She advised that in the 2012/13, École Élémentaire Les Aiglons implemented a new pre-kindergarten programme, "Tiens-moi la main, j'embarque". In that programme, future Kindergarten students and their parents attend École Élémentaire Les Aiglons after-hours in late November. Students are given a short assessment, and parents return in January to receive the results. Parents of students who are not adequately prepared for Kindergarten are given extra assistance by way of at-home visits to help students develop their skills in advance of attending Kindergarten.

d) The Impact of Early Learning Programmes

[1842] Mr. Allison explained that where a CSF school includes a preschool programme, it often becomes the main source for recruiting students into the CSF's Kindergarten classes.

[1843] This is partially borne out by Ms. Marsan's evidence. Annually, Ms. Marsan collects data from preschools and daycares located in CSF schools about the proportion of those children who go on to enrol in CSF schools. The data show that since 2006/07, most years, about 90% of children of rightsholders attending a Francophone daycare or preschool located at a CSF school go on to enrol in Kindergarten at that school. Of the 10% that do not, many attend French immersion programmes, while fewer attend a majority-language school.

[1844] Tiens-moi la main, j'embarque has a similar effect. The first year that École Élémentaire Les Aiglons ran Tiens-moi la main, j'embarque, all 18 of the students in that programme went on to enrol at École Élémentaire Les Aiglons for Kindergarten.

In 2013/14, 24 students enrolled in the programme, but not all of them went on to attend Kindergarten at that school. This may be related to the potential eviction of École Élémentaire Les Aiglons from Garibaldi Highlands Elementary, which is explained in more detail in Chapter XIX, École Élémentaire Les Aiglons (Squamish).

[1845] The evidence establishes that many children who attend early learning programmes at CSF schools go on to attend Kindergarten in the same school. However, it does not show the corollary suggested by Mr. Allison or the plaintiffs: that most children in CSF Kindergarten classes (in those schools with early learning programmes) were previously enrolled in the early learning programmes.

[1846] The Court also heard about the role that early learning programmes located in CSF schools play in the linguistic and cultural development of CSF students. Many CSF educators testified that housing the programmes within the school eased students' transition into Kindergarten classes. Some, like Ms. Chagnon, also testified that those students became leaders in their Kindergarten classrooms.

3. The Province's Interest in Early-Childhood Education

[1847] The CSF's involvement in early learning programmes is not unique. The evidence suggests that many majority schools use surplus space in their schools for early learning programmes. Further, over the past 10 years, the Ministry has developed an interest in supporting such programmes, and has crafted an allowance for capital projects that provides school space for community uses like early learning programmes.

a) Strong Start

[1848] Mr. Miller confirmed that by 2004, the Minister was given responsibility over early learning for children from birth to school entry. In the summer of 2005, staff in the Ministry's Governance Branch considered amendments to the *School Act* that would allow and encourage school boards to provide early learning opportunities.

[1849] According to Mr. Miller, the focus on early learning resulted in the creation of Strong Start centres in some schools. These centres provide space for caregivers

or family members to bring children to participate in play-based activities that encourage children to learn. The Ministry funds the programmes separately from the funding it provides for K-12 Education.

[1850] The Ministry began instituting Strong Start centres in 2006. By Mr. Miller's account, the Ministry targeted the first Strong Start programmes to socio-economically vulnerable neighbourhood schools where districts had surplus space.

b) Neighbourhoods of Learning Centres

[1851] Many districts lease their surplus space to private daycare and preschool service providers. In 2000, there were about 360 private early childhood service providers operating in public schools. Mr. Miller confirmed they are sometimes charged less than market rental rates or no rent at all.

[1852] According to Mr. Miller, the Ministry views these programmes as particularly attractive when schools are operating below capacity. Rent-paying or revenue-generating uses like early childhood education, clinics and community centre activities support the viability of a building and prevent school closures.

[1853] Facing declining enrolment in many districts, in 2004 the Ministry developed an interest in supporting school districts to use their excess capacity for alternative purposes. The idea of integrating community services into schools evolved over time, then took hold in the form of Neighbourhood of Learning Centres.

[1854] Mr. Stewart's evidence was that in September 2008, the Minister sent a letter to all districts introducing the Neighbourhoods of Learning Centres ("NLC") concept: the idea that schools and community organizations could create neighbourhoods of learning for people to access educational and community services under one roof. The programme began as a pilot project in 2009, with the intent of exploring what specific services could be integrated into schools, and how much space should be allotted to them. The pilot project began at three schools in SD39-Vancouver, and then was implemented in five or six rural school districts. The

pilot project led the Ministry to implement a policy whereby it increases the envelope of new school projects by 15% to allow the school board to build community spaces.

[1855] Mr. Miller described some of the community spaces that have been built with NLC funding. He has seen elementary schools built to incorporate spaces for childcare, early learning hubs, health care spaces and some expanded multipurpose spaces. In secondary school projects, Mr. Miller has seen expanded theatres and gymnasiums, and spaces for adult education and recreational services.

4. The right to early childhood education as part of s. 23

[1856] The plaintiffs argue that the uncontested evidence of Dr. Paradis is that the critical period for language acquisition is birth to six years. The plaintiffs point out that Kindergarten in British Columbia begins when most students reach five years. They say that in those circumstances, without early learning programmes, the odds of children from Exogamous households reaching full proficiency in the minority language are greatly reduced.

[1857] The plaintiffs urge the importance of locating early childhood learning programmes within minority schools. They say that it would be very hard to organize minority language daycare services otherwise, citing the opinion of Dr. Landry. The plaintiffs say Dr. Landry's opinion accords with Mr. Gignac's evidence concerning the history of Francophone early childhood education in British Columbia.

[1858] The plaintiffs therefore agree that an interpretation of the meaning of "primary ... school instruction" in s. 23 that reflects substantive equivalence must include preschool education. They point to the comments of Dickson C.J.C. in *Mahe*, who wrote at 378 that the form of educational system provided to the minority need not be identical to the majority. They also rely on Karakatsanis J.'s comments in *Association des Parents- SCC* at para. 32 that the remedial nature of s. 23 and the challenges of preventing assimilation may mean that equivalence requires something other than formal equivalence.

[1859] In the plaintiffs' submission, in light of the circumstances of minority language schools in BC and the need to protect the minority and prevent assimilation, this Court ought to adopt a definition of primary education that includes early learning programmes, and differs from what is available to the majority. They suggest the Province's exclusion of early learning programmes from primary education prevents children from Exogamous households from developing language skills early, and therefore the full realization of s. 23's purpose.

[1860] In light of these issues, the plaintiffs take the position that the CSF must be afforded space within its schools to offer early learning programmes where they are not available due to overcapacity, and ought not to have its use of space for such programmes counted against it when it seeks expanded facilities.

[1861] The defendants submit that the definition of "primary ... instruction" in s. 23 does not go so far as the plaintiffs suggest. They rely on *NWT- CA* at paras. 85 to 87, where the Court concluded that primary education does not include preschool. Additionally, they rely on the point made in *NWT- CA* that school boards must "marshal their resources", and must not devote their space provided for K-12 Education to preschool and daycare.

[1862] The plaintiffs urge the Court not to follow *NWT- CA*. In their submission, both Charbonneau J. and Slatter J.A. interpreted s. 23 through a lens of formal equality. They suggest that those courts erred by defining "primary education" with reference to decisions made by the territorial government without regard for s. 23 of the *Charter*. The plaintiffs also suggest that the Court in *NWT- CA* did not have the type of evidence before it that this Court does, which shows the benefits of early learning programmes to realizing the goals of s. 23.

[1863] The expert evidence persuades me that, as Dr. Paradis suggests, early exposure to the minority language, ideally before age six, is optimal for development of language skills to full, native-speaker proficiency. Due to the high rate of Exogamy and low rate of linguistic transfer in British Columbia, most children of rightsholders in this province will not be exposed to a depth, breadth and variety of

French words and sentences without some exposure to a structured programme in the French language in early childhood, like a minority language preschool or daycare. If children begin exposure to the minority language through attendance at a minority language school after age six, they may develop features of a foreign accent in French, and have negative early academic achievement and literacy. If children are exposed to the minority language in the preschool years, they will have a more secure foundation for long-term development and maintenance of the minority language.

[1864] This was consistent with the views of CSF educators. Where the CSF offers a minority language early childhood programme in its schools, students have greater facility with the school building and the French language, and become leaders in their Kindergarten classes.

[1865] The plaintiffs also argue that minority language early learning programmes serve as valuable tools for recruiting children to minority schools. The evidence of Ms. Marsan shows that many students who attend minority language early childhood centres in CSF schools go on to attend those schools. Of course, this is a correlation, and cannot be used to show causation. It is likely that those parents who enrol their children in minority language daycare and preschools programmes would have enrolled their children in a CSF school in any event. The plaintiffs did not provide evidence to show, or to argue, that where a minority language school offers an early childhood programme, attendance in that school's Kindergarten programme is higher than it would otherwise be.

[1866] While early childhood education programmes are undoubtedly of great benefit to the language skills of children in the linguistic minority in British Columbia, I cannot conclude that they are included within the meaning of "primary ... school instruction" in s. 23 of the *Charter*.

[1867] As I explained in Chapter VI, The Respective Roles of the Province and the CSF, s. 23 creates a complete code for minority language education. It establishes the baseline requirements for services that the Province must provide: schools must

be funded to accommodate the enumerated classes of rightsholders, and they must include primary and secondary education. It is open to the Province to go beyond those minimums; however, it has no positive obligation to do so.

[1868] Further, while the Province's jurisdiction over education is limited, it continues to have jurisdiction over the composition of the public education system so long as it does not interfere with the minority's linguistic and cultural concerns. Rightsholders are not entitled to any particular design to the education system except to the extent that it guarantees primary and secondary instruction.

[1869] In this case, the Province has chosen to implement an education system in which primary education begins with Kindergarten, and ends with Grade 12. School districts are permitted to use surplus space for early childhood education services, but the Province does not fund those services and they do not form part of the K-12 education programme. The Province could extend the meaning of primary and secondary education to include early childhood education services. However, it has no obligation to do so. Thus, the definition of primary instruction does not include preschool and daycare services.

[1870] The plaintiffs argue that the Province is required to provide the CSF with space for early childhood education services because it has a positive duty to affirm and promote minority language education. As I explained in Chapter VI, The Respective Roles of the Province and the CSF, this argument goes too far. Section 23 ensures a certain form of education rights to give effect to the principle of preserving and promoting the minority language and culture. It does not place a duty on government to achieve those ends through any means other than providing the mandatory minimum level of minority language education.

[1871] There are two caveats to my conclusion.

[1872] First, the K-12 education system now includes Strong Start. The Ministry does not fund space for the programme. Indeed, the evidence shows that some Strong Start programmes, like those in SD8-Kootenay Lake, operate out of

elementary school gymnasiums, not in dedicated space. As a result, where the CSF decides, within its right to management and control over language and culture, that a Strong Start programme is pedagogically appropriate, the Ministry should provide the CSF with operating funding for that programme.

[1873] Second, the Ministry's capital planning system for K-12 Education now includes an allowance for NLC space, which may be used by community service providers like early childhood providers. When the CSF builds new schools, it, too, should be entitled to build NLC space, which it can use to accommodate early learning programmes. For the reasons that I give in Chapter XL, Administrative Requirements of the Capital Funding System, the plaintiffs have not established that a 15% additional space allocation is insufficient for the CSF, particularly since the CSF is also eligible for Federal funding to build additional community space.

5. The Right to Equivalent Early Learning Programmes

[1874] In the alternative, the plaintiffs take the position that the CSF has a right to early learning facilities as a part of the requirement that it have facilities equivalent to those that are provided to the majority.

[1875] The evidence shows that there are early learning programmes in surplus space at many of the majority schools in communities where the CSF claims for better facilities. In my view, the presence or absence of early childhood education services is a factor that a reasonable rightsholder parent might have in mind when making enrolment decisions for their children. As a result, it is one factor that courts should weigh when determining whether minority facilities offer an equivalent global educational experience to what is offered to the majority.

XVI. INTRODUCTION TO PART 3: THE COMMUNITY CLAIMS

[1876] The third part of this decision concerns the Community Claims. The plaintiffs advance stand-alone claims concerning the adequacy of minority language educational facilities in each of 17 communities. The plaintiffs also rely on the circumstances in those communities to support their arguments that the Province's

capital funding system for education breaches s. 23 of the *Charter*, which I address in the fourth part of these reasons.

[1877] All the Community Claim chapters follow the same format, with headings that correspond to the early chapters of these reasons: Given the remedial nature of s. 23, I begin with the relevant background context and the history that gave rise to the current situation. Then, I turn to the evidence concerning the number of children, entitlement, justification and remedies.

[1878] Here, I make findings concerning the weight I will give to the different sources of evidence in the Community Claim chapters. I also make findings concerning the relevance of several factors to the standard of entitlement analysis. Finally, for convenience and ease of reference, I summarize the approach I will take to the analysis of each sub-section of the Community Claim chapters based my conclusions in the preceding chapters.

A. Evidentiary Issues

[1879] The evidence in the Community Claim chapters is drawn from a variety of sources. Below, I discuss each source, and make findings about the weight I will assign to each of them.

1. Maps

[1880] The plaintiffs tendered as evidence a set of maps that show the CSF's current and proposed catchment areas. Each map marks all the CSF and majority schools offering the same grade levels in the area, and the location of CSF students' homes. Those maps are helpful for assisting me to determine where the families that attend a CSF school actually reside, and which majority schools are appropriate comparator schools.

2. Joint Fact Finder's Evidence

[1881] In September 2014, the parties jointly tendered into evidence the fact-finding report of Mr. David Milne (the "Joint Fact Finder's Report"). The parties jointly

retained Mr. Milne to gather standardized information concerning majority and minority schools and school board offices throughout British Columbia.

[1882] The Joint Fact Finder's Report arose out of a suggestion by Mr. Justice Willcock, then of this court, at a case planning conference in January 2013. He proposed that the parties appoint a common expert to prepare "a set of statistics that may be available to both parties with respect to which there is no issue, and to avoid duplicating the expense of some work..." In the spring of 2013, the parties agreed to retain Mr. Milne to provide fact evidence instead of opinion evidence.

[1883] By the fall of 2013, the parties had negotiated the questions and schools that Mr. Milne would be asked to study, and prepared his terms of reference. The terms of reference specify schools and school board offices in each community for Mr. Milne to study, and list the amenities on which Mr. Milne was to collect data. The amenities range from the size and nature of typical school spaces (like classrooms, libraries and gymnasiums), to spaces that are integral to a building (like heating and ventilation, storage and washrooms), to particular programmes offered at the school (like French immersion and early learning programmes).

[1884] The Joint Fact Finder's Report begins with a very detailed introduction that explains his methodology. Counsel inform me that the text of the introduction was jointly developed and agreed to between the parties and Mr. Milne.

[1885] Mr. Milne and a team of three additional facility specialists and three data specialists (the "Fact-Finding Team") studied the schools using three sources of data: centrally available district and facility information from the Ministry ("Ministry Data"); school district facility-specific and district-wide data ("District Data"); and data collected on visits to a sample of 20% to 35% of the schools in each district, as well as visits to all the corresponding CSF schools and 24 of 46 board office facilities.

[1886] The Ministry Data consists of the FCI assessments of school facilities, and historical data on dates of original construction and school additions. The Ministry also provided the Fact-Finding Team with historic and projected enrolment data,

reports on seismic vulnerability and programme information identifying which schools offer French immersion, Strong Start and Neighbourhood Learning Centres. The data specialists extracted information about class size and composition from school district websites. Taken together, that information was used to populate the data sheets for each school.

[1887] To collect the District Data, the facility specialists were each assigned different communities in the claim, and extracted information from school board records. The type of available records varied by school district. The facility specialists cross-referenced all District Data against the Ministry Data, and used the most current data where that information differed. In most cases the data assembly and site visits for all schools in a district were completed by the same facility specialist. The facility specialists shared responsibility for the school board offices.

[1888] After extracting the District Data, the facility specialists performed site visits at a sample of schools within each district. The goal of the site visits was to take sample measurements to verify District and Ministry Data, take photographs, discern functions operating from the facility and observe site conditions. They visited a cross-section of the building stock: some larger, smaller, newer and older buildings. Typically, a facilities manager from the school district accompanied the facility specialists on the visits.

[1889] In the Introduction to the Joint Fact Finder's Report, Mr. Milne and his team also provided detailed information concerning the particular process that the specialists followed when compiling data for each community.

[1890] For each school and school board office, the Joint Fact Finder's Report summarizes the collected data on a data sheet. The data sheet is supported by documentary evidence including the school's FCI data, floorplans and sometimes photographs. The data sheets and supporting documentation are grouped in portfolios for each community (the "Community Portfolios")

[1891] The Joint Fact Finder's Report is extremely detailed. The Introduction presents 112 pages of dense information that particularizes the Community Portfolios. The exhibit was tendered electronically. I am told that if the Joint Fact Finder's Report were printed, they would fill some 27 volumes amounting to some 6,000 pages.

[1892] When the parties tendered the Joint Fact Finder's Report, the plaintiffs sought to call Mr. Milne to present it. They argued that the parties' joint retainer made no specifications about what weight should be given to the information gathered by Mr. Milne and his team. They urged that it was important that the parties cross-examine Mr. Milne to allow the Court to properly assess the report's reliability and weigh it against other evidence. The defendants asked the Court to direct that Mr. Milne could not be called as a witness by either party, and should only be allowed to testify to answer questions from this Court. The defendants stressed the special nature of the joint retainer that the parties agreed to, and urged that the Province should not be deprived of the benefit of the bargain struck by the agreement to a joint retainer.

[1893] At the time, I considered that the Joint Fact Finder's Report is neither direct evidence, nor an expert report, nor an agreed statement of facts or admissions, although it shares some characteristics with each of them. I concluded that, in light of the agreement between the parties, the joint development of the evidence, the factual content of the report and the non-binding nature of the evidence, the Joint Fact Finder's Report was best viewed as the agreed-upon form of evidence-in-chief of Mr. Milne, a fact witness, and formed part of the cases of both the plaintiffs and the defendants. I also concluded that the Joint Fact Finder's Report contains sufficient explanations of the team's methodology and data sources to assist me to weigh it against conflicting evidence.

[1894] For that reason, I did not permit the plaintiffs to call Mr. Milne to provide evidence to supplement the Joint Fact Finder's Report. However, both sides were permitted to lead evidence to supplement, rebut or contradict it.

[1895] Pursuant to the Document Agreement reached by the parties, the contents of the Joint Fact Finder's Report do not constitute hearsay. Both parties rely on data taken from the Joint Fact Finder's Report in their written arguments. Neither party made arguments about the weight to be given to the Joint Fact Finder's Report, although the defendants suggest that the data is "objective and empirical".

[1896] Having reviewed the Joint Fact Finder's Report in detail, I am satisfied that it is generally a highly reliable source of information that is relevant to my determination of whether the entitlement standard has been met in each community. The Fact-Finding Team ensured internal consistency of information by primarily using the same data sources and same building specialist to compile each Community Portfolio. The data the facility specialists relied on are generally taken from official, objective records that were not prepared for the purpose of this litigation. Overall, due to the Fact-Finding Team's methodology, the information for each school has the hallmarks of accurate and reliable data. It is the best available source of evidence concerning the comparisons between majority and minority schools.

[1897] I say this with one caveat. Since the parties were litigating in "real time" over the course of several years, some of the data in the Joint Fact Finder's Report is now outdated. For instance, the Court has more recent evidence concerning school district enrolment and FCI scores from Ministry witnesses. Where this concern arises, I rely on the most current evidence. Since the Joint Fact Finder's Report presents fact rather than opinion, this has no bearing on the reliability of the rest of the report.

[1898] Both sides tabulated some of the data in the Joint Fact Finder's Report where it tended to support their clients' positions. To ensure a holistic analysis of the evidence, for every comparator school in the Joint Fact Finder's Report I independently tabulated and considered data concerning: enrolment, class size, student/staff ratios, FCI score, average age, space per student, operating capacity, capacity utilization, transportation services, site size, portables, main entrances,

administrative space, hallways, multipurpose spaces, classroom sizes, libraries, technology, gymnasiums, cafeterias, specialty classrooms, special education, staff room space, and community and early learning spaces in schools.

3. CSF Educators

[1899] The plaintiffs called as witnesses 13 educators who work in CSF schools. The plaintiffs note that the experts in this case emphasized that educators have a better sense of building condition than district-level administrators.

[1900] I consider the educators' evidence to be a helpful supplement to the data in the Joint Fact Finder's Report in the sense that it provides some detail about the functionality of the spaces.

[1901] Several of the educators provided some limited evidence of amenities that they saw when they visited majority schools for various purposes. Their evidence was not comprehensive. For example, some educators were able to only comment on the gymnasiums of majority schools because they had only visited those schools for sporting events. Because the evidence lacks comprehensiveness and because the educators have limited knowledge of those schools, I give their descriptions of comparator schools less weight than the objective evidence found in the Joint Fact Finder's Report.

4. Parent Affidavit Evidence

[1902] In support of their equivalence arguments, the plaintiffs tendered affidavits from 57 rightsholder parents who visited hundreds of majority schools and compared them to minority schools. The defendants cross-examined a sample of about 14 of those parents.

[1903] The plaintiffs urge that because the test for entitlement assumes the perspective of a reasonable rightsholder parent, the views of actual parents ought to be given considerable weight.

[1904] The defendants suggest the parent affiants' evidence is not credible, and should be given very little weight. In their submission, the process by which the affidavits were compiled is inherently suspect. They also note that the process resulted in formulaic affidavits expressed in similar and often identical language, despite being offered as individual parent impressions.

[1905] The defendants also urge that the parents were not a neutral, unbiased group of observers. Almost all, they say, were aware of the litigation and saw it as their role to gather evidence for one side. They say that the cross-examinations showed that the parents were looking primarily for features of majority schools that were superior to what was available for the minority. The defendants also note that despite their complaints, many of the parents admitted they were happy with the quality of education their children were receiving, and continued to send their children to CSF schools.

[1906] In response, the plaintiffs take the position that it is not appropriate to assess the credibility of the parent affidavits as a group; credibility, they say, must be assessed individually. The cross-examinations of 14 parents, they say, cannot impugn the credibility of all of the affidavits.

[1907] For the reasons I gave in Chapter VIII, Entitlement, I reject the argument that the actual views of rightsholder parents must be given considerable weight. The reasonableness standard has both objective and subjective elements. It is intended to remove the idiosyncrasies and vagaries of personal opinions. As a result, the parent affidavits must be treated with some care. This is particularly so when those parents have become involved in assisting one side in litigation. Parent views lose value when they do not display the characteristics of a reasonably prudent parent.

[1908] In my view, it is impossible to attribute any weight to the parent affidavit evidence due to the process by which the affidavits were compiled, and because, on their face, the affidavits do not have the hallmarks of credible or reliable evidence.

[1909] The evidence of those witnesses who were cross-examined revealed a pattern for the preparation of the affidavits that is inherently problematic.

[1910] Parents were typically approached by counsel for the plaintiffs, the FPFBC or a member of the Association des Parents d'Élèves ("APÉ") to visit schools and prepare affidavits. For some communities, the parents compare every majority school in the catchment area to the minority school. For others, the parents only describe a selection of schools. This can be problematic.

[1911] Ms. Suzana Straus (École Élémentaire des Navigateurs (Richmond)) explained that counsel for the plaintiffs provided her with a list of all the elementary schools in Richmond, and she ensured that, between them, the parent affiants from Richmond visited all the schools on the list. However, not all the schools that the parents visited were included in the affidavits. For example, Ms. Straus visited Sea Island Elementary. While she was being cross-examined, she described that building as being older, with only part of the building used as a school. Counsel for the plaintiffs decided not to include her description of Sea Island Elementary in her affidavit. Ms. Straus did not know why.

[1912] Ms. Miriam Bélanger (École L'Anse-au-Sable (Kelowna)) advised while under cross-examination that she visited Oyama Traditional School and took notes on her observations. That school is not included in her affidavit. Ms. Bélanger's evidence was that all the schools described in her affidavit were larger than École L'Anse-au-Sable. Oyama Traditional School was nearest in size to École L'Anse-au-Sable, and the only school she visited with a smaller student population. It was also older than the SD23-Central Okanagan schools described in her affidavit. Ms. Bélanger could not say why Oyama Traditional School was not described in her affidavit.

[1913] I infer that when majority schools were visited but not described in the parent affidavits, it is because those schools were older or in worse condition, and it would not assist the CSF's case to compare it to the CSF school. This supports the conclusion that the affidavits are partial, and undermines their credibility.

[1914] The evidence establishes that many parent affiants did not visit the schools that would have been their reasonable alternatives. Ms. Susan Haworth (École Élémentaire La Vérendrye (Chilliwack)), for example, has a son that attends Strathcona Elementary. She did not describe that school; it was described by someone else. Similarly, Ms. Selina Roy (École Élémentaire Océane (Nanaimo)) enrolled one of her sons at Cilaire Elementary for personal reasons. Although that school was clearly the most relevant majority-language comparator for her, she did not describe it in her affidavit.

[1915] The corollary is also true: some parents appear to have visited schools that would never be realistic alternatives for them. Mr. Emmanuel Malenfant (École Élémentaire des Sentiers-Alpins (Nelson)) stated in his affidavit that he lives in the City of Nelson, and would prefer a school in those boundaries. Two of the schools he visited are located in communities at some distance from Nelson: Kaslo and Slocan. The third school he visited is located between Nelson and Kaslo, at a further distance from Nelson than is École Élémentaire des Sentiers-Alpins. Those schools are not realistic alternatives for him given his stated preference for a school within the City of Nelson.

[1916] Parents were given special instructions for their visits that asked them to examine criteria that might not be readily apparent or important to a reasonable rightsholder.

[1917] Ms. Mary Tam (École Élémentaire Anne-Hébert (Vancouver (East))) confirmed that when she visited majority schools, she used a written list of guidelines suggesting things for her to observe. That list was given to her by counsel for the plaintiffs. Similarly, Ms. Josyane Testa (École Élémentaire La Vérendrye (Chilliwack)) advised that she was provided with a piece of paper including the headings for her affidavit, and was directed to take notes on those aspects of the school. Ms. Roy, too, was given a lengthy document asking her to compare various aspects of the schools she visited to those at the minority school. Ms. Isabelle Christensen (École Élémentaire La Vérendrye (Chilliwack)) likewise

confirmed that she was given a checklist of items to look for, like storage rooms, play equipment and parking stalls.

[1918] Because of this, many parents comment and compare aspects of the school that they never would have noticed had they not received the instructions they did. The evidence from Ms. Lise Godin (École Élémentaire des Sentiers-Alpins (Nelson)) is instructive. In her affidavit, Ms. Godin comments unfavourably on the lack of a fence around the École Élémentaire des Sentiers-Alpins schoolyard. While she was being cross-examined, she conceded that she only became aware of a lack of fence as a concern because she was told to look for fencing around the schoolyard on the checklist she received.

[1919] Some parents admitted that they were not taking a neutral approach when viewing the comparator schools. Ms. Tam conceded that when she visited majority schools, she was looking to record things that would benefit her child that were not available at École Élémentaire Anne-Hébert. Ms. Roy reluctantly admitted that she thought that her role when visiting schools was at least in part to observe what École Élémentaire Océane (Nanaimo) lacked, as she assumed that was the type of information the Court would be interested in.

[1920] I take from this that parents likely compared aspects of the schools that were important to the legal case rather than important to the decision of where to enrol their children in school. Their affidavits are coloured by the concerns of the litigation rather than their own experiences, values and impressions.

[1921] Parents reported their observations, by telephone, to counsel for the plaintiffs, who prepared their affidavits. Not all of the parents' recollections were recorded in the affidavits, particularly the ones that do not assist the CSF's case. Ms. Christensen, for example, testified that at Promontory Heights Elementary, she saw several portables that were being used as classrooms. At F. G. Leary Elementary, she observed that some of the classrooms in the older portion of the school were similar to the classrooms at École Élémentaire La Vérendrye

(Chilliwack). She could not say why those observations were not included in her affidavit.

[1922] To give another example, Ms. Pascale Rivest-Gadbois (École Élémentaire Les Aiglons (Squamish)) commented on the attractive playgrounds at the majority schools, while making no mention of the playground École Élémentaire Les Aiglons shared with Garibaldi Highlands Elementary at the time, even though she admitted while under cross-examination that she had seen the play structures that École Élémentaire Les Aiglons students use.

[1923] The same was evident in the affidavit of Ms. Godin. She visited Canyon Lister School in the Creston area. She advised that some elements of that school compared favourably to École Élémentaire des Sentiers-Alpins, while other aspects compared less favourably. She could not recall why that school was not included in her affidavit.

[1924] The affidavits also seem biased toward reporting the favourable aspects of majority schools, while leaving out the negative. In her affidavit, Ms. Rivest-Gadbois concluded that Stawamus Elementary is “far superior” to École Élémentaire Les Aiglons at Garibaldi Highlands Elementary, offering a beautiful, picturesque school yard and a superb library, in an attractive, warm and inviting environment. Yet, when she gave her evidence-in-chief, she advised that she and her husband concluded that Stawamus Elementary, where École Élémentaire Les Aiglons was considering moving, would not be an option for her family. This illustrates how her affidavit presents a one-sided view based on limited information.

[1925] Similarly, Ms. Tanya Richman (École Élémentaire de la Vallée de Pemberton (Pemberton)) focused only on the positive aspects of the majority-language schools, and the negative aspects of École Élémentaire de la Vallée de Pemberton. For example, she presented Blackwater Creek Elementary as a spacious building, with ample storage and technology. She did not mention what that school lacks: a music room, cafeteria, library, and space for special education.

[1926] In some ways, the affiants attempt to make points of distinction out of minimal differences. Ms. Christine Leroux (École Élémentaire Entre-lacs (Penticton)), for example, describes the exterior colours of the schools in her affidavit. She describes École Élémentaire Entre-lacs as being painted in neutral tones of beige, grey and off-white, implying their negative character. She describes the other schools she visited as being painted in attractive pastels, or mostly grey with some accent colours. Having viewed the photographs appended to Ms. Leroux's affidavit, it seems to me that the schools are all painted in similar colours: varying grades and tones of neutral beige.

[1927] Some parents present amenities as being positive when, by all other accounts, they are negative (and vice versa). For example, Ms. Jocelyne Praud (École Élémentaire Océane (Nanaimo)) comments favourably on the location of South Wellington Elementary, describing it as a rural school, "nestled in a forested area", rather than bordering a busy road like École Élémentaire Océane. The maps reveal that South Wellington Elementary is located outside Nanaimo, at some distance from where École Élémentaire Océane's population is concentrated. In Nelson, parents see distance from the central community and a forested schoolyard as a detriment, not a benefit. Further, Dr. Ardanaz spoke favourably about the accessibility of École Élémentaire Océane, and about how its proximity to a busy road was one reason that the CSF preferred to acquire Princess Anne Elementary over other options.

[1928] The affidavits also leave aside the positive aspects of minority schools. Ms. Marie-Claude Gilbert (École Élémentaire La Vérendrye (Chilliwack)) indicated that some of the schools she visited had computer labs while École Élémentaire La Vérendrye did not. She omitted that students at École Élémentaire La Vérendrye all have access to laptops and tablets, and Wi-Fi throughout the school. She did not comment on whether SD33-Chilliwack students had access to the same amenities. There are similar problematic comments in the affidavits of Ms. Sylvia Green and Ms. Hanadi Gray (both of École L'Anse-au-Sable (Kelowna)). In that way, the

affidavits present a skewed perspective on the benefits and drawbacks of each school.

[1929] Similarly, Ms. Tam thinks that École Élémentaire Anne-Hébert (Vancouver (East)) offers good-quality teaching, and she appreciates that the school is small. Ms. Godin conceded on cross-examination that the students at École Élémentaire des Sentiers-Alpins (Nelson) have access to an outdoor basketball court and, theoretically, to nearby tennis courts. The affiants do not mention these positive features in their affidavits.

[1930] I also note the parallels between all of the parent affidavits. All the parent affidavits are in the same format, and the parents use virtually identical language to describe their views and experiences. This detracts from their reliability, as it is difficult to view them as an accurate reflection of the parents' unique perspectives.

[1931] These problems are only a sample of all the problematic statements that arise on the face of the affidavits, and out of the cross-examination of the parent witnesses. Overall, while I appreciate the time that the parents put into visiting schools, I cannot give the affidavits any weight. It appears that the affidavits are biased toward reporting flaws in the CSF schools and positive aspects of the majority schools. They systematically omit any evidence of positive aspects of CSF schools and negative aspects of majority schools.

[1932] Furthermore, the use of a checklist caused parents to step outside the role of a reasonably prudent parent and perform detailed examinations of the facilities that go far beyond what a reasonable parent would be likely to notice when making enrolment decisions for their children. The visits were performed with a view to the litigation. The affidavits cannot be taken as an accurate reflection of the matters that are important to rightsholder parents and the affiants' actual views of the schools they visited.

[1933] The evidence of the witnesses that were cross-examined is sufficiently consistent to reveal a pattern for the preparation of the affidavits. I infer that the

same or a similar pattern was used even for the affidavits of those witnesses who were not cross-examined before the Court.

[1934] Moreover, the affidavits of the witnesses who were not cross-examined follow an identical format and use nearly identical language to those of the affiants who appeared before me. On their face they display some of the problems with selective choice of evidence and schools that is apparent on the face of the affidavits of those witnesses who were cross-examined. I therefore do not find it necessary to have heard from each witness to conclude the affidavits are not credible. It would have been disproportionate for the defendants to cross-examine every parent affiant.

5. The CSF's Enrolment Projections

[1935] In each of the Community Claim chapters, I trace the history of the CSF's requests for capital projects, which may shed some light on the question of where responsibility lies for a breach of s. 23 of the *Charter*. In doing so, from time to time I will reflect on the enrolment projections that the CSF submitted to the Ministry to support its capital project requests.

[1936] The CSF's enrolment projection practice has not been without its problems. Below, I discuss Mr. Wood's analysis of the CSF's enrolment projections, and how the CSF's methodology for projecting enrolment has changed over the years. I also summarize the evidence from Mr. Bonnefoy and Mr. Allison concerning their enrolment forecasting practices, and some of the disputes that arose between the CSF and the Ministry with respect to the CSF's enrolment projections. Based on that evidence, I arrive at some conclusions about the weight to be given to the CSF's projections.

a) Mr. William Wood

[1937] In his expert report, Mr. Wood analyzed the enrolment forecasts that the CSF provided in support of its capital project requests, as well as the CSF's actual enrolment and the Baragar projections.

[1938] With reference to the CSF's enrolment projections between 2001 and 2008, Mr. Wood observed that the CSF's forecasts were essentially "straight-line projections" that assumed a simple percentage increase in enrolment each year. He noted that in the short term, the forecasts tended to be close to the actual enrolments with the exception of the CSF's 2001 projections, which were excessive. In the longer-term, all of the estimates made by the CSF were too high.

[1939] Turning to the CSF's projections in 2009 and 2010, Mr. Wood noted that the CSF abandoned its straight-line enrolment projections, estimating that enrolment would start at a higher point. The projections in those years were much higher than the CSF's actual enrolments. He also noted that the higher projections in those years paralleled an escalation in the CSF's capital budget requests.

[1940] Mr. Wood noted that the CSF did not mention explain its enrolment projection methodology in its submissions to the Ministry. That is not unusual. However, he formed the impression that the CSF should have prepared more thorough enrolment forecasts and documented its rationale because of its unique position and forecasting concerns.

b) Mr. Bonnefoy

[1941] Mr. Bonnefoy provided evidence about his experience with enrolment forecasts when he was Secretary-Treasurer for the CSF between 2004 and the end of 2009. He described enrolment forecasting at the CSF as "trying to nail Jell-O to the wall".

[1942] Mr. Bonnefoy confirmed that like all other districts, the CSF received a form that set out enrolment forecasts for the entire district. These projections were created by BC Stats. The CSF was then responsible for breaking out that potential enrolment by school and grade and justifying any variance between the Ministry and the CSF numbers.

[1943] Mr. Bonnefoy explained that Mr. Milne, acting as a consultant for the CSF at the time, calculated the CSF's forecasts using Baragar. According to Mr. Bonnefoy,

Baragar required the input of “local knowledge” of the factors unique to each region of the province that might influence enrolment trends. Mr. Milne used Statistics Canada reports and other local knowledge to improve the accuracy of the Baragar projections.

[1944] Mr. Bonnefoy explained that one of the CSF’s biggest challenges with respect to enrolment was determining the rates at which the children of rightsholders could be expected to participate in CSF schools. He agreed that the CSF had to determine not only the number of eligible students in an area, but also the proportion of students that could be expected to attend the CSF school. He acknowledged that, for the CSF, market share was an important consideration.

c) Mr. Allison

[1945] Mr. Allison explained how the CSF currently estimates enrolment for capital planning purposes. The CSF does not base enrolment projections on a rate of participation of the potential market for minority language education. Instead, the CSF looks at the number of students currently attending the programme, and the number of potentially eligible students, then asks for a minimum number of students, and room for future growth.

[1946] While he was under cross-examination, Mr. Allison maintained and elaborated on his view of participation rate as a method of projecting enrolment. He conceded that some rightsholders will never send their students to a CSF school no matter how nice the school is. However, he also took the view that participation rates were unhelpful because the CSF did not offer equivalent education. He maintained that this was the case even in those communities where the CSF had constructed new schools.

[1947] Mr. Allison also testified that he does not attempt to ensure that the CSF’s projections for growth are consistent with anticipated demographic trends. He disagreed that he should have to provide any rational basis for his requests for extra room for future growth. Instead, he stated he believed it sufficient for him to point to

current enrolment and the universe of students outlined by Dr. Landry, and ask for a school of some size between those two numbers.

[1948] This approach has resulted in disputes between the CSF and the Ministry in connection with at least three matters: the replacement of École des Pionniers (Port Coquitlam), the CSF's interest in McTavish Elementary in Saanich and the In-House PIRs the CSF submitted in support of its project requests in 2013 and 2014.

i. École des Pionniers

[1949] Mr. Stewart testified that in about 2011, the Ministry worked with BC Stats on a new methodology for forecasting the potential enrolment at CSF schools. To start, BC Stats would use census data to estimate the number of children with a Mother-Tongue Rightsholder parent. Next, staff would attempt to discern approximately what percentage of eligible students would be likely to attend a new CSF school.

[1950] By November 2012, the attention of Capital Branch staff had shifted to determining the scope of the CSF's project replacing École des Pionniers in Port Coquitlam. Ministry staff applied the new formula, while the CSF resisted it. I describe this in detail in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam).

[1951] In brief, in 2012/13, the École des Pionniers had 395 students enrolled in its K-12 programme. In its draft PDR for the project, the CSF wrote that it was targeting a design capacity of 660 students. The CSF did not provide any further rationale for its requested capacity.

[1952] Mr. Palmer reviewed and discussed the PDR with Mr. Cavelti, as was their usual practice. They were concerned that the CSF projected an increase in enrolment from 395 students to 660 students without any justification. That was problematic because it made the scope difficult to justify before Treasury Board.

[1953] Mr. Palmer was also concerned that the CSF's draft PDR did not project enrolment by grade level and year into the future. The CSF only provided historical enrolment, and then set out an anticipated jump to 660 students by 2017/18. While the Ministry was prepared to accept that enrolment at École des Pionniers would increase with a new school, it wanted to see some methodology to quantify the anticipated enrolment growth.

[1954] Mr. Cavelti wrote to Mr. Allison and asked for the CSF's enrolment projections by year up to the 2021/22 school year, and asked how those projections would be affected if another CSF project were approved in Burnaby. Mr. Allison responded that the CSF did not have reliable enrolment projections, and provided Mr. Cavelti with information concerning the universe of eligible children from Dr. Landry's work.

[1955] The Ministry tried to engage in a dialogue with Mr. Allison about the enrolment projections. Mr. Cavelti suggested projecting enrolment based on a participation rate after taking into account enrolment patterns in nearby communities where the CSF had built new schools. In response, Mr. Allison suggested to Mr. Cavelti that he did not believe that participation rates were appropriate or helpful for projecting enrolment at École des Pionniers. He refused to provide Mr. Cavelti with data concerning the universe of eligible children in the communities where the CSF had built new schools. Eventually, and with much hesitation, he provided Mr. Cavelti with a narrative summary of the enrolment trends at some of the CSF's new schools.

[1956] Mr. Palmer confirmed that since he and Mr. Cavelti met with resistance at the idea of using participation rates, they engaged BC Stats to help project enrolment based on participation rate of Mother-Tongue Rightsholders. Mr. Cavelti analyzed the potential participation rate at École des Pionniers after taking into account the general trend of increasing enrolment at that school. He also considered the participation rates the CSF had achieved in North Vancouver and Surrey as background context. Based on that work, Mr. Palmer and Mr. Cavelti

settled on building a school for an anticipated enrolment of 50% of the Mother-Tongue Rightsholders in the area.

[1957] Mr. Palmer related that based on the information that Mr. Allison provided, it seemed to him and Mr. Cavelti that 560-capacity school seemed to be a scope that was defensible before Treasury Board. Mr. Allison eventually agreed to that capacity to move the school forward. As I describe in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam), after the conclusion of the trial the parties eventually agreed to increase the scope of the École des Pionniers replacement project, settling the major part of the CSF's claim concerning Port Coquitlam.

[1958] Even still, the evidence concerning the scope of the École des Pionniers Replacement Project shows Mr. Allison's total lack of willingness to co-operate with the Ministry. He refused to justify his enrolment projections and provide necessary and relevant information to the Ministry. This caused a month-long delay of the École des Pionniers Replacement Project.

ii. McTavish Elementary

[1959] In about 2011, Mr. Allison wrote to the Ministry to request an acquisition of McTavish Elementary, on the North side of its Victoria catchment area. The CSF later abandoned this request, as I describe in more detail in Chapter XXVI, École Victor-Brodeur (Victoria). The substance of Mr. Allison's request to the Ministry-- particularly his enrolment projections-- presents a number of problems.

[1960] Mr. Allison purported to support the request with data provided by Dr. Landry concerning the universe of rightsholders' children in the area. Mr. Allison wrote that according to Dr. Landry's analysis of 2011 census data, 371 children of Mother-Tongue Rightsholders were eligible to attend that school. Mr. Allison conceded that the Ministry had no independent means of testing that analysis. He also noted that Dr. Landry was only able to calculate the number of rightsholders

because he had knowledge of the proposed catchment area, which the Ministry did not.

[1961] Mr. Allison went on to report that the number of potentially eligible students is “necessarily under-inclusive” because not all parents self-report correctly. He agreed, on cross-examination, however that incorrect reporting could also result in bias in the opposite direction.

[1962] Mr. Allison proceeded to make the point that the census does not calculate the number of persons who might be rightsholders even though they do not meet the Mother-Tongue criteria because they are Education or Sibling Rightsholders. Mr. Allison wrote that the CSF estimated that the number of children in that category would amount to at least 10% of the number of children who have at least one Mother Tongue Rightsholder parent.

[1963] Mr. Allison confirmed that the CSF engaged Dr. Landry in part to determine how many of those types of rightsholders might be in the proposed catchment areas. However, the CSF did not use Dr. Landry to reach this 10% estimate. Instead, according to Mr. Allison, the CSF reached that number based on a survey that the CSF did independently, which I first introduced in Chapter VII, the Number of Children. The CSF surveyed “all the parents” in three communities (Pemberton, Whistler and Sechelt). According to Mr. Allison, the surveys revealed that almost 20% of children attended those schools by reason of a criterion other than the Mother-Tongue criterion. To be conservative, the CSF applied a 10% factor.

[1964] Mr. Allison admitted that the CSF did not provide the survey information to the Ministry in this letter, or otherwise. The survey was not disclosed as part of this litigation. The survey information was likewise not communicated to Dr. Landry. Mr. Allison conceded that the CSF was asking the Ministry to trust its numbers at face value, while refusing to provide any supporting documentation.

[1965] In his letter, Mr. Allison wrote to the Ministry that a “conservative” estimate could be made by multiplying the number of students who might be eligible because

they have a Mother Tongue Rightsholder parent by a factor of 1.2. On cross-examination Mr. Allison corrected this, noting that the number of students ought to have been multiplied by a factor of 1.1. He admitted that he realized the mistake for the first time during his cross-examination. He implied that the Ministry could have caught and corrected the error for itself.

[1966] Based on the CSF's undisclosed survey results, Mr. Allison multiplied the number of estimated Mother Tongue Rightsholders' children by its proposed factor. This led it to assert that about 37 children had Sibling or Education Rightsholder parents. Adding that to the number of Mother-Tongue Rightsholders' children, the CSF estimated there were 408 rightsholders' children in the proposed catchment area.

[1967] In his letter to the Ministry, Mr. Allison went further, and wrote that a further 1,110 students might be eligible to attend the CSF school because they fell in the Knowledge Category, and 240 might be eligible because they fall in the Regular Home Use category. Mr. Allison refused to admit in his evidence that most children would have some knowledge of both French and English and did not have rightsholder parents

[1968] Adding those children to those with a Mother-Tongue Rightsholder parent, Mr. Allison estimated there were between 648 and 1,518 students in the area who might be eligible to attend the CSF's school.

[1969] Mr. Allison's analysis was put to Dr. Landry while he was under cross-examination. Upon reviewing the data presented in the letter, Dr. Landry agreed that some of the numbers in the letter were drawn from his Catchment Area Tables. However, he also confirmed that in estimating the number of potential rightsholders, Mr. Allison included all children with knowledge of French or who spoke French at least regularly at home. Dr. Landry agreed that not all of those children would qualify to attend a CSF school.

[1970] Dr. Landry stated that Mr. Allison calculated a larger range of potentially eligible children that he would have. He confirmed that Mr. Allison's approach would tend to over-account for the number of rightsholders. He agreed that Mr. Allison significantly inflated and exaggerated his numbers in those communications to the Ministry.

[1971] Dr. Landry explained that while he knew that his calculations would be put to some use, it was not clear to him that they would be used in this way. He stated that he did not even suspect that his numbers would be used to determine the amount of resources allocated to minority language education.

iii. The CSF's 2013 PIRs

[1972] Mr. Allison admitted that the analysis he performed in connection with the McTavish project formed the basis for the CSF's enrolment projections in the In-House PIRs it prepared in the summer and fall of 2013. He admitted that the discussion of potential enrolment follows the same format and uses the same methodology. The CSF updated those PIRs in-house in 2014, following a similar format, but reducing the potential number of students by focusing on students in the Regular Home Use category.

[1973] Mr. Cavelti wrote to Mr. Allison with feedback on the CSF's 2013 PIRs in January 2014. He wrote that before the Ministry could include the CSF's projects in its Consolidated Capital Plan, the Ministry required the CSF's enrolment projections. Mr. Cavelti wrote that while it was valuable to have a projected number of eligible students, the Ministry required some indication of what the participation or uptake rate would be among eligible students. As a result of the CSF's failure to perform that analysis, many of the CSF's projects were ranked "NPIR".

[1974] Although there was no capital plan request for 2014/15, Mr. Allison, in terms that sound remarkably similar to legal argument, wrote to Mr. Cavelti on October 22, 2014, in connection with the CSF's previous Capital Plan Submission and In-House PIRs. Mr. Allison reiterated the CSF's concerns with the Ministry's focus on

enrolment projections. He explained that although the CSF did not provide cohort-retention enrolment projections based on projected birth and death rates, it did provide potential enrolment figures as a proxy. He also referred to the Ministry's acceptance of those figures before approving capital projects for Rossland and Port Coquitlam.

[1975] Mr. Palmer gave evidence about his reaction to Mr. Allison's October 22, 2014 letter. He conceded that the Ministry had previously accepted feasibility work for seismic projects in Rossland and Port Coquitlam. However, he observed that Mr. Allison omitted reference to the Ministry's refusal to accept the potential enrolment figures when defining the scope of the Pionniers Replacement Project at the PDR stage. He maintained that the Ministry's decision to mark the projects as NPIR was appropriate given that the Ministry needed more information to justify the projects before Treasury Board.

[1976] Mr. Allison went on to note that, in the interest of ensuring that the CSF's PIRs were accepted, the CSF would provide, under protest, cohort-retention enrolment projections performed by Mr. McRae. Mr. Allison provided those projections by way of an email to Mr. Cavelti dated October 27, 2014.

[1977] In the covering email, Mr. Allison explained that the CSF based its projections on several assumptions. First, the CSF assumed that no student would join a cohort as it progressed through a school. The CSF also assumed that the size of incoming Kindergarten classes would either remain stable or grow gradually depending on the estimated number of rightsholder in the catchment area. The CSF also assumed attrition as students move to the secondary level. The appended tables show past enrolment at CSF schools beginning in 2012/13, and project enrolment at existing and planned CSF schools through the 2023/24 school year.

[1978] The tables do not include projections for Burnaby and Abbotsford. As Mr. Allison explained in the covering letter, the CSF could not provide cohort-retention data for those communities because it did not have existing schools in those communities. Instead, the CSF used census data and calculated the

percentage of potential attendees that would have to attend to fill the proposed CSF school: 45% for Abbotsford and 47% for Burnaby. The CSF took as the total universe of rightsholders all the Mother Tongue Rightsholders counted by the census, marked up by 10%. The CSF theorized that it would easily be able to attract that proportion of students by 2023/24.

d) Discussion

[1979] The defendants submit that the plaintiffs' methodology for projecting enrolment, as applied in its capital project requests and PIRs, is unreasonable. They note that in many instances the CSF has ventured further than Dr. Landry would have gone. In particular, they point out that Dr. Landry disagreed with the plaintiffs' method for estimating enrolment at McTavish Elementary.

[1980] The evidence suggests that until Mr. Allison became Secretary-Treasurer in about 2010, the CSF's enrolment projections were reasonably accurate. The CSF used a well-respected software application, Baragar, to estimate enrolment based on the best information it could find concerning the total population of rightsholders, participation rates and other data. Those estimates proved to be reasonably accurate in the short-term, but less accurate in the long-term, as is the case with most enrolment projections.

[1981] Since Mr. Allison became Secretary-Treasurer in 2010, the CSF has ceased using the type of enrolment projections that it used under Mr. Bonnefoy's leadership. Instead of examining total population and market share, the CSF makes whatever requests its staff and directors subjectively believe to be desirable based on current enrolment and the total number of eligible students in an area based on Dr. Landry's data. The CSF then asks for capacity for a minimum number of that somewhat inflated universe of students, and room for future growth.

[1982] Mr. Allison has refused to apply any more rigorous analysis, such as one that might examine how a participation rate could be expected to change over time. In his view, and presumably the CSF's, the CSF's schools are so deficient that it is

not helpful to look at participation rates at any of its schools to gain insight into what the CSF might reasonably request and expect on construction of a new facility.

[1983] While Mr. Allison has taken the view that participation rate is unhelpful, that is simply not the case. As Mr. Wood acknowledged, and Mr. Bonnefoy agreed, the CSF must examine both the total universe of students and the percentage that can reasonably be expected to attend. In rejecting that concept, and arguing that even the CSF's new schools could not provide valuable contextual information, Mr. Allison revealed how his partisan views on behalf of the CSF showed intransigence and irrationality. The fact is that the CSF will never be able to achieve participation of all eligible students in a given region, as Dr. Landry agreed to be the case. By focusing only on the total market of students to the exclusion of the potential uptake rate, the CSF has taken a position that is inconsistent with the proper approach to identifying the number of students likely to enrol in a facility, and one that made disputes with the Ministry inevitable.

[1984] The evidence shows that the Ministry must be prepared to justify all aspects of a project request before Treasury Board. Since 2011, Mr. Allison has refused reasonable requests from the Ministry to justify or explain the CSF's requested capacity. This was particularly manifest in connection with the École des Pionniers Replacement Project. The Ministry was consistently polite and courteous, and made reasonable requests for further information. Ministry staff acknowledged and agreed that the CSF could expect some enrolment growth, but asked the CSF for more information to quantify the extent of that growth.

[1985] Mr. Allison's responses were indignant, defensive and uncooperative. Mr. Allison refused to provide, or provided reluctantly and partially, the type of local knowledge that would have helped the CSF to justify its request to the Ministry and before Treasury Board. Rather than seeking to help its own position by providing necessary detail on its requests, Mr. Allison dug in his heels and refused to provide the type of information that the Ministry wanted. Ultimately, he agreed to the Ministry's analysis of the appropriate capacity to move the project ahead faster. Had

the CSF cooperated by providing the requested information to the Ministry, and taken greater care to negotiate and confirm catchment areas and the reasons it sought capacity for 660 students, it would likely have had greater and speedier success.

[1986] Mr. Allison's approach with respect to the proposed McTavish Elementary acquisition and the 2013 PIRs showed similar problems. The CSF based its requests on a significant inflation of the numbers in Dr. Landry's report. Dr. Landry himself disavowed Mr. Allison's use of his numbers. The CSF also proposed a means of calculating potential enrolment based on a growth factor the CSF arrived at based on a survey of parents, without ever disclosing that survey or the reasons for its approach to the Ministry. The Ministry had no ability to assess the reasonableness of Mr. Allison's request.

[1987] When the CSF was pressed with respect to its enrolment forecasts in its 2013 PIRs, it did not attempt to explain or justify its request. Instead, it provided cohort-retention enrolment projections based on current enrolment. Mr. Allison became defensive at having been asked to justify requests, and provided cohort retention projections that he knew would be inaccurate as they assumed no growth in a cohort moving through a school. Thus, they would not account for the potential growth that might be expected on construction of a new school. This was a disservice to both the CSF's relationship with the Ministry and the CSF's role and responsibility to advocate for its own projects on behalf of its constituents.

[1988] Under Mr. Allison's leadership, the CSF ceased taking the sort of collaborative approach that would have allowed it to properly negotiate mutually agreeable capacities for new schools. Mr. Allison demanded the Ministry trust his numbers. Given that the CSF's numbers were unsupported and exaggerated, the Ministry was correct not to do so.

[1989] Given all of these problems, I will treat the enrolment projections the CSF has provided to the Ministry under Mr. Allison's leadership very cautiously. They are

not based in a rational analysis of the number of children likely to participate in a minority language programme.

6. Positioning Letters

[1990] A word should also be said about a series of letters that the CSF sent to the Ministry beginning in about 2011 that appear to have been drafted by counsel for the purposes of this litigation (the “Positioning Letters”). The CSF most often used the Positioning Letters to argue that the Ministry ought to immediately fund and approve capital projects outside the Ministry’s regular Capital Planning Cycles. The Positioning Letters typically included lengthy and often self-serving versions of the histories of events that had given rise to a certain situation in a certain community. They also included legal argument. As Mr. Palmer described, the letters were not ones that the Ministry typically received, and tended to be more “legal” than typical communications between school boards and the Ministry.

[1991] The evidence of Mr. Palmer and Mr. Allison showed me that the histories recounted in the Positioning Letters embellished and misstated facts in favour of the CSF. Given the timeframe of the letters and their legal content, I infer that the Positioning Letters were crafted with a view to using them as evidence and for positioning in this case. I do not give any weight to the history, facts and arguments in those letters as proof of any of the contents of those statements. I only take from them that the CSF made the request that it did when it did so: similar to a demand letter in the context of debt litigation.

B. Factors Relevant to the Standard of Entitlement Analysis

[1992] The question whether the minority is receiving all that it is entitled to in a given community falls to be decided based on the particular facts and circumstances concerning the community at issue. However, there are some common issues of fact that will inform my analysis of whether the standard of entitlement is met in each of the Community Claim chapters. In this section I resolve some disputes between

the parties concerning the relevance of certain measures to the reasonable rightsholder's assessment of the global educational experience.

1. Factors that Influence Student Learning

[1993] Both the plaintiffs and the defendants presented expert evidence concerning how physical school amenities influence student learning.

a) Dr. Lance Roberts

[1994] Dr. Lance Roberts is a professor in the Department of Sociology at the University of Manitoba. He has conducted research into a variety of educational issues and published extensively with respect to the sociology of education, social change in Canada and ethnic minority communities and multiculturalism. Since the early 2000s, Dr. Roberts has studied the effect school facilities have on student performance. He primarily performs quantitative and survey-based research based on two data sources: data collected from the Programme for International Student Assessment ("PISA") and data from his independently-created Learning Environment Roster ("LER").

[1995] Dr. Roberts was qualified as an expert in sociology and applied sociology, including the sociology of education and educational institutions; the quality of teaching and learning environments; survey research methods and data analysis; methods for evaluating the condition of school facilities; and the effects of the condition of school facilities on educational outcomes.

[1996] The plaintiffs retained Dr. Roberts to provide an opinion on whether and how school facilities influence educational outcomes. Dr. Roberts did not perform any original research for his report. Rather, he prepared a narrative directed at the questions he was asked based upon his reading of the pertinent literature, and previous research he performed using the PISA and the LER.

[1997] Based on his experience, relevant research studies, and his independent analysis of Canadian data, Dr. Roberts opined that "school facilities have an important, measurable impact on educational outcomes".

[1998] The PISA dataset consists of the results of standardized student achievement studies in more than 70 countries, and includes more than 1,000 schools from Canada alone. In addition to standardized test scores, the PISA dataset includes survey data measuring school quality and characteristics. Dr. Roberts has used the PISA data set to determine the relationship between PISA measures of school facility condition and the quality of teaching and learning environments.

[1999] The LER, which Dr. Roberts devised, generates a global score called the School Learning Index (“SLI”). Using that index, Dr. Roberts collected data on almost 900 schools, which he believes to be the largest dataset of mission-relevant school facility conditions in Canada.

[2000] Dr. Roberts explained that research has shown that mission-relevant measures of facilities and educational outcomes show a reliable link between facilities and educational outcomes. Dr. Roberts noted that facilities can affect student outcomes either directly (such as when a building’s acoustics do not allow a student to hear a lesson) or indirectly (such as when facilities result in poor morale, engagement and commitment).

[2001] Dr. Roberts emphasized the importance of quality teaching and learning environments (“QTLE”), which relates to school climate and atmosphere. QTLE sets the stage and provides the social conditions for effective teacher-student engagement, which Dr. Roberts placed at the core of educational success.

[2002] Using PISA and the LER/SLI, Dr. Roberts reached two conclusions: First, he found a direct, substantial, significant relationship between school facility conditions and the QTLE. Second, each of the mission-relevant assessment components displays a direct, substantial, significant relationship to the QTLE. Thus, his view is that in Canada, “[w]hether using the PISA data or SLI measure, schools with better school facilities (as experienced by educators) have better teaching and learning environments”.

[2003] Based on his review of the literature, Dr. Roberts opined that QTLE accounts for between 5% and 17% of the variance in student achievement scores. The most balanced estimate is that QTLE accounts for 10% of the variation in achievement scores, a difference of about one letter grade. He acknowledged, however, that good teaching can mitigate many influences that impede learning, which might explain why students can perform well in schools with poor facilities.

[2004] Dr. Roberts went on to address the effects of specific facility condition components, discussing them within the rubric of the four components of SLI: pedagogical functionality, programmatic suitability, cosmetic appropriateness and participant wellness.

[2005] Facility conditions relevant to pedagogical functionality affect all teaching and learning activities in the school, and include acoustics, lighting, indoor air quality and temperature. Acoustics are important to pedagogical outcomes because they ensure students and teachers are able to hear one another to facilitate communication and learning. Lighting, too, is placed at the core of the teaching-learning experience by Dr. Roberts, because without visual clarity and comfort, students experience strain, which in turn results in sub-optimal learning. Unsatisfactory air quality, in Dr. Roberts' opinion, is a significant contributor to absenteeism and student illness, as well as on-task classroom behaviours. Thermal conditions, including temperature and humidity, must be kept within comfortable ranges lest teachers and students become less productive.

[2006] Dr. Roberts also considered factors connected to programmatic suitability, which includes the adequacy of furniture, equipment and other materials required to effectively deliver specific programmes. He noted that ergonomic seating is connected to improved teaching and learning. He also advised that computing and other technologies (such as science labs, art studios, physical education space and artistic performance areas), where they are used, must be installed properly, maintained and updated regularly to be effective.

[2007] Cosmetic appropriateness, in Dr. Roberts's view, is important to fostering "pride of place" and encouraging student, teacher and community engagement, and is also correlated with academic achievement. He noted that building age is often used as a proxy for cosmetic appropriateness, and stated that as facility age increases, there is a corresponding decrease in attendance as well as achievement on standardized math, reading and composition scores. He also linked cosmetic appropriateness to student disciplinary incidents and teacher retention.

[2008] Finally, Dr. Roberts considered indicators linked to participant wellness, which concern health and safety. He urged that the health and safety of school occupants should not be compromised by facility conditions, and pointed to an asserted (rather than researched) connection between factors linked to participant wellness and educational outcomes.

[2009] Dr. Roberts also explained that the aggregate of the school building factors he outlined could account for approximately 10% of the variance in student achievement scores. While he maintained that school facilities will always have some effect on student achievement, he acknowledged that not every difference in building quality would result in a full 10% difference in learning outcomes. He stated that the QTLE model does not operate at a sufficient degree of precision to determine what combination of school building factors will result in a 10% difference in student letter grades.

[2010] On cross-examination, counsel for the defendants, Mr. Milman, pressed Dr. Roberts with respect to the factors that affect student performance. Dr. Roberts acknowledged that building quality is only one important variable, and that 90% of student achievement is affected by factors other than facility quality. He also reluctantly admitted that if one considered two hypothetical schools that were completely equal in every respect except for school building facilities, if the students in one school had better learning achievements, that it would be reasonable to infer that the school had better facilities.

b) Dr. Glen Earthman

[2011] Dr. Glen Earthman, who testified for the defendants, is a professor emeritus of educational administration at Virginia Polytechnic Institute and State University, a position he has held since 1998. He holds a bachelor's degree and master's degree from the University of Denver, and a doctorate in education with a major in educational administration from the University of Northern Colorado. He has 50 years' experience in the education sector, having served as a teacher, principal, school facility planning administrator and consultant for many school districts.

[2012] Dr. Earthman's research interests extend to all phases of school facility development, with a concentration on the relationship between school building condition and student achievement. He has written extensively in the area of school facility planning, having authored six textbooks on school planning, in addition to more than 100 articles and technical and research reports. He has also served as a consultant to over 70 school systems across the United States and overseas, assisting with various school facility issues and planning on a practical level.

[2013] In March 2015, I ruled that Dr. Earthman is qualified as an expert in school facility administration, planning and evaluation of school facilities in relation to educational purposes. I also concluded that he has expertise in the relationship between school facilities and student educational outcomes, as well as the evaluation of school facilities and their physical condition in relation to the factors that affect student educational outcomes.

[2014] Counsel for the defendants asked Dr. Earthman to provide his opinions on the relative impact of physical facilities, among other factors, on educational outcomes and student achievement, both generally and in the context of this litigation. Counsel for the defendants also directed Dr. Earthman to analyze and review complaints advanced by the CSF, and provide his opinions about whether the nature of the complaints have any impact on student achievement and educational outcomes, and about the extent to which those complaints are or are not supported by the evidence.

[2015] In March 2015, I ruled that much of Dr. Earthman's report was unnecessary and inadmissible because Dr. Earthman, at request of the defendants, had gone beyond the role of an expert and analyzed the merits of the plaintiffs' claim based on the evidence in the Joint Fact Finder's Report. In May 2015, I clarified that I would admit those generic passages of Dr. Earthman's report that relate to the link between educational outcomes and school facilities.

[2016] As a result, the defendants tendered as evidence a redacted version of Dr. Earthman's report (the "Redacted Earthman Report"). In the Redacted Earthman Report, Dr. Earthman offered an opinion on the relative influence that physical facilities have on student educational outcomes in general. He presented a review of research concerning the relationship between school building conditions and student achievement and educational outcomes.

[2017] Dr. Earthman advised that more than 60 years of research support the positive relationship between building quality and student educational outcomes. Some research suggests that the condition of facilities could account for as many as 11 percentile points on student achievements assessments. Further, poor educational environments tend to adversely influence the health, performance and attendance of students.

[2018] Dr. Earthman referred to a tool he uses to assess the relationship between school facilities and educational outcomes: the Commonwealth Assessment of Physical Environment, a survey instrument used by school administrators to rate specific characteristics of a building that have been identified as impacting student educational outcomes. It examines cosmetic and structural characteristics, and measures their relationship to the staff that create those conditions, and the parents, faculty and students that are affected by the conditions.

[2019] Dr. Earthman advised that cosmetic factors are consistently linked with improved educational outcomes. Structural factors, like heating and air-conditioning, are also linked to educational outcomes.

[2020] Dr. Earthman pointed to a number of factors that have repeatedly been recognized as influencing student educational outcomes. These include natural lighting, paint colours and paint cycles, general cleanliness, air quality, temperature control, acoustical enhancements, safety features, absence of graffiti and air conditioning.

[2021] Dr. Earthman went on to explain the building characteristics that matter the most to student educational outcomes.

[2022] Dr. Earthman first pointed to thermal conditions, noting that the temperature range for optimal learning is narrow. He referred to studies showing that adverse temperature and ventilation rates in the classroom have a negative impact on educational outcomes. Later, he advised that satisfactory control of the thermal environment is necessary for successful student learning.

[2023] Dr. Earthman also noted the importance of lighting, particularly research showing that controlled daylighting and appropriate artificial lighting improve health and performance of students and teachers.

[2024] Dr. Earthman likewise referred to acoustics, noting that if students are unable to hear, their learning will be challenged. Later in his report, he acknowledged that noise can be a factor influencing educational outcomes, but suggested sound problems can be abated through use of acoustical treatments. He confirmed, however, that a school intercom system can be an acoustic distraction with an influence on educational outcomes.

[2025] Dr. Earthman also noted that health and safety issues, including air quality, are of prime concern for student safety and learning. In connection with cleanliness, Dr. Earthman advised that research has shown that lack of graffiti, clean floors or walls and other measures of a school's cleanliness are linked to student academic performance. Moreover, students in buildings rated as being in unsatisfactory condition had lower opinions of their school building than students in buildings rated as being in satisfactory condition. Later, he noted that cosmetic factors, like worn

out carpet or gymnasium floors in need of refinishing, are factors that tend to influence student educational outcomes.

[2026] Dr. Earthman advised that even wall colour has been identified as a factor that influences educational outcomes. He noted that research supports the preference of pastel colors to dark or white walls.

[2027] Dr. Earthman highlighted the importance of technology to student learning. He advised that learning skills currently include competence in the use of technology, which can be impeded by a lack of access. He noted that research supports the positive effects appropriately integrated technology has on student achievement and its contribution to 21st century skills. He also advised that an appropriately-staffed library, with appropriate furnishings and diverse materials, is important to all schools. He confirmed that the use of technology has generally improved access to resources.

[2028] Next, Dr. Earthman pointed to density and its impact on achievement. He referred to studies showing that students experience decreased achievement and increased incidences of misbehaviour in overcrowded buildings. He pointed to evidence that elementary students housed in schools with less than 100 square feet per student performed worse on standardized test than those in schools with greater than 100 square feet per student. Later in his report, he noted that schools exceeding their operating capacity will face challenges providing dedicated space for non-core curriculum and specific instructional programmes.

[2029] Finally, Dr. Earthman spoke to the importance of teacher satisfaction and student and teacher morale. He noted the importance of student and staff attitudes to student success. Positive student attitudes about their school building are important to maintaining an environment that enhances learning. Further, he advised that research demonstrates that teacher satisfaction is basic to the attitude necessary to build relationships that enhance student learning.

[2030] In addition to those factors, Dr. Earthman offered an opinion on a number of factors that have not been shown to have an impact on educational outcomes.

[2031] In connection with complaints about buildings being unattractive, Dr. Earthman advised that the little research related to the matter deals with painting and upkeep of the exterior of the building rather than attractiveness. He was not aware of any substantial research to support the contention that unattractiveness has any relationship to student educational outcomes. On the other hand, he did note that cosmetic factors, including worn carpets and gymnasium floors, and outside appearance of a building including landscaping and exterior maintenance, are correlated with student educational outcomes.

[2032] Dr. Earthman was likewise unaware of any research to indicate that there is a relationship between modular units and student educational outcomes, either negative or positive. In fact, he advised that research suggests that there is no significant difference in student achievement scores between students attending school in portable classrooms and those in regular classrooms. He did note that having classes in multiple locations might create management and administrative issues, although he could not identify any research to confirm that travelling to other schools has an impact on educational outcomes, either negative or positive.

[2033] In connection with storage, Dr. Earthman acknowledged that inadequate storage may create an inconvenience for teachers and administrators. However, he advised that there is no known research to suggest lack of storage influences student educational outcomes. He likewise could not point to any known research to suggest using rented or leased space has an influence on student educational outcomes.

[2034] Dr. Earthman confirmed while under cross-examination that he attempted to be relatively comprehensive in his review of the building amenities that had been examined in connection to student outcomes. He agreed that he could not say one way or another whether factors that had not been studied would make a difference to student learning.

c) Discussion

[2035] Dr. Roberts and Dr. Earthman do not disagree with one another. Reading their reports together, I am able to conclude that a wide range of factors have been shown to have an impact on student learning: lighting, temperature, acoustics, air quality, cleanliness, cosmetic appropriateness, state of repair, age, and library and technological resources. Further, dense or overcrowded buildings -- particularly those with less than 100 square feet per student -- have a negative impact on student learning.

[2036] Dr. Roberts and Dr. Earthman both prepared their opinions before the decision in *Association des Parents- SCC* confirmed that the question at the entitlement stage of the s. 23 analysis is whether the global educational experience, assessed from the point of view of the reasonable parent, meets the standard of majority schools. Thus, I do not understand either side to argue that the factors pointed to by the experts should be given particular weight. Indeed, the plaintiffs argue that it is open to the Court to go beyond the expert evidence to comprehensively and holistically assess the relevant factors.

[2037] I agree with the plaintiffs. While the evidence concerning the factors that influence student learning is interesting, I do not infer that the reasonable parent would have the special skills and experience to know how school facilities will influence educational outcomes. I therefore do not give any of the factors that the experts pointed to any significant weight merely because they have been shown to have an impact on student educational outcomes.

2. Standard Provincial Measures

[2038] The parties disagree about the relevance of several common metrics to the entitlement analysis: FCI scores, Area Standards and measures of school capacity and overcrowding.

a) FCI Scores

[2039] The plaintiffs and defendants disagree about whether FCI scores are relevant to the assessment of a school's global educational experience. The plaintiffs suggest the measure is focused on property management and not important to a reasonable parent. The defendants suggest there is a correlation between a building's appeal and state of repair, making FCI a relevant consideration.

[2040] As the manager of capital information and data at the Ministry's Capital Branch, Mr. Ken Frith is responsible for working with the Capital Asset Management Services Initiative. That initiative has involved an independent, third-party contractor, VFA, calculating the FCI score for all public education facilities across the province.

[2041] I introduced the FCI concept in Chapter III, Introduction to the Capital Planning Process. I discuss FCI scores in detail in Chapter XXXVII, Building Condition Projects and the Building Condition Driver, where I analyze the plaintiffs' claim that the Province's use of FCI to prioritize Building Condition Projects is contrary to s. 23. The question here is whether FCI, regardless of its validity under s. 23, is relevant to the global educational experience in school facilities.

[2042] In Chapter XXXVII, Building Condition Projects and the Building Condition Driver, I find that the Ministry contracts with a wholly independent contractor, VFA, to perform building condition assessments of all schools in the Province. The resulting work, the Facility Condition Index, or FCI Score, provides a picture of the remaining lifecycle of a school based on the remaining economic life in its component pieces. They afford the Ministry and school boards a portrait of the cost of remedying all the deficiencies in a building, expressed as a ratio of the value of the deficiencies against the replacement value of the building. As the FCI approaches 1, it is reaching the end of its economic life. A building with an FCI score closer to zero is fairly new.

[2043] The evidence in that chapter establishes that the FCI measure was developed for property management purposes and is based on the life remaining in each component of each subsystem of the building. It is not systematically related to teaching and learning outcomes. It also does not directly take into account whether a building is functional for educational purposes.

[2044] However, while many of the factors assessed in the FCI score relate to the structure and engineering of a building, some factors also have a cosmetic or functional aspect. Further, the FCI metric provides a wholly objective assessment of building condition, and relatively current data for nearly every school building in the Province. Thus, it may be of some assistance.

[2045] Overall, this leads me to reach a conclusion consistent with that of Mr. Justice Willcock in *Association des Parents-BCSC* at paras. 68 and 142. I find that the FCI metric, while not assessing the fitness of a school for educational purposes, is one relevant objective criterion that can assist a court when determining whether school facilities are equivalent or proportional to one another. In particular, it provides a snapshot of the building's relative need for repair from a property management perspective. It is an objective measure that the court may afford some weight; however, it might not be particularly helpful in all instances.

[2046] A reasonable parent is not likely to be aware of a school's FCI score, or to give any thought to whether it is reaching the end of its economic life. However, I infer that there is likely a correlation between a building at the end of its economic life and its relative state of repair, which would be of concern to a reasonable parent. It may prove to be especially relevant to the plaintiffs' claims that its schools are older and in worse repair than competing majority schools in certain communities: for example, with respect to École Élémentaire Océane (Nanaimo) and École Élémentaire du Pacifique (Sechelt). It may be, however, that FCI proves not to be a particularly helpful measure where the issues are more related to crowding and transportation times, as was the case in Willcock J.'s assessment of the building

condition at École Élémentaire Rose-des-Vents (Vancouver (West)) in *Association des Parents- BCSC*.

[2047] Mr. Firth provided evidence of the 2014 FCI scores of all school buildings that have been assessed in the 25 school districts in which the CSF physically operates a facility, whether that facility is leased, owned or shared. He also presented a ranking of school facilities by FCI score in each district, as well as the average FCI score for each district and the CSF. When measuring the equivalence or proportionality of a CSF programme to majority programme or facility, I will weigh along with the rest of the evidence the school's FCI score against the FCI scores of the appropriate comparator schools.

b) Area Standards

[2048] From time to time, the plaintiffs argue that certain amenities in CSF schools are undersized in comparison to the Area Standards. I introduced the concept of Area Standards in Chapter III, Introduction to the Capital Planning Process. I address them in more detail in Chapter XL, Administrative Requirements of the Capital Funding System, in connection with the plaintiffs' claim that the Area Standards are inconsistent with s. 23.

[2049] In Chapter XL, Administrative Requirements of the Capital Funding System, I conclude that the Area Standards were developed to control project budgets by specifying the maximum total floor area for individual schools based on capacity. They allocate a total allowable area for each amenity to be included in a new school construction, including classrooms, gymnasiums, libraries, special education, and design and mechanical spaces. They also provide total allowable space based on capacity for school sites, and total board office administrative and facilities space based on district enrolment. While facilities funded by the Ministry cannot exceed the total allowable envelope generated by the Area Standards, districts have some allowance to build specific amenities slightly larger or smaller than the Area Standards would allow.

[2050] I also find that the Area Standards, which were developed in about 1988, have only been reviewed occasionally. The Province does not fund capital projects to bring existing schools up to the current Area Standards. As a result, buildings have been built to different standards over time, and have different amenities of different sizes. Schools built today have some amenities, like spaces for drama and music that were not included in buildings built prior to 1988. On the other hand, some older schools have much larger gymnasiums than newer schools.

[2051] In my view, given that different standards have applied over time and that the Ministry does not fund projects to bring school facilities up to current standards, the extent to which a building adheres to the Area Standards is of limited utility for assessing the global educational experience at a school. The equivalence and proportionality analyses are focused on the meaningful differences between local facilities. If the minority school falls below the Area Standards to a similar extent as local comparator schools, then the minority facilities will be equivalent no matter its adherence to the standards. Similarly, if a minority school meets the Area Standards but the majority schools exceed the standards to a greater degree, then the minority school may not be equivalent or proportional despite being built to the current standard.

[2052] The predominant question is always whether the minority facility is equivalent or proportionate to what the majority has. A facility's level of adherence to the Area Standards does not shed light on that question. I will generally not take into account the extent to which facilities conform to current Area Standards when assessing whether or not a school meets the appropriate entitlement standard.

c) School Capacity and Overcrowding

[2053] The plaintiffs occasionally argue that overcrowding results in the numbers warranting new facilities, or detracts from the global educational experience at a school. This raises the question of the appropriate manner of calculating school capacity and overcrowding.

[2054] In addition to his responsibility for the FCI Database, Mr. Frith manages the Remote Data Entry Capital Planning (“RDECP”) database. Using that database, he prepared a report on the space per student at all active schools in all school districts as of January 2015. For each school district, he lists the total enrolment as of September 2014 and the facility’s total square metres, and then calculates the space in square metres per student. The total space includes modular structures, but does not include portables. Mr. Frith makes the same calculations for the CSF, including both its leased and its owned space.

[2055] While this is useful information to give a sense of overall physical crowding in schools, it does not assist to determine the overcrowding in school classrooms. A better measure for that purpose is the operating capacity of the school relative to enrolment.

[2056] Mr. Miller and Mr. Wood both gave evidence about the Ministry’s two formulae for calculating capacity. The nominal capacity of the school is based on a historic notional class size of 25 students to a classroom. It generates a capacity by multiplying the notional class size by the number of classrooms.

[2057] In about 1998, Mr. Miller advised, the Ministry changed its focus from nominal to operating capacity. Operating capacity is the capacity of a school as determined by the class sizes established by collective agreements. Mr. Wood and Mr. Miller confirmed that those average class sizes are 19 students per Kindergarten class, 22 students per classroom for Grades 1-3 and 25 students for classrooms for Grades 4 through 12. According to Mr. Miller, because of this, the operating capacity of a school is always less than the nominal capacity.

[2058] The Ministry typically focuses on operating capacity when applying the Space Rank Formula to determine the relative need for Expansion Projects. However, nominal capacities are relevant to the initial definition of scale for approved projects. The Area Standards determine the size of various amenities within a school based on its nominal capacity.

[2059] In my view, operating capacity is the most relevant measure of capacity for determining the overcrowding in schools. It is the measure that the Ministry uses when assessing the relative need for new space projects. It also comes closest to capturing how space is actually used in a school.

[2060] The Joint Fact Finder's Report sets out the nominal and operating capacity of all schools he was asked to study. The Fact-Finding Team obtained nominal and operating capacities from the most recent data available from the Ministry. For new facilities built to a specific nominal capacity with no capacity information on file, the Fact-Finding Team calculated operating capacity based on the school's grade structure and the weighted average class sizes for those structures set out in the Area Standards. The weighted average class size for a Grade 1-7 through 12 classroom, for example, is about 23.29. This is consistent with how the Area Standards suggest operating capacity should be calculated.

[2061] Mr. Frith prepared a chart using RDECP data showing the nominal and operating capacities of school facilities leased and owned by the CSF. Mr. Frith drew the nominal capacity of each school from the RDECP database. For most schools, he also drew the operating capacity directly from the database. Occasionally, he had to manually calculate the operating capacity of the facility. He did so using the formula applied by the RDECP database. That formula appears to be the same as the one noted in the Area Standards: it breaks out Kindergarten classrooms based on actual enrolment, and assigns them operating capacity for 19 students. The remaining classrooms are assigned an average operating capacity based on school grade structure. Mr. Frith could not specifically recall the average capacity per room, but believed it to be 23.3 or 23.5 students per class.

[2062] When Mr. Wood calculated operating capacity, he used a different formula. He began by determining the proportion of the school's enrolment is in each of three categories: those in Kindergarten, those in Grades 1-3 and those in Grades 4-7. He then discounts a proportion of the nominal capacity for each of the two younger categories. He described this as a very mathematical formula.

[2063] Mr. Wood advised that still others calculate operating capacity based on the actual enrolment and use of classrooms at the time. He did not agree with that formula, but was not asked and did not explain that approach, or why he disagreed with it.

[2064] In June 2015, the plaintiffs challenged the admissibility of Mr. Frith's evidence concerning the operating capacities of CSF schools. The plaintiffs took the position that there are subtleties and nuances that the formula used by Mr. Frith did not take into account. The plaintiffs expressed concern that the operating capacities prepared by Mr. Frith were not identified as estimates. They told the Court that both sides would make submissions in their final argument concerning the best way of estimating operating capacity.

[2065] At that time, I explained that I was alive to the issue and would address the proper formula in my reasons. The plaintiffs then withdrew their objection. Neither side argued the proper manner of calculating operating capacity in their final arguments.

[2066] As I see it, Mr. Frith, the Area Standards and the Fact-Finding Team all applied the same approach to calculating operating capacity: Kindergarten enrolment and classrooms are assigned operating capacity for 19 students. Then, the remaining classrooms are assigned a weighted average enrolment based on the grade structure of the school. For most grade structures, the weighted average operating capacity is 23.29 students. The operating capacities for each room are added together to arrive at operating capacity for the entire facility.

[2067] Given that all three sources rely on the same formula, in my view it is appropriate to rely on the estimated operating capacities for CSF schools identified in Mr. Frith's affidavit. They can be compared to the operating capacities for various schools reported in the Joint Fact Finder's report, which are calculated using the same formula. When these numbers are taken together with the most recently available enrolment data, it is possible to discern the extent to which schools are

overcrowded. I will also take into account space per student as calculated by Mr. Frith.

[2068] The plaintiffs also argue that the NLC programme has caused a particular disadvantage to the CSF. They say that although they have programmes in their buildings that are similar to those that are built in NLC space, the Ministry refuses to exclude that space from the CSF's capacity when assessing its capacity utilization. This, the plaintiffs, say, creates an arbitrary distinction between schools built prior to and after 2008 when both schools are experiencing enrolment pressure. The plaintiffs therefore argue that its schools' operating areas should be reduced by at least 15% to reflect its need to provide early childhood learning functions.

[2069] The CSF is able to, and has, implemented early childhood education programmes in surplus space at its schools, as well as portables on school sites. Only one of the CSF's schools was built with NLC space. As a result, when the CSF requests a new school to accommodate its enrolment, the surplus space occupied by the early learning programme counts against the CSF's application.

[2070] I cannot accept the plaintiffs' argument that the CSF's early childhood education programmes ought to be discounted from its school capacity to ensure equivalence with schools built with NLC space. The Province has built very few new schools since the NLC programme began. As a result, the CSF does not compete with many - if any - schools built with NLC space.

[2071] To the extent that the CSF's use of space for early learning programmes counts against it when the Ministry examines enrolment pressures, majority districts that have similar programmes are in exactly the same predicament. While the Ministry seems to have created an arbitrary distinction between schools built before and after 2008, the distinction does not disproportionately impact the CSF.

3. System-Wide Factors

[2072] The parties also disagree on the relevance of evidence concerning the CSF's district-wide performance in relation to the rest of the province.

[2073] The defendants emphasize the importance of system-wide comparisons. In their view, a reasonable rightsholder parent ought to be considered to have knowledge of factors such as educational outcomes, and would consider those to be important to his or her enrolment decisions.

[2074] Because of the local focus of the entitlement analysis, in the plaintiffs' submission, it is no answer to a claim that a school offers an inferior educational experience to point to system-wide comparisons of the majority and minority education systems. Such system-wide evidence, they say, "is ultimately of extremely limited relevance, is apt to distract from the local inquiry required, and distorts the real life choices that s. 23 rights-holders face".

[2075] There is no doubt that local comparisons are the hallmark of the equivalence and proportionality analyses. Thus, courts must be cautious not to give undue weight to evidence concerning the minority school board's system-wide performance. A reasonable rightsholder parent would likely have greater interest in school-level performance than district-wide performance.

[2076] However, where a school district is meaningfully outperforming or underperforming other districts in the province on a measure relevant to the overall educational experience, that information will be relevant and considered by a reasonable rightsholder parent. Further, a reasonable rightsholder parent will likely have some interest in the minority's district-wide performance as it compares to the performance of the local majority district.

[2077] Thus, for each measure, I will take into account the local comparison of each district's systemic performance. I will also give some weight to the CSF's province-wide performance where it meaningfully differs from the provincial standard. I make the latter findings below in connection with three factors relevant to the global educational experience: student/teacher ratios, technology and graduation rates.

a) Student-to-Teacher Ratios

[2078] Mr. Lebrun prepared charts that show the current and historic student-to-teacher and student-to-staff member ratios for all school districts, including the CSF. Mr. Lebrun also provided evidence concerning the ratio of special needs students to special needs educators.

[2079] Many CSF educators spoke to the pedagogical advantages of small class sizes. In my view, low student-to-teacher ratios are something that a reasonable rightsholder parent would find attractive in an educational facility. Thus, when performing the local comparisons, I will take into account the CSF's student-to-teacher ratios in comparison with those of the comparator majority school district where the CSF programme operates.

[2080] Of course, this is not a perfect comparison. The perfect comparison would be the student to staff ratio at the given school in the community where the CSF competes, in comparison to the appropriate comparator schools. The evidence before the Court is not that specific. Thus, I will consider the district-wide data as a reasonable proxy.

[2081] The defendants also provided argument that calculates the CSF's district-wide student-to-teacher ratios as against the provincial average and all other districts. Examining that data, I conclude that out of 61 school districts, the CSF had the seventh lowest student-teacher ratios in 2000/01, the fourth or fifth lowest in 2009/10 and the ninth or tenth lowest in 2013/14. In all instances, the CSF is well within the bottom fifth of school districts, and well below the provincial average student-to-teacher ratio. A reasonable rightsholder parent would consider that a benefit when making enrolment decisions.

[2082] The CSF also performs exceedingly well on a provincial comparison with regard to the ratio of FTE special needs students per FTE special needs teacher. The CSF had the lowest such ratio in 2000/01 and the second-lowest in each of

2009/10 and 2013/14. Rightsholder parents with this need would likely find this attractive.

b) Technology Programme

[2083] The CSF has a robust technology and laptop programme that involves offering one laptop to every child in Grades 4 through 12, and one tablet for every two children below that grade level. All laptops are replaced every three years.

[2084] Ms. Picard, the principal of the CSF's programmes in Sechelt, testified that the laptop programme has given teachers access to infinite resources. She also explained that the programme helps teachers to network and strategize on-line, which assists the CSF to operate as a provincial school district.

[2085] Ms. Marie-Claude Gilbert, a CSF educator that currently works at École Élémentaire La Vérendrye (Chilliwack), was an early participant in the CSF's technology programme. According to her, École Élémentaire La Vérendrye was one of the first schools to receive laptops, as it was a rural, more isolated school. She became a cyberpédagogue (technology coach for other teachers) at École Élémentaire Anne-Hébert (Vancouver (East)), then a teacher-educator who helped to roll out the technology programme across the Province.

[2086] Ms. Gilbert described how the CSF integrates technology into all aspects of the prescribed curriculum. Rather than teaching technology as a separate subject, technology is a tool that allows her to teach every subject.

[2087] When teaching a Grade 4 through 7 split class at École Élémentaire La Vérendrye, Ms. Gilbert used technology in many different ways to ease the burden of the split levels. The weekly "Dictée", or spelling quiz, was performed using an electronic audio recording adapted to each grade. This also allowed students to hear different people speak French.

[2088] Ms. Gilbert used technology in language arts in many interesting ways, from preparing public speaking presentations to using French-language autocorrect

software. Around the holidays, Ms. Gilbert helped students create electronic cards featuring recordings of the student speaking French that they sent to their Francophone relatives.

[2089] In the research context, students in Ms. Gilbert's class could access French materials on the internet that would otherwise be difficult to access in BC, from media materials to materials on renewable energy. This helped students to appreciate the broader, global French community.

[2090] Technology is fully integrated into Ms. Gilbert's teaching. In math, students used spreadsheet software to track data and make diagrams. Staff used software to digitize records of student artwork in a digital portfolio. Teachers can access specialized programmes for special needs students. Ms. Gilbert even used school technology to make videos about conflict resolution for the counselling programme.

[2091] Ms. Gilbert finds technology to be valuable for student assessment, as well. Her students created a digital portfolio, recording themselves recounting the same story at various points in the year. Both student and teacher could see the student's progress in the French language.

[2092] Ms. Drapeau, the principal at École Élémentaire Les Aiglons (Squamish), explained how she used tablets for her primary school students. She used specific applications for math, French, science and literacy courses. She used reading applications that recited stories in French while highlighting the words being spoken, which helped students to hear French spoken properly. She also found it to be a valuable assessment tool.

[2093] Technology is also important to the CSF as a means of providing courses electronically. Due to limited enrolment at the secondary level, some courses are offered by way of electronic correspondence, or "École Virtuel". Ms. Asselin explained that even at École Victor-Brodeur (Victoria), where there were about 150 secondary students, it was not always possible to run a full complement of

secondary courses. École Virtuel filled the gap by allowing students from across the province to take the course together electronically.

[2094] In my view, the CSF's advanced technology programme is a factor that a reasonable rightsholder parent would find to be especially attractive when making enrolment decisions for their children.

[2095] The defendants provided evidence from Mr. James Shypitka, the executive director of the Strategic Technology Initiatives Branch at the Ministry, concerning empirical survey research that the Ministry performed in about 2010 to gather a portrait of the technological landscape across all 60 districts with a view to developing more personalized education. IBM Consultants used two online surveys that were completed by all school districts, followed by a series of interviews with senior administrators and IT managers in all school districts. Once all the information was collected, the IBM Consultants collated the information, and reviewed it to understand common technology issues across all school districts.

[2096] Mr. Shypitka appended the districts' responses to the surveys to his report. However, I will be careful not to afford them weight as a precise portrait of the technological landscape because records are not current and were always intended to be supplemented by interviews. I also give some weight to the records concerning additional spending above the basic funding for network services per FTE student in 2014/15.

[2097] However, I give more weight to the data in the Joint Fact Finder's Report, which often reports the number of computers, their age and their location in the comparator schools. That is the information that would be readily apparent to a parent making enrolment decisions for their children.

[2098] I will also consider the CSF's relative performance across the province, which I conclude would be of interest to parents. In 2014/15, the CSF was one of only 10 districts that spent more than \$10.00 per FTE students for basic network services. Its spending was well above the provincial (excluding the CSF) average of

\$2.58 per FTE, and the \$2.57 per FTE spent in the districts where the CSF competes.

[2099] In my view, given its significant technology programme, and its significant extra spending compared to other districts, the CSF is among the most technologically advanced school districts in the Province. This is a significant advantage that reasonable rightsholder parents would consider when making enrolment decisions for their children.

[2100] The plaintiffs argue, however, that even if the CSF has a current technological advantage it, will dissipate soon. By Mr. Shypitka's account, the Ministry has undertaken the Next Generation Network ("NGN") Initiative, which will allow consolidation of voice, video and data traffic over a single, secure and reliable private network, and will remove existing barriers while realizing cost and performance efficiencies. Mr. Shypitka estimated that all 60 school districts would move to the NGN by the end of December 2016, with a ramp up by March 2017.

[2101] I cannot accede to the CSF's suggestion that the CSF will soon lose its competitive advantage concerning technology. While the NGN Initiative is of interest to school boards and may improve the technology for some of them relative to the CSF, it is pure speculation to suggest that the CSF will soon lose its competitive advantage. As well, the NGN Initiative should improve speed and connectivity, but it does not address the need for new hardware while the CSF renews its hardware every three years.

c) Graduation Rates

[2102] The defendants also provided evidence concerning the CSF's first-time Grade 12 graduation rates and six-year completion rates for all students, aboriginal students and special needs students. The CSF performs above average in almost all categories and years, with the exception of the first-time graduation rate of special needs students in 2009/10. However, it does not perform so consistently and markedly above the provincial average that it would automatically be of interest

to any parent across the Province. I will only consider the CSF's local performance with respect to graduation rates: whether the CSF significantly outperforms majority schools.

d) Secondary School Instruction

[2103] There is at least one competitive advantage associated with the CSF's secondary programmes: a subsidized trip to France.

[2104] Ms. Bernier explained that secondary students earn points through community service toward a 10-day trip to France in Grade 12. Ms. Picard testified that the CSF and parents share the cost of the trip. The trip helps the CSF's secondary programmes to retain students through secondary school. Ms. Annie Bédard, the principal of the CSF's Nanaimo programmes, explained that she uses the trip as a "selling point" when discussing the programme with Francophone parents.

[2105] In my view, this trip would be something that reasonable rightsholder parents might consider when making enrolment decisions for their children.

C. Summary of the Approach to the Community Claim Chapters

[2106] As the test for s. 23 entitlement is formulaic, all of the Community Claim chapters will follow a similar format. I made common legal and factual findings relevant to all communities in Chapters V through X, and to a lesser extent XII through XV. Below, for ease of reference, I summarize my findings in those chapters and how I will apply them in the Community Claim chapters.

1. History and Context

[2107] In Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, I conclude that s. 23 establishes a right to education with a view to preserving and promoting the language and cultures of both French and English speakers, and the unique partnership that sets our country apart among nations. To achieve those purposes, s. 23 must be interpreted purposively, in a way that will

encourage the flourishing and preservation of minority language groups and their culture. It must also be interpreted remedially, in a manner that is alive to the balancing of interests and context of particular minority language groups.

[2108] Since context and remediation are essential to the analysis of each Community Claim, I begin each chapter by describing the catchment area and the history of the local Francophone community.

[2109] With that information, I will also take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, concerning assimilation: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. I also conclude in Chapter V that while Francophone schools will increase the Vitality of minority language communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

2. The Number of Children

[2110] I make common findings concerning the law and evidence on the number of children in Chapter VII, The Number of Children. There, I explain that there are three categories of rightsholders that are entitled to have their children attend minority language schools Mother-Tongue, Education and Sibling Rightsholders. The relevant number for s. 23 is the number of children of rightsholders who could reasonably be expected to take advantage of a service, which will fall somewhere between the known demand and the total number of rightsholders in an area.

[2111] The court's task is to anticipate what proportion of the total number of potentially eligible children are likely to enrol in the program: a participation rate.

[2112] The total population of students eligible for the service can be difficult to estimate. Since the Court is most concerned with the number of children likely to attend a programme, the outer boundaries of the range need not be precise; they may be estimated based on the best available evidence. The number likely to take

advantage of the service should also be estimated based on all the contextual evidence, which may include drawing inferences based on the experiences in other nearby communities, and demographic and community-specific information like the density and distribution of the population in the school's catchment area. I will also, in my findings, attempt to ensure that schools are built for whatever growth is reasonably foreseeable based on the evidence. However, I will also bear in mind the temporal aspect of the number of children analysis, and that the number of children likely to avail themselves of a new minority language programme tends to start small and grow over time.

[2113] To calculate the total universe of children eligible to attend a CSF school, I will rely on Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. Since the number of Education and Sibling Rightsholders in the Province cannot be quantified to any degree, I will use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to attempt to account for every possible rightsholder.

[2114] When interpreting the numbers, I will bear in mind that Dr. Landry's count of Mother-Tongue Rightsholders is not completely accurate, and likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. I will also have regard to the fact that this universe does not include the children of Education and Sibling rightsholders.

[2115] I will then attempt to estimate an uptake rate. I will begin by examining current demand: the historic enrolment patterns at the CSF programme at issue. If there is evidence of a significant number of non-rightsholders admitted to a programme, pursuant to an Expanded Admissions Policy, I will exclude them from the calculation of current enrolment. Then, I will examine the potential for growth, with regard to the size and concentration of the minority language community, other educational programmes and the historic uptake rate in the community, as well as the experience at other schools in British Columbia with similar characteristics.

[2116] I will consider that evidence together with the general findings of fact that I made concerning the calculation of the uptake rate in Chapter VII, The Number of Children: There, I found that the CSF can generally expect some modest enrolment increases in enrolment on construction of a new, homogeneous French-language school. However, due to the high rate of assimilation and Exogamy in British Columbia, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[2117] For the reasons that I gave earlier in this chapter, I will also treat the CSF's recent enrolment projections with extreme caution. Since 2010, the CSF's enrolment projections have not been based on any identified methodology, and tended to be exaggerated.

3. Entitlement

[2118] After determining the number of children, the question becomes what that number is entitled to. I address my approach to these questions in Chapter VIII, Entitlement.

[2119] As I explain in VIII, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the lower extremity) to equivalent homogeneous facilities (at the higher extremity). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of children given considerations of pedagogy and cost.

[2120] As I see it, the sliding scale begins with a threshold, below which no minority language education services are warranted. The low end of the sliding scale does not arise in this litigation.

[2121] The numbers pass the upper threshold and require equivalent programmes and facilities distinct from those of the majority when the number of students is comparable to the number of students in majority programmes in the same geographic area. Without comparable populations, it is not practical or cost-effective for the minority programme to offer equivalent spaces and facilities. Thus, enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region.

[2122] In the middle of the range, what exactly the minority is entitled to will fall to be determined based on whatever is practical given considerations of pedagogy and cost, with some deference owed to the CSF in its assessment of what is pedagogically appropriate. The numbers are entitled to instruction, at the least. As the number of children grows, the entitlement grows, too, to include progressively more elements of the programmes and services offered in majority schools. Given the temporal aspect of the number of children, what is warranted in the early years of a CSF programme will differ from what is warranted at a mature programme.

[2123] At the upper end, the minority is entitled to full educational facilities distinct from, and equivalent to, majority schools. When determining whether minority facilities are equivalent to those found in the schools of the majority, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending his or her child to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority

schools that represent realistic alternatives for the rightsholder parents. Costs and practicalities are not relevant to this assessment.

[2124] Before the minority reaches the equivalence threshold, the minority is not entitled to fully equivalent programmes, amenities and services. That would not be practical. Instead, the minority is entitled to proportionate programmes, amenities and services. When performing the proportionality analysis, courts may consider *per capita* space, but must be cautious not to unduly emphasize such factors lest they fall into the trap of a formal equivalence analysis. The proportionality analysis should mirror the perspective used in the equivalence analysis: it should adopt a substantive equivalence analysis, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with this question, as the government could meet the appropriate entitlement standard by funding any range of amenities and services.

[2125] When determining if facilities meet the pertinent entitlement standard, I will begin by delineating the appropriate comparator schools. Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents. However, where a minority school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[2126] After selecting the appropriate comparator schools, I will compare the sizes of majority and minority schools and consider the overall context to situate the number of children on the sliding scale and determine the standard of entitlement: instruction, equivalence or something less than equivalence, but proportionate.

[2127] Then, I will take into account the global educational experience at the CSF programme and compare it to students' experience at majority schools. I will weigh the quality of school facilities together with all other factors relevant to the

educational experience because the evidence does not establish that they are of such importance to parents that they will have any greater or lesser weight than other factors in a rightsholder parent's decision-making process.

[2128] In doing so, for the reasons that I give in this chapter, I will rely predominantly on the Joint Fact Finder's Report as well as statistics provided by my Ministry witnesses and the views of CSF educators and administrators. I will also consider the CSF's performance with respect to the measures I discuss in this chapter: student-to-teacher ratios, technology, graduation rates, secondary school instruction.

[2129] I will consider the FCI score of local schools as one objective criterion because there is a correlation between FCI score and the relative state of repair of a school, which would be of interest to a reasonable rightsholder parent. I will also take into account the level of crowding in a school with reference to school capacity as calculated by Mr. Frith and the Joint Fact Finder, as well as the square metres per student calculated by Mr. Frith. In doing so, I will exercise care not to fall into a formal equality analysis, and recognize that the CSF may, in fact, need greater space due to its grade configurations.

[2130] While the evidence establishes that a number of facilities factors have an impact on student learning, I will not give any particular weight to that impact because a reasonable rightsholder parent is not likely to have the skills and experience to know how school facilities are likely to influence educational outcomes. I likewise will not attach weight to the extent to which a school adheres (or not) to the Ministry's Area Standards because it does not shed light on whether a minority facility meets the equivalence or proportionality standard in the region in which it operates.

[2131] I will also take into account my findings in Chapter XV, Linguistic and Cultural Programming. A reasonable rightsholder parent would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Francophone community Vitality in British

Columbia. I will also consider the presence or absence of early learning programmes, including Strong Start, daycare, and preschool programmes in surplus space as a factor that reasonable rightsholder parents might have in mind when making enrolment decisions for their children.

4. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2132] In Chapter VI, The Respective Roles of the Province and the CSF, I explain how the Province enjoys broad, plenary power over education pursuant to s. 93 of the *Constitution Act, 1867*. That jurisdiction is limited by s. 23, which places a unique, positive duty on governments to make expenditures out of public funds. The Province is also required to cede management and control over aspects of education going to minority language and culture to the minority community, and defer to decisions taken within that domain. The Province does, however, retain a legitimate interest in crafting an appropriate, constitutionally-compliant framework within which the minority must exercise both its statutory and constitutional duties.

[2133] Given the overlapping jurisdiction of the Province and minority boards, either or both can cause a breach of s. 23. It is essential to know what caused the rights breach to determine whether that measure is justified pursuant to s. 1 of the *Charter*. Further, if the Province has either solely or materially contributed to a breach by failing to meet its positive duty or interfering with the minority's exercise of its rights, then the remedy must hold the Province accountable. If the minority board caused the breach through an exercise of its management and control, or its failure to abide by a legitimate educational framework, then the remedy must require the minority board to remedy the situation by exercising its jurisdiction.

[2134] Because of these concerns, for each Community Claim I will trace the history of negotiations between the CSF, the Ministry and majority boards that gave rise to the particular circumstances at issue. I will use that discussion to make findings of fact concerning responsibility for the breach.

[2135] Importantly, the history of negotiations is also relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects Province's capital funding system. It is therefore the basis for the chapters in Part 4 of this decision. As a result, I will also make findings of fact relevant to how the capital funding system did or did not cause the situation in the given community.

5. Justification

[2136] Where I find that the entitlement standard has not been met, I will go on to consider whether the breach of s. 23 can be demonstrably justified pursuant to s. 1 of the *Charter*. I make findings concerning the justification framework in Chapter IX, Justification.

[2137] In Chapter IX, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. I will consider that the purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds", and that the purpose is pressing and substantial.

[2138] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. When examining the rational connection, I will have regard to the objective and the scheme for achieving that objective. I will avoid intruding into the minimal impairment stage of the test by attempting to link the "absolute nature of the prohibition" to the objective.

[2139] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward a high level of deference. On the other hand, while society places a high value on education, deciding how to allocate funds for schools is not exactly a decision about responding to a social ill. Thus, in my view, a middle level of

deference is appropriate to account for the difficult task Government faces and the social priority placed on education. The extent to which the measure minimally impairs the plaintiffs' rights will fall to be determined based on the specific infringing measure and engaged rights in the relevant community.

[2140] Finally, I will assess the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects. When examining the salutary and deleterious effects, the salutary effects must be those of the entire regulatory scheme, not just the benefits caused by the effect of the scheme on the CSF. Cost savings may be one salutary effect to be weighed against the deleterious effects of the rights infringement, although it may be difficult to weigh the cost of rectification as against the effect of the right.

[2141] The salutary and deleterious effects to be weighed in the proportionality analysis are those that exist at both the local and the systemic level. Undoubtedly, the salutary and deleterious effects on the rightsholder community at issue play an important role in the proportionality analysis. However, it is also important to take into account what the capital funding system has yielded for the CSF across the system, and how that compares to the majority.

[2142] I find that the pertinent salutary effects will include what the system provides rightsholders with in the local community. Those benefits will fall to be decided based on the particular community at issue.

[2143] The evidence of salutary effects must also include evidence of what the system has yielded for the CSF across the province, and how it compares to what the system has yielded for majority school boards. That evidence tends to reflect the extent to which the Province is achieving its goal of a fair and equitable allocation of resources across the province.

[2144] I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the

CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[2145] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[2146] Much like the salutary effects, the deleterious effects should also include consideration of both the local and systemic impact of the infringing measure. At the local level, the deleterious effects will include the particular nature of the breach, and the extent to which rightsholders' children are not receiving the global educational experience to which they are entitled.

[2147] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact

on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[2148] As a result, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. Thus, the cost of the infringement at the systemic level is relatively low.

6. Remedies

[2149] In the event that I find an unjustifiable infringement of s. 23 in a Community Claim chapter, I will turn to the appropriate remedy. I discuss the legal principles concerning remedies in Chapter X, Remedies.

[2150] For the Community Claims, the most appropriate and just remedy will typically be a declaration of the positive rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches.

[2151] Absent some evidence that the Government has intentionally delayed implementing s. 23 rights or is unlikely to comply with court orders in a given community, it will not be appropriate to require the parties to return to court to report on their progress remedying the breach. Further, since the CSF seeks remedies in the Community Claims as a manifestation of the unconstitutional effects of a law, absent some evidence of bad faith on the part of Government, countervailing factors concerning the public good will often weigh against an award of *Charter* damages.

D. The Community Claims

[2152] It is against that backdrop, and those common findings, that I will address the seventeen Community Claims in this case.

[2153] The first seven Community Claim chapters concern CSF programmes that operate out of leased rather than owned space. I begin with the four Community Claims that concern the CSF's lease of heterogeneous space: Chapter XVII, École Élémentaire La Passerelle (Whistler) and Chapter XVIII, École Élémentaire de la Vallée de Pemberton (Pemberton) concern minority schools that sharing space with majority schools. Chapter XIX, École Élémentaire Les Aiglons (Squamish) and Chapter XX, École Élémentaire du Pacifique (Sechelt) concern homogeneous schools on heterogeneous campuses. Then I deal with leased homogeneous facilities: Chapter XXI, École Élémentaire des Sentiers-Alpins (Nelson); Chapter XXII, École Élémentaire Entre-lacs (Penticton); and Chapter XXIII, École Élémentaire des Navigateurs (Richmond).

[2154] Following that, I turn to those communities where the CSF operates out of owned space or does not operate any space. I begin with four communities where the CSF owns homogeneous schools, but claims that rightsholders are entitled to new facilities to remedy substandard facilities and/or overcrowding: Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)); Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)); Chapter XXVI, École Victor-Brodeur (Victoria) and Chapter XXVII, École L'Anse-au-Sable (Kelowna).

[2155] The next three of these chapters concern owned, homogeneous facilities that the CSF claims are substandard or do not offer appropriate programmes: Chapter XXVIII, École Élémentaire Océane (Nanaimo); Chapter XXIX, École Élémentaire La Vérendrye (Chilliwack); and Chapter XXX, École Élémentaire Deux-Rives (Mission).

[2156] The next two chapters concern communities where the CSF does not operate a programme, and serves rightsholders in schools in nearby communities: Chapter XXXI, Abbotsford French-Language Education and Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam). Included in the chapter concerning Burnaby, I address the plaintiffs' claim concerning École des

Pionniers (Port Coquitlam), as that claim is limited and because the analysis of the number of children in Port Coquitlam influences my decision concerning Burnaby.

[2157] Finally, I turn to the CSF's unique claim related to the quality of its school board office facilities: Chapter XXXIII, Board Office.

XVII. ÉCOLE ÉLÉMENTAIRE LA PASSERELLE (WHISTLER)

[2158] École Élémentaire La Passerelle is located in the resort municipality of Whistler. It is one of three CSF schools in the Coast Mountain region of British Columbia. École Élémentaire La Passerelle is a leased, heterogeneous, French-language Kindergarten to Grade 7 school. In 2014/15, the school's enrolment was 67 students.

[2159] In Whistler, the CSF proposes to acquire a new site and construct a homogeneous elementary/secondary school (the "Whistler Elementary/Secondary Project") to serve elementary students from Whistler and secondary students from both Whistler and Pemberton. In 2014, the CSF estimated that projection would cost more than \$22.5 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[2160] Mr. Bonnefoy and Mr. Allison both testified about the circumstances at École Élémentaire La Passerelle. Mr. Palmer spoke to his recent dealings with the CSF and SD48-Sea-to-Sky concerning the CSF's Whistler programmes.

[2161] The Court also heard from several CSF educators. Ms. Drapeau, the principal at École Élémentaire Les Aiglons (Squamish), described Spring Creek Elementary as it was when she worked there as a teacher-on-call in the spring of 2006. As I describe in Chapter XIX, École Élémentaire Les Aiglons (Squamish), I do not find her to be a credible witness.

[2162] The Court also heard from Mr. Tardif, who is currently the principal at École Élémentaire La Passerelle and École Élémentaire de la Vallée de Pemberton

(Pemberton). Mr. Tardif took a position as principal of the CSF's Coast Mountain programmes in about 2004.

[2163] The Joint Fact Finder's Report discusses schools in SD48-Sea-to-Sky. A member of the Fact-Finding Team visited Spring Creek Elementary and performed measurements to confirm room dimensions. The Joint Fact Finder's Report also cites District and Ministry Data. I find it to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Whistler Catchment Area

[2164] Dr. Kenny described the history of Francophones in the Coast Mountain region. He advised that the Francophone community lacks deep roots because non-aboriginal settlement of the area began relatively late. He did not find any traces of historic Francophone missionary and fur-trading work.

[2165] With specific reference to Whistler, Dr. Kenny explained that Francophones began to form a larger portion of the population by the late 20th century. The first Programme Cadre opened in 1990 at Myrtle Philip Elementary with 11 students. At the time, parents were concerned about a perceived lack of enthusiasm for the programme by Myrtle Creek Elementary principal, diversion of Programme Cadre funds to the majority school and split classes.

[2166] École Élémentaire La Passerelle moved to its current home at Spring Creek Elementary in 2003/04. It operates as a heterogeneous school serving children in Kindergarten to Grade 7. It shares space with Spring Creek Elementary, an SD48-Sea-to-Sky majority-language elementary school. There is no Francophone secondary education in Whistler, nor are there any Francophone early learning programmes.

[2167] École Élémentaire La Passerelle is one of three minority schools that serves rightsholders living in the territory of SD48-Sea-to-Sky. Its catchment area is composed of the Resort Municipality of Whistler and its environs. SD48-Sea-to-Sky owns and operates two elementary schools in the École Élémentaire La Passerelle

catchment area (including Spring Creek Elementary), and offers French immersion after Grade 5.

2. Conclusions

[2168] When analyzing the Whistler claim, I will take into account the fact that there is a weaker Francophone history in the region as compared to other areas of British Columbia. I will also consider that both the catchment area and the Resort Municipality of Whistler are very small. École Élémentaire La Passerelle only competes with two majority schools, and only competes with French immersion after Grade 5.

[2169] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate.

C. The Number of Children

[2170] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children is likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[2171] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[2172] Dr. Landry estimated that in 2011 there were 68 elementary-school age children (age 5-13) living in the catchment area for the Whistler Elementary/Secondary Project that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 66 children of Mother-Tongue Rightsholders in the catchment area, a slight reduction in the population of eligible students.

[2173] I note that Dr. Landry also found 110 elementary-age children in the Knowledge Category, and 35 in the Regular Home Use Category. I do not find those numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in Whistler.

[2174] Dr. Landry and Mr. McRae also estimated the number of Francophone students from Whistler and Pemberton that might be eligible to attend a regional Francophone secondary programme. Based on Dr. Landry's data, in 2011, there were 36 secondary-age children (age 14-17) in the two communities with a Mother-Tongue Rightsholder Parent. Forecasting out to 2023, Mr. McRae suggested there will be 40 such children in the catchment area, slight growth. I do not find that Dr. Landry's counts of 75 secondary-age children in the Knowledge Category or 15 in the Regular Home Use Category to be helpful evidence.

[2175] I therefore conclude that a reasonable proxy for the total universe of rightsholders' children in the catchment area for the Whistler Elementary/Secondary Project into the reasonably foreseeable future is about 68 elementary-age children and 40 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[2176] The evidence shows that enrolment at École Élémentaire La Passerelle has grown from 34 students in the 1996/97 school year, to 67 in the 2014/15 school

year. In most years between 2001 and 2010, enrolment at École Élémentaire La Passerelle hovered between about 60 and 70 students. In 2010/11, enrolment jumped to 80 students, and has since declined to 67 students, bringing enrolment back within the range it was in through the first decade of the century. Thus, I conclude that enrolment at École Élémentaire La Passerelle has been stable since about 2001.

[2177] According to CSF evidence, the École Élémentaire La Passerelle admitted three non-rightsholders pursuant to the CSF's Expanded Admissions Policy when it was in force. Removing these children from École Élémentaire La Passerelle's enrolment, I conclude that current demand is about 65 elementary children, but is often closer to 70 elementary students.

[2178] Since the CSF does not operate a secondary programme in Whistler, actual demand for that programme is nil. In 2012, Mr. Tardif performed a survey that led him to believe that 8 students in Grades 8 and 9 would participate in a Francophone secondary programme in 2012. His 2013 survey suggested there would be closer to 20 students who wanted to participate. As such, known demand for a secondary programme can be estimated at around between eight and twenty children.

3. The Uptake Rate

[2179] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, competing educational programmes and the experience in other communities with similar characteristics.

[2180] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's

Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[2181] The plaintiffs say that the CSF seeks a new elementary/secondary (K-12) school with capacity to accommodate at least 240 students: 154 students in Kindergarten through Grade 7, and 75 students in Grades 8 through 12. That would give École Élémentaire La Passerelle two Kindergarten classrooms, five elementary classrooms and three secondary classrooms. The plaintiffs submit that given anticipated growth with a new facility and École Élémentaire La Passerelle's current four-division structure, it is not unreasonable for the CSF to request seven elementary classrooms. The plaintiffs also suggest it is reasonable to expect that the CSF's secondary programme could attract 50 students, which they say justifies three classrooms.

[2182] While under cross-examination, Mr. Allison accepted that the CSF would need a 230% proxy participation rate to fill its proposed school. In other words, the school that the CSF requested would only be 43% full with 100% participation of the 104 children with a Mother-Tongue Rightsholder parent. Even assuming that all 50 children in the Regular Home Use Category were to attend, École Élémentaire La Passerelle would require a 155% participation rate to fill the requested school.

[2183] Mr. Allison conceded that this was the case, and admitted that he was not relying on Dr. Landry's data to make enrolment projections for planning purposes. He suggested Dr. Landry's data could not be relied on for Whistler, and stated that he projected continuous growth.

[2184] As I explain in Chapter XVI, Introduction to the Part 3: The Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their projection of 240 students is not realistic.

[2185] École Élémentaire La Passerelle appears to have a very high participation rate. There are 65 children of rightsholders enrolled at École Élémentaire La Passerelle. I conclude that into the reasonably foreseeable future, the elementary-age proxy universe of rightsholders' children will be about 68 children. École Élémentaire La Passerelle therefore has a 95% proxy participation rate.

[2186] To explain the high participation rate, the plaintiffs suggest the census figures for Whistler are under-representative. They point to affidavit evidence showing that some of the students enrolled at École Élémentaire La Passerelle in 2011/12 were not included in Dr. Landry's count of children because their parents were Education Rightsholders, were out of the country or because they did not respond to the census in a manner that would identify them as Mother-Tongue Rightsholders. I address these arguments in Chapter VII, The Number of Children, where I conclude that some unquantifiable number of children of Education and Sibling Rightsholders live in each community, but that they cannot be accounted for.

[2187] The Province counters that the only possible explanation for the high participation rate is that École Élémentaire La Passerelle has admitted some children of non-rightsholders.

[2188] I infer from the evidence from CSF educators that principals do not always rigorously test whether parents meet admission criteria. I therefore find that there are likely a significant number of non-rightsholders enrolled at École Élémentaire La Passerelle, which explains its very high proxy participation rate. This is particularly so in light of the fact that the CSF performed a survey of all parents of students attending École Élémentaire La Passerelle concerning their rightsholder status, and did not disclose it. I infer that the plaintiffs did not do so because it was not favourable to their position.

[2189] At the elementary level, the proxy participation rate in Whistler is very high: nearly 100%. This is so even after taking into account that there are likely some children of Education and Sibling Rightsholders not included in the proxy universe of rightsholders, and that many children of non-rightsholders attend École Élémentaire La Passerelle. Enrolment has been stable since about 2001, subject to a small spike in enrolment around 2010/11.

[2190] I also consider that École Élémentaire La Passerelle faces very little competition in Whistler. It competes only with two elementary schools: the newer school with which it shares space, and a school in another area of Whistler. It does not compete with French immersion programmes until Grade 5, which likely contributes to the high proxy participation rate. As I describe below, the facilities housing École Élémentaire La Passerelle are adequate and do not deter parents from sending their children to the minority programme.

[2191] In light of the high participation rate, stable enrolment, adequate facilities and lack of competition, I find that École Élémentaire La Passerelle is likely approaching the top end of its participation rate.

[2192] Given the high participation rate in Whistler, it is difficult to draw inferences from other communities about the likely result on elementary enrolment if École Élémentaire La Passerelle were to move to a homogeneous school facility and add secondary grades for the first time. The closest parallel is École Au-cœur-de-l'île (Comox). In Comox, the CSF operated leased, heterogeneous elementary, middle and secondary programmes. The CSF opened a new homogeneous elementary/secondary school in 2011/12 with enrolment of 99 children in Kindergarten to Grade 6. By 2014/15, enrolment had grown to 156 children in those grades: growth of about 57%.

[2193] Dr. Castonguay, using Dr. Landry's methodology, counted 228 children age 5 to 12 living in the École Au-cœur-de-l'île catchment area in 2011/12 that had a Mother-Tongue Rightsholder parent. Assuming the universe of Francophones in the area remained constant, the participation rate grew from 43% to about 68%.

[2194] The experience in Comox shows that elementary enrolment and a participation rate may increase substantially when a programme moves from a heterogeneous elementary school to a new homogeneous school that includes secondary space. However, it is not clear that the CSF could expect the same magnitude of increase in enrolment in Whistler. As I describe in Chapter XXXVIII, Site and School Acquisition Projects, École Au-cœur-de-l'île faced many facility problems and a lack of security of tenure before it moved to its new school, and undoubtedly had a lower participation rate than École Élémentaire La Passerelle has now. École Élémentaire La Passerelle does not face the same facility challenges and has an exceptionally high participation rate. There is simply less room for the École Élémentaire La Passerelle participation rate to grow. As a result, I infer that École Élémentaire La Passerelle will see less enrolment growth at the elementary level than École Au-cœur-de-l'île did.

[2195] Taking into account all the surrounding circumstances, including that there are likely many children of non-rightsholders enrolled at École Élémentaire La Passerelle, I conclude that about 85 children in Kindergarten through Grade 7 are likely to take advantage of a Francophone programme in Whistler in a newly-constructed homogeneous school with secondary space. Enrolment of 85 children reflects a 125% proxy participation rate: growth by about 21%. That growth is about one-third of the growth that École Au-cœur-de-l'île experienced at the elementary level upon moving into a new, homogeneous K-12 facility.

[2196] At the secondary level, there is little reliable evidence of actual demand. The CSF secondary programme will compete with French immersion. If the CSF's secondary programme is located within the walls of a homogeneous K-12 minority language school, it will not be able to offer the same breadth of programmes as a majority secondary school due to the small numbers of rightsholders' children. The CSF will likely experience significant attrition as age cohorts approach the secondary years. Further, Dr. Ardanaz's evidence concerning École Élémentaire La Passerelle's early years educating rightsholders' children from Pemberton in Whistler leads me to conclude that the CSF will struggle to recruit secondary

students from Pemberton due to the distance between the two communities and winter driving conditions.

[2197] However, the evidence of high participation rates at École Élémentaire La Passerelle suggests that the CSF might expect a higher participation rate in the secondary grades than it sees in other communities.

[2198] There is no precedent to assist me to determine how a new facility might influence secondary enrolment. The Court has no evidence of the CSF starting new secondary programmes in a K-12 school, except for possibly Surrey, which is not comparable given its urban setting. In all other instances in the evidence, CSF secondary programmes in homogeneous K-12 facilities started in heterogeneous secondary facilities.

[2199] Given the balance between an anticipated high participation rate, coupled with significant attrition in secondary grades and the types of services the CSF could realistically offer a low number of secondary students, I consider that 30 children are likely to participate in a secondary programme in Whistler. This represents a 75% proxy participation rate.

D. Entitlement

[2200] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement. In this case, the entitlement analysis differs for the elementary and secondary components of the CSF's proposed Whistler school.

1. Appropriate Comparator Schools

[2201] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Given the distribution of the École Élémentaire La Passerelle student population, the appropriate elementary comparator schools are the two schools in the École Élémentaire La Passerelle catchment area: Myrtle Phillip Elementary and Spring Creek Elementary.

2. Location on the Sliding Scale

[2202] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[2203] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[2204] In the plaintiffs' submission, the Area Standards contemplate small schools like the one that the CSF has requested. They note that the Ministry approved new schools with capacities for less than 100 students in Big White in 2004 and in Port Clements in 2007. The defendants respond that the schools built at Big White and Port Clements were anomalous.

[2205] The Court has limited evidence about the school at Big White, which is a ski resort. The school at Port Clements, though, was built to serve a very remote community in Haida Gwaii. The Minister's options were to build a school or not. There was no option for a space sharing arrangement. Thus, the defendants say it is not cogent to apply what was found pedagogically appropriate and financially practical in that area with the minority language situation in Whistler.

[2206] I have determined that if the Province were to build a homogeneous elementary/secondary school for minority language students in Whistler, 85 elementary-age children and 30 secondary-age children would be likely to attend that school. The Province rarely builds schools to that capacity. Where it has, the

school was built to serve an isolated and remote community; a new school was the only practical way of providing those children with an education. In Whistler, there are other options, including spaces for heterogeneous minority language instruction.

[2207] As I see it, 85 elementary and 30 secondary-age children are not entitled to a newly-constructed homogeneous facility fully equivalent to those provided to the majority. In Whistler, the two comparator elementary schools were built with respective operating capacities of 270 students (Myrtle Phillip Elementary) and 363 students (Spring Creek Elementary). Their respective enrolments in 2014/15 were 287 students (Myrtle Phillip Elementary) and 316 students (Spring Creek Elementary). While the CSF is entitled to some deference concerning what is pedagogically appropriate for its students, providing a homogeneous school for 85 elementary students would deprive them of the pedagogical benefit of interacting with large populations, and would not be cost-effective in light of the size of comparator schools. Given the numbers, it is not practical for the linguistic minority to have a newly built, homogeneous facility equivalent to that of the majority.

[2208] At the same time, 85 children will normally be divided into about four elementary divisions. Thus, the numbers warrant more than just instruction at the elementary level. The number therefore falls in the middle of the sliding scale, and is entitled to instruction with access to the core facilities required to provide minority language education.

[2209] The number of secondary students, though, only just passes the threshold for warranting instruction, and falls near the bottom of the sliding scale.

3. Global Elementary School Experience

[2210] The plaintiffs argue that École Élémentaire La Passerelle students receive a substandard educational experience because: the École Élémentaire La Passerelle facilities do not support Vitality; École Élémentaire La Passerelle does not have equitable access to core facilities; and École Élémentaire La Passerelle students must travel longer and farther than majority students to attend school. I consider

those factors together with other elements relative to the global educational experience.

a) Francophone Experience

[2211] As I describe in Chapter XV, Linguistic and Cultural Programming, reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia. In Whistler, there is no French immersion until Grade 5, which makes École Élémentaire La Passerelle a particularly attractive option for rightsholder parents. Within the walls of its classrooms, the environment is entirely Francophone. Mr. Tardif stated that he saw the Francophone environment as a benefit to an education at École Élémentaire La Passerelle.

[2212] On the other hand, the plaintiffs submit that since École Élémentaire La Passerelle is in a heterogeneous environment, the fragmented nature of the programme has fostered a limited identity for École Élémentaire La Passerelle.

[2213] Generally, the environment at Spring Creek Elementary is Anglophone. For many years, École Élémentaire La Passerelle's classrooms were spread throughout Spring Creek Elementary based on grade level. Mr. Tardif's office space was initially located on Spring Creek Elementary basement floor, which made it difficult to find. When Ms. Drapeau first visited Spring Creek Elementary as a substitute teacher, she had to ask where to find École Élémentaire La Passerelle.

[2214] As I describe below, starting in about 2012, École Élémentaire La Passerelle's operations have moved to a wing of Spring Creek Elementary owned by the Resort Municipality of Whistler, and designed as community space. Mr. Tardif's office was found in that area for some time. He now has office space in the Spring Creek Elementary administrative space at the school entrance.

[2215] Further, as of 2015/16, two of École Élémentaire La Passerelle's classrooms and its special education space are all consolidated in the community wing of the

school. Its two other classrooms are located across from one another on the same floor, although they are at the far end of the building's opposite wing. As such, École Élémentaire La Passerelle has been able to develop more of a distinct identity at Spring Creek Elementary than it had prior to about 2012.

b) Transportation

[2216] The CSF contracts with SD48-Sea-to-Sky to provide school bus transportation to students attending École Élémentaire La Passerelle.

[2217] In 2012/13, 44 of École Élémentaire La Passerelle's 78 students took the bus to and from school. The average ride time for École Élémentaire La Passerelle students was 15 minutes, and the longest was 30 minutes. These ride times are well below the 45-minute ride time limit envisioned in the CSF's 2009 Transportation Policy.

[2218] Both comparator schools offer school bus transportation, with average ride times between 10 and 15 minutes, and longest bus ride times ranging from 20 to 30 minutes.

[2219] The plaintiffs concede that for those 24 École Élémentaire La Passerelle students who live closer to Spring Creek Elementary than to Myrtle Phillips Elementary, the ride time to school is comparable to the ride times of SD48-Sea-to-Sky students attending Spring Creek Elementary. However, the plaintiffs argue that about two-thirds of the student population live closer to Myrtle Phillip Elementary than to Spring Creek Elementary, and therefore have a longer bus ride time than they would if they attended the nearest majority-language school.

c) Access to Core Facilities

[2220] The plaintiffs argue that École Élémentaire La Passerelle students do not have equitable access to the gymnasium, library and multipurpose room at Spring Creek Elementary.

i. Gymnasium

[2221] École Élémentaire La Passerelle and Spring Creek Elementary share an attractive gymnasium. Mr. Tardif explained that the gymnasium is larger than a standard elementary school gymnasium, and is used by the Whistler community. According to Ms. Drapeau, it can be divided using an electric sliding door to create two large gymnasium spaces.

[2222] When Mr. Tardif began working at École Élémentaire La Passerelle, administrators assigned blocks of physical education time by way of a lottery including both École Élémentaire La Passerelle and Spring Creek Elementary divisions. Starting in about 2007, Spring Creek Elementary administrators began assigning physical education blocks to École Élémentaire La Passerelle.

[2223] École Élémentaire La Passerelle is typically assigned nine blocks of physical education time for its four divisions. Every Spring Creek Elementary division has three blocks of gymnasium time. Since physical education blocks are allocated based on enrolment rather than divisions, École Élémentaire La Passerelle has about 20% of the building's population and 20% of the time periods for physical education.

[2224] According to Mr. Tardif, École Élémentaire La Passerelle is not assigned enough time periods for each division to obtain the Ministry-suggested 30 minutes of physical activity per day. I note that Spring Creek Elementary students also do not meet that standard. Spring Creek Elementary sometimes shares gymnasium time among several primary divisions. It is not clear whether École Élémentaire La Passerelle has attempted to share gymnasium blocks between two of its divisions at once. Mr. Tardif commented that he has faced challenges attempting to share space between École Élémentaire La Passerelle and Spring Creek Elementary divisions.

[2225] Mr. Tardif gave some evidence about how École Élémentaire La Passerelle attempts to enhance physical education for students. Students at École Élémentaire

La Passerelle go on field trips for ice skating, gymnastics and cross-country skiing. École Élémentaire La Passerelle also uses the Spring Creek Elementary playfields in the fall and spring months to supplement physical education time.

ii. Library

[2226] The library at Spring Creek Elementary, by Mr. Tardif's description, is open with large windows and natural light. It has about eight round work tables, a reading area, monitors for presentations and stacks for books. There is a small section for French books. The library is big enough to hold an entire class.

[2227] As with the gymnasium, library scheduling is determined by Spring Creek Elementary administrators. Mr. Tardif finds the scheduling to be challenging. There can be time delays for École Élémentaire La Passerelle's books to be catalogued. École Élémentaire La Passerelle also has limited space for its library books.

iii. Special Education

[2228] Mr. Tardif advised that Spring Creek Elementary has a multipurpose room that it uses about 3.5 days per week. Mr. Tardif asked to use that space for music instruction, but his request was denied.

[2229] École Élémentaire La Passerelle does not technically have its own multipurpose room. However, it leases a community room in the community wing of the school, known as the Daisy Lake Room. That room is divided by a sliding solid wall. One side of the room is used for Student Services: Francisation, a French-language facilitator and non-confidential counselling. The other half of the room is used for learning assistance, music, and for some group project work by École Élémentaire La Passerelle divisions. With the wall removed, the Daisy Lake room is used for monthly assemblies, theatrical performances and Francophone community events. In my view, the Daisy Lake room acts as a multipurpose room for École Élémentaire La Passerelle.

d) Other Aspects of the Educational Experience

[2230] Together with these factors, I weigh some of the other evidence concerning the global educational experience at École Élémentaire La Passerelle, and how that compares to the educational experience at the comparator schools:

i. Class Sizes

[2231] École Élémentaire La Passerelle has much smaller class sizes than either of the comparator schools. The average class size in the comparator schools is about 23.5 students. At École Élémentaire La Passerelle, the average class size is 16.5 students.

ii. Student to Staff Ratios

[2232] The CSF's student-to-teacher ratio is better than that of SD48-Sea-to-Sky. The CSF has 15 students to every teacher, and four special needs students to every special needs teacher. SD48-Sea-to-Sky has close to 18 students to every teacher, and about 10.5 special needs student to every special needs teacher.

iii. Technology

[2233] Both of the comparator schools have desktop computers in computer labs. The CSF is among the most technologically advanced districts in the province. At École Élémentaire La Passerelle, like other schools, it offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students. Mr. Tardif explained that École Élémentaire La Passerelle used the Spring Creek Elementary computer lab between 2004 and 2006, but only rarely uses it now that it has a laptop programme.

iv. Building and Amenities

[2234] The plaintiffs concede that Spring Creek Elementary is an attractive school that appears very new. As I see it, given that École Élémentaire La Passerelle shares space with the newest SD48-Sea-to-Sky school in Whistler, the physical building facilities are generally equivalent to those offered to the majority except to

the extent that École Élémentaire La Passerelle is unable to access and use those facilities.

e) Analysis

[2235] The proportionality analysis mirrors the perspective used in the equivalence analysis: it takes a substantive equivalence approach, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with this question, as the government could meet the appropriate entitlement standard by funding a range of amenities and services. When performing the proportionality analysis, courts may consider *per capita* space, but must be cautious not to stray into a formal equivalence analysis. The overall question is what is practical to provide for the number of students, and whether the children are receiving an education that meets that standard.

[2236] École Élémentaire La Passerelle has current demand for about 60 to 70 students. In the best possible circumstances, it could expect about 85 elementary students to attend its programme. Comparator schools are more than quadruple its size. Thus, rightsholders in Whistler are not entitled to wholly equivalent facilities. They are entitled to facilities proportionate to École Élémentaire La Passerelle's size.

[2237] The plaintiffs say that the educational experience is substandard because the heterogeneous environment prevents École Élémentaire La Passerelle from realizing a completely Francophone environment. Certainly, the Francophone identity of École Élémentaire La Passerelle would be stronger if it did not operate in heterogeneous space. Students are exposed to the majority language in hallways and on the playground.

[2238] However, École Élémentaire La Passerelle is able to maintain a Francophone identity in rooms that are exclusively for its own use. With time, it has also found its way into a distinctive space at Spring Creek Elementary. To remedy the problem, École Élémentaire La Passerelle would have to move to homogeneous

space. Given the very low number of children, the CSF cannot expect that result. The strength of Francophone identity in the school and community is commensurate with the size of the school.

[2239] With respect to transportation times, I note that only about half of École Élémentaire La Passerelle's population faces longer bus ride times to attend École Élémentaire La Passerelle than they would to attend the nearest comparator school. The ride times to school for CSF students, even those who take the longest to get to school, is comparable to the longest ride times faced by the majority. Given the small size of the Resort Municipality and the lack of competition the CSF faces, this is not a factor that a reasonably prudent rightsholder parent would find to be a significant disincentive to enrolling at École Élémentaire La Passerelle.

[2240] There have also been problems sharing core facilities, particularly the gymnasium and the library. The evidence establishes that Spring Creek Elementary considers its own needs first when scheduling time for those amenities. While École Élémentaire La Passerelle receives gymnasium access proportionate to its share of the population, students do not receive the same amount of physical education instruction as majority students do. A reasonable rightsholder parent might see this as a detrimental aspect of the educational experience at École Élémentaire La Passerelle. I will also take this into account when considering the plaintiffs' claim that they are disadvantaged by a capital funding system that requires the CSF to operate out of leased space in Chapter XXXV, Leases. Of course, given the CSF's small class sizes, it could potentially divide the gymnasium and offer more physical education instruction to its students.

[2241] Reasonable rightsholder parents would find other aspects of École Élémentaire La Passerelle particularly appealing. École Élémentaire La Passerelle significantly outperforms comparator schools in terms of class size. École Élémentaire La Passerelle also has a very advanced technology programme that incorporates technology into children's daily educational experience. Comparator

schools do not offer that programme. Of lesser importance is the fact that the CSF's student-to-staff ratio is better than that of SD48-Sea-to-Sky.

[2242] Overall, in my view, a reasonably prudent rightsholder parent would consider that École Élémentaire La Passerelle offers a global educational experience that meets the standard of majority schools, particularly given École Élémentaire La Passerelle's small size.

4. Secondary Programme

[2243] There is no Francophone secondary programme in either Whistler or Pemberton. I find that there are about 30 children would be likely to take advantage of such a programme or facility if one were included in a newly-built elementary/secondary school in Whistler.

[2244] The CSF takes the position that it is pedagogically appropriate to educate 30 secondary students together. It is entitled to some deference in that assessment. If the CSF were to offer such a service in a heterogeneous environment, as it does in other communities, then the service could also prove to be cost-effective. It is not, however, pedagogically appropriate or cost-effective to build a new school for that number of children, particularly given that elementary students have access to appropriate facilities proportionate to their numbers. Thus, in my view, it is only pedagogically appropriate and cost-effective for the CSF's anticipated 30 secondary students to receive basic minority language instruction in a heterogeneous environment.

[2245] Mr. Tardif dreams of one day opening a targeted distinct, homogeneous, French-language secondary programme for the greater Whistler area with a focus on physical activity and sport, which could serve athletes who compete at the national level. While this is ambitious and admirable, it goes far beyond the basic level of services that the Province is required to provide for the linguistic minority in British Columbia.

[2246] Since there is no secondary instruction offered at the secondary level, the numbers are not receiving the heterogeneous instruction that they are entitled to, contrary to s. 23 of the *Charter*.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2247] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of the relationship between École Élémentaire La Passerelle and its host school, Spring Creek Elementary, as well as the CSF's dealings with SD48-Sea-to-Sky and the Ministry in connection with École Élémentaire La Passerelle.

[2248] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Whistler, I will make findings that are of particular relevance to: Chapter XXXV, Leases; and Chapter XXXVI, Expansion Projects and the Enrolment Driver.

1. The CSF's Capital Plan Requests

[2249] The CSF assumed management and control of minority language education in Whistler in 1998/99. At that time, the CSF's programme was at Myrtle Phillip Elementary, and over time moved entirely into portables on that site.

[2250] The CSF made its first capital request for Whistler in its June 1998 Capital Plan Submission for 1998/99. Dr. Ardanaz explained that at that time, the CSF had been looking to build a wing at Myrtle Phillip Elementary. The CSF requested as its fifteenth-highest priority project the acquisition of a portion of an existing elementary school site and a new school on that site (the "Whistler Elementary Annex Project").

[2251] The CSF continued to request the Whistler Elementary Annex Project as its fourth-highest ranked project in its September 1998 Capital Plan Submission for 1999/00. However, its focus shifted to building an addition to Spring Creek

Elementary, which was a planned new construction at that time. SD48-Sea-to-Sky, however, did not confirm interest in that proposal. The CSF again requested the Whistler Elementary Annex Project as an unranked project with its June 1999 Capital Plan Submission for 2000/01 and June 2000 Capital Plan Submission for 2001/02, but returned to focusing on building an annex at Myrtle Phillip Elementary.

[2252] The CSF moved to surplus space at the newly-constructed Spring Creek Elementary when it opened in 2003/04. Corresponding with the move, the CSF did not make any capital requests for Whistler from its June 2001 Capital Plan Submission for 2002/03 through the November 2006 Revised Capital Plan Submission for 2007/08. While the CSF listed an unranked, medium-term asset transfer from SD48-Sea-to-Sky as a potential future project between 2003 and 2005, I infer those requests related to Squamish since there is no evidence of any closed schools available for transfer in Whistler.

[2253] In 2007, the CSF began requesting a new Kindergarten to Grade 7 elementary school to replace leased space (the “Whistler Elementary Project”). That project was the CSF’s seventh-highest ranked project in the CSF’s October 2007 Capital Plan Submission for 2008/09. With the May 2009 Capital Plan Submission for 2009/10, the CSF moved to ward-based capital planning, and asked for the Whistler Elementary Project as its second-highest ranked project in the South Coast Ward.

[2254] The CSF’s planning changed in 2010, concurrently with Mr. Allison’s first capital plan as Secretary-Treasurer and the start of this litigation. In its June 2010 Capital Plan Submission for 2010/11, the CSF requested the Whistler Elementary/Secondary Project for the first time. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF’s #1 priority. The CSF sought accelerated funding for it in the first two years of the Province’s capital budget, contrary to the Province’s direction to only seek capital funding starting in the third year of the capital plan. The CSF’s form of ranking was not reflected in the Echo Report.

[2255] The Province did not seek Capital Plan Submissions in 2011. In the CSF's November 2012 Capital Plan Submission for 2012/13, it asked for the Whistler Elementary/Secondary Project again, with the same form of prioritization as it had previously. The Whistler Elementary/Secondary Project was also requested as a top priority in the CSF's September 2013 Capital Plan Submission for 2013/14. Each time, the CSF asked for a higher-capacity school than its previous request.

[2256] In support of its September 2013 submission, the CSF also submitted an In-House PIR, which is dated November 2013. In that PIR, the CSF identified three privately-owned sites that it could acquire to build a new school.

[2257] In the Echo Report for the September 2013 Capital Plan Submission for 2013/14, the Whistler Elementary/Secondary Project is ranked NPIR. Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in that PIR, as the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school.

[2258] The CSF submitted a revised In-House PIR for Whistler dated October 2014. The CSF indicated it had engaged Mr. McRae to provide 10-year cohort retention enrolment projections. Mr. Allison provided the Ministry with those projections in a subsequent email dated October 27, 2014. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[2259] As of the conclusion of the evidence at trial in August 2015, the Ministry had not approved any capital projects for the CSF in Whistler.

2. History of Arrangements with SD48-Sea-to-Sky

a) Early Tenure at Myrtle Phillip Elementary

[2260] When Dr. Ardanaz first joined the CSF, SD48-Sea-to-Sky offered a Programme Cadre at Myrtle Phillip Elementary, which also offered French immersion and English-language instruction. It served children from both Whistler

and Pemberton. When the CSF took control of the programme, it leased space at Myrtle Phillip Elementary on a year-to-year basis, with no assurances that the space would be available in the following year. Students from Pemberton were transported to the school by bus by way of an agreement with SD48-Sea-to-Sky.

[2261] As enrolment increased at Myrtle Phillip Elementary, the CSF was gradually displaced from the facility. By 2000/01, École Élémentaire La Passerelle was located entirely in portable classrooms on the Spring Creek Elementary site. According to Dr. Ardanaz, in the summer of 2001, Myrtle Phillip Elementary had 10 portables on it pending construction of Spring Creek Elementary.

[2262] Enrolment at École Élémentaire La Passerelle was growing, too. In the summer of 2000, the CSF asked for additional instructional space. Ms. Nancy Edwards, Secretary-Treasurer for SD48-Sea-to-Sky, refused to commit to giving the CSF another portable until enrolment at Myrtle Phillip Elementary was confirmed in September. At Ms. Edwards's suggestion, Dr. Ardanaz made inquiries about space owned by the Resort Municipality. However, the only available municipal space, a room at the municipal hall, was not acceptable to the CSF.

[2263] Ultimately, SD48-Sea-to-Sky allowed École Élémentaire La Passerelle the additional portable. However, the issue caused some frustration and discouragement for CSF administrators.

b) Move to Spring Creek Elementary

[2264] In 2003/04, SD48-Sea-to-Sky opened Spring Creek Elementary, a community school with a wing for community offices and a large gymnasium available for municipal purposes. The same year, École Élémentaire La Passerelle moved to surplus classrooms space in the SD48-Sea-to-Sky portion of the building. The CSF continued to hold one-year leases.

[2265] In the first few years, SD48-Sea-to-Sky acceded to CSF requests to lease additional classrooms for École Élémentaire La Passerelle. In 2003/04 and 2004/05, the CSF used three classrooms: two on the lower floor and one on the upper floor.

In 2005/06 or 2006/07, École Élémentaire La Passerelle added a fourth division in a classroom on the upper floor of the building. This remained unchanged until 2011/12.

[2266] According to Ms. Drapeau and Mr. Tardif, École Élémentaire La Passerelle's classrooms were interspersed with the SD48-Sea-to-Sky classrooms based on grade level. By Ms. Drapeau's account, the only way to tell whether a room was a CSF or SD48-Sea-to-Sky classroom was by the nameplate on the door: it named teachers as either Madame/Monsieur or Mr./Ms.

[2267] When Ms. Drapeau worked at Spring Creek Elementary as a teacher-on-call, École Élémentaire La Passerelle's administrative space was located on the bottom floor of the Spring Creek Elementary building. Mr. Tardif confirmed this was the case, and advised that there were no signs at the front entrance to indicate École Élémentaire La Passerelle's presence.

[2268] Mr. Tardif related that École Élémentaire La Passerelle also used a small room on the lower floor, about 8 feet by 8 feet, for Francisation, counselling and special services like learning assistance. According to Mr. Tardif, that room could hold a maximum of about five students. École Élémentaire La Passerelle staff delivered some special services in the hallway or in an alcove under some stairs.

[2269] Mr. Allison advised that he has some concerns about the cost of the services the CSF receives from SD48-Sea-to-Sky, particularly regarding transportation. Pursuant to the contract with SD48-Sea-to-Sky, the CSF's pays SD48-Sea-to-Sky \$31,000 per year for school transportation services. Mr. Allison thinks that is more expensive than what the CSF pays elsewhere in the province. He would prefer that the CSF offer its own transportation services, but SD48-Sea-to-Sky refused to allow the CSF's buses to park or drop off students at Spring Creek Elementary.

c) Loss of space at Spring Creek Elementary

[2270] École Élémentaire La Passerelle's position at Spring Creek Elementary remained stable until 2011/12, although the CSF only ever had one-year leases.

[2271] In January 2012, Ms. Edwards put Mr. Allison on notice that SD48-Sea-to-Sky anticipated space constraints for the 2012/13 school year, and might not be able to accommodate all of École Élémentaire La Passerelle's programmes. It became clear that École Élémentaire La Passerelle would lose access to one of its classrooms.

[2272] At the same time, École Élémentaire La Passerelle anticipated that it would require a fifth division. Mr. Bonnefoy, whom the CSF contracted to manage arrangements with SD48-Sea-to-Sky for 2012/13, told SD48-Sea-to-Sky officials about that need in February 2012. Ms. Edwards suggested that the CSF contact the Resort Municipality to determine if the CSF could lease the community space at Spring Creek Elementary.

[2273] According to Mr. Bonnefoy, Mr. Allison and Mr. Tardif, the community space at Spring Creek Elementary consists of a separate and distinct wing with dedicated administrative space. The Resort Municipality proposed that the CSF lease both community rooms, as well as the community office and storage space, which the CSF did beginning in 2012/13. The CSF negotiated exclusive use of those spaces for a three-year term with two one-year renewal options. The Resort Municipality suggested an annual lease rate of \$57,564, or \$12 per square foot.

[2274] Mr. Palmer gave evidence about some of the more recent developments related to the CSF's operations in Whistler. In April or May of 2015, he received information that SD48-Sea-to-Sky was requiring the CSF to vacate one further classroom at Spring Creek Elementary for 2015/16, and would likely require the CSF to vacate a further two classrooms for 2016/17.

[2275] Mr. Palmer attempted to persuade Mr. Rick Ikebuchi, the current Secretary-Treasurer for SD48-Sea-to-Sky, to allow the CSF to place portables on the Spring

Creek Elementary site. While Mr. Palmer was under cross-examination, he received further information that the issue had been resolved, but he could not say how.

[2276] The CSF subsequently provided an affidavit from Mr. Tardif that elucidates what occurred. Because Spring Creek Elementary was requiring École Élémentaire La Passerelle to vacate one classroom, for 2015/16, École Élémentaire La Passerelle moved one of its divisions to a community room. The CSF uses the sliding wall to divide the space into two rooms, such that part of the space can continue to be used for learning assistance and as multipurpose space. Spring Creek Elementary also allowed École Élémentaire La Passerelle access to one of its office spaces four days a week for counselling.

[2277] École Élémentaire La Passerelle continues to lease two classrooms at Spring Creek Elementary for 2015/16. However, at the meeting in April 2015, Mr. Ikebuchi indicated that École Élémentaire La Passerelle might be required to vacate those two classrooms, possibly as early as the 2016/17 school year.

[2278] Mr. Allison's evidence was that the CSF has attempted to improve École Élémentaire La Passerelle's security of tenure. In January 2014, Mr. Roger Hébert, President of the CSF, wrote to Mr. Rick Price, Chair of SD48-Sea-to-Sky, to request a meeting to discuss issues in Whistler, Squamish and Pemberton. Mr. Price responded that he thought it more appropriate for the issues to be resolved between staff than between the two school boards. The CSF has not invoked the *Education Mediation Regulation* with respect to these issues.

d) Secondary Instruction

[2279] According to Mr. Bonnefoy, CSF officials have been discussing a secondary programme in Whistler since his time as Secretary-Treasurer in 2004 through 2009. The evidence reveals several occasions where the CSF raised with SD48-Sea-to-Sky its desire to offer a class for minority language instruction at Whistler Secondary. SD48-Sea-to-Sky refused those requests, citing a lack of space. There is no evidence of this specific issue being brought to the Ministry's attention.

3. Conclusions and Findings of Fact

[2280] While the CSF made several early capital plan requests for Whistler, after moving to Spring Creek Elementary, it ceased making serious capital requests for Whistler until the its October 2007 Capital Plan Submission for 2008/09. At that point, the CSF was interested in a building a new elementary/middle school. It moved quickly from being the CSF's seventh-highest priority to its second-highest. Thereafter, the CSF began requesting an elementary/secondary school. I conclude that while the CSF has been requesting projects in Whistler for about eight years, the Ministry's capital funding system has not responded to its capital request. However, since 2010, the CSF has not sequentially prioritized that project, nor has it offered enrolment projections that were satisfactory to justify its request.

[2281] The CSF's arrangements with SD48-Sea-to-Sky show how the CSF's heterogeneous leasing arrangements can sometimes cause insecurity of tenure for the CSF. SD48-Sea-to-Sky was insistent on year-to-year leases. As SD48-Sea-to-Sky's enrolment has grown, École Élémentaire La Passerelle has been vulnerable to the loss of space.

[2282] As Myrtle Phillip Elementary grew, the CSF was displaced into portable classrooms. SD48-Sea-to-Sky also refused to accede to the CSF's requests for more space until the last minute because it was properly concerned about providing for its own students. While École Élémentaire La Passerelle fared better at Spring Creek Elementary, as enrolment grew at that school the CSF was gradually displaced into the community space in the building. With enrolment continuing to grow, in recent years École Élémentaire La Passerelle has lost more of its space at Spring Creek Elementary. Its future at that school is uncertain.

[2283] In a heterogeneous environment, the CSF likewise may or may not be able to create its own identity. When the CSF first moved to Spring Creek Elementary, its classes were interspersed around the building near majority classrooms with children around the same grade level. As École Élémentaire La Passerelle lost space there and moved to the community space, it has been able to create more of

an identity. However, its lack of control over its own locations and space presents challenges for École Élémentaire La Passerelle to develop its own identity.

[2284] The heterogeneous environment is also problematic with respect to access to core facilities. The evidence above shows that Spring Creek Elementary has preferred gymnasium and library access over École Élémentaire La Passerelle.

[2285] While the CSF has attempted to resolve these issues, SD48-Sea-to-Sky has refused a meeting between the two school boards. The CSF has not, however, attempted to invoke the *Education Mediation Regulation* to resolve the disputes concerning Whistler.

[2286] Overall, I find that responsibility for the elementary conditions at École Élémentaire La Passerelle lies with the capital funding system: particularly the aspect of the funding system that requires the CSF to use leased, heterogeneous space. However, I do not find that the conditions are out of step with what types of facilities the numbers warrant, so there is no breach of s. 23.

[2287] In connection with secondary instruction, I conclude that SD48-Sea-to-Sky has repeatedly refused to accommodate the CSF's request to use its space for heterogeneous instruction. The CSF has not raised this particular issue with the Ministry, and I do not find that the Ministry refused the CSF assistance with respect to secondary instruction. As a result, in my view, the lack of secondary instruction likely arises out of SD48-Sea-to-Sky's decision to refuse the CSF with access to space for minority language education. It is compounded by the CSF's decision not to take steps to remedy the situation, by, for example, notifying the Ministry of the issue or invoking the *Education Mediation Regulation*. I note that CSF witnesses all conceded that it is not appropriate for the Ministry to intervene in disputes between the CSF and majority school boards unless the CSF asks.

[2288] Instead of taking the steps open to it, the CSF elected to pursue more facilities than it was reasonably entitled to: a full-scale capital project for an elementary/secondary school. Given the very low numbers in Whistler, the numbers

are not likely to ever warrant homogeneous instruction in a stand-alone school equivalent to schools afforded to the majority in Whistler. In my view, the fact that the CSF sought more than the CSF is entitled to through the capital funding system does not convert the cause of the breach from the decisions taken by SD48-Sea-to-Sky and the CSF to the capital funding system.

F. Justification and Remedy

[2289] I conclude that a reasonable rightsholder parent would find that the elementary educational experience in Whistler is proportionate to what is available at majority schools in light of École Élémentaire La Passerelle's numbers. The situation arises out of the Ministry's requirement that the CSF leases space. If I had found that the requirement resulted in a substandard elementary educational experience, then it would have been open to the Ministry to try justify that limit pursuant to s. 1 of the *Charter*. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed the justification question. Since I set out the framework for crafting remedies in Chapter X, Remedies, I do not find it necessary to address what remedy would have been appropriate to respond to the circumstances surrounding elementary education in Whistler.

[2290] The situation is different for secondary instruction. I have found that the CSF is owed some deference to its determination that it is appropriate to instruct 30 secondary students in Whistler. Since there is no secondary instruction in that area, rightsholders are not receiving the secondary instruction that they are entitled to. The analysis therefore turns to whether the infringement is justified.

[2291] As I outline in Chapter IX, Justification, the s. 1 test focuses on whether the "infringing measure" can be justified. I do not find that the lack of secondary instruction arises out of the operation of the Ministry's capital funding system. Instead, the "infringing measure" seems to be the decision taken by SD48-Sea-to-Sky to refuse the CSF space, as well as the CSF's failure to exercise either of the

two dispute resolution mechanisms available to it: requesting assistance from the Ministry or invoking the *Education Mediation Regulation*.

[2292] SD48-Sea-to-Sky is not a party to this proceeding. The Court has not heard its side of the story, and has no direct evidence concerning its amenities and reasons for refusing the CSF's request. All the evidence concerning its reasons is hearsay. There was no argument attempting to justify SD48-Sea-to-Sky's decision pursuant to s. 1, nor was their argument attempting to justify the CSF's failure to take self-help steps. In light of that, I cannot say whether the lack of heterogeneous secondary space is justified.

[2293] In light of that, I consider an appropriate remedy to be a declaration confirming the CSF's right to act within its jurisdiction to remedy the problem by starting a secondary programme in Whistler. I declare that:

- a) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme (for children age 14-17) in Whistler with heterogeneous instructional space for about 30 students (or such other numbers and facilities as the parties agree to).

[2294] The CSF and the Ministry will need to work together to achieve that objective. As I develop further in Chapter XXXV, Leases, the Ministry must fund the CSF's reasonable lease costs for that programme provided that the CSF complies with the valid provincial conditions for securing that funding. As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[2295] Alternatively, the CSF may want to pursue a remedy against the party that seems to be responsible for the breach, SD48-Sea-to-Sky.

[2296] The plaintiffs also seek *Charter* damages against the Province related to the situation in Whistler. In light of my conclusion that the defendants are not responsible for the lack of secondary instruction in Whistler, and given that the CSF

did not begin requesting space for secondary students until the same time as it started this litigation, I do not find that *Charter* damages are an appropriate remedy.

G. Summary

[2297] I conclude that if the CSF were to build a homogeneous elementary/secondary school in Whistler, in the best possible circumstances the number of children in Kindergarten through Grade 7 likely to take advantage of that programme is about 85 children. I consider that 30 children are likely to participate in a secondary programme in Whistler.

[2298] I find that the numbers at the elementary level in fall in the middle of the sliding scale, warranting more than instruction but less than homogeneous instruction. The numbers are entitled to instruction with proportionate access to the core facilities required to provide minority language education. Thirty secondary students, though, only just pass the threshold for warranting instruction, and fall near the bottom of the sliding scale.

[2299] I conclude that a reasonably prudent rightsholder parent would consider that École Élémentaire La Passerelle offers a global educational experience that meets the standard of majority schools, and is proportionate to École Élémentaire La Passerelle's small size. Since there is no secondary instruction offered at the secondary level, the numbers are not receiving the heterogeneous instruction that they are entitled to.

[2300] In my view, the lack of secondary instruction seems to be caused by a decision taken by SD48-Sea-to-Sky not to provide the CSF with space for its programme, and the CSF's failure to exercise self-help by approaching the Ministry for assistance or invoking the *Education Mediation Regulation*. Since SD48-Sea-to-Sky is not a party to this litigation, I conclude that the appropriate remedy is a declaration confirming the CSF's ability to act within its jurisdiction to remedy the problem.

**XVIII. ÉCOLE ÉLÉMENTAIRE DE LA VALLÉE DE PEMBERTON
(PEMBERTON)**

[2301] École Élémentaire de la Vallée de Pemberton is located in Pemberton. It is the second of the CSF's three schools in the Coast Mountain region of British Columbia. École Élémentaire de la Vallée de Pemberton is a heterogeneous, French-language Kindergarten to Grade 7 school. In 2014/15, the school's enrolment was 48 students.

[2302] In Pemberton, the CSF proposes to acquire a site and construct a homogeneous elementary school (the "Pemberton Elementary Project") to serve elementary students from Pemberton. In 2014, the CSF estimated that project would cost more than \$8 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[2303] Mr. Bonnefoy and Mr. Allison both gave evidence about their experiences with École Élémentaire de la Vallée de Pemberton. Mr. Stewart gave evidence about the Ministry's involvement in the CSF's acquisition of some portables in Pemberton. Mr. Tardif testified about his experience as principal at that school, and Ms. Drapeau gave evidence about the school as it existed when she worked there as a teacher-on-call.

[2304] The Joint Fact Finder's Report describes schools in SD48-Sea-to-Sky. A member of the Fact-Finding Team visited Signal Hill Elementary and performed measurements to confirm room dimensions. The Joint Fact Finder's Report also cites District and Ministry Data. I find it to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Pemberton Catchment Area

[2305] As in Whistler, according to Dr. Kenny, there is no known history of Francophone missionaries and fur-trading in Pemberton. There was likewise little

evidence concerning the Francophone community in Pemberton, which is a predominantly Anglophone community.

[2306] École Élémentaire de la Vallée de Pemberton is a heterogeneous school serving students in Kindergarten through Grade 7. It operates out of portable classrooms behind an SD48-Sea-to-Sky school, Signal Hill Elementary, and shares some of its amenities. It also uses space at a nearby community centre. There is no minority secondary instruction in Pemberton, nor are there any Francophone early learning programmes.

[2307] The École Élémentaire de la Vallée de Pemberton catchment area overlaps with that portion of SD48-Sea-to-Sky's territory that surrounds the municipality of Pemberton. In that area, SD48-Sea-to-Sky operates two elementary schools: Signal Hill Elementary and Blackwater Creek Elementary. There is a French immersion programme at Signal Hill Elementary. Blackwater Creek Elementary serves a different community, Devine, and appears to be tens of kilometres away from Pemberton. No children from that community attend École Élémentaire de la Vallée de Pemberton.

2. Conclusions

[2308] When analyzing the Pemberton claim, I will take into account that there is a weaker Francophone history in the Coast Mountain region as compared to other areas of British Columbia. I will also consider that École Élémentaire de la Vallée de Pemberton's catchment area is a large one, but that it primarily serves the very small City of Pemberton-- a community so small that it has only one other elementary school. I will also consider the fact that École Élémentaire de la Vallée de Pemberton competes with a French immersion programme at the elementary level.

[2309] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is

very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate.

C. The Number of Children

[2310] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[2311] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[2312] Dr. Landry estimated that in 2011 there were 23 elementary-school age children (age 5-13) living in the catchment area for the Pemberton Elementary Project that have a mother-Tongue Rightsholder Parent. Mr. McRae forecasted no change to that number through 2023.

[2313] I note that Dr. Landry also found 30 elementary-age children in the catchment area in the Knowledge Category and 5 in the Regular Home Use Category. I do not find those numbers to be a reliable proxy for the number of children Education or Sibling Rightsholders in Pemberton.

[2314] I conclude that a reasonable proxy for the total universe of rightsholders' children in the catchment area for the Pemberton Elementary Project into the reasonably foreseeable future is about 23 elementary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not

account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[2315] École Élémentaire de la Vallée de Pemberton serves students in Kindergarten through Grade 7. The evidence shows that from its inception in 2004/05 until 2011/12, enrolment at École Élémentaire de la Vallée de Pemberton was largely stable or decreasing, ranging from a low of 21 students to a high of 29. Beginning with 2012/13, though, enrolment increased sharply and dramatically, to 32 students in 2012/13, 43 students in 2013/14 and 48 students in 2014/15.

[2316] One student was admitted pursuant to the CSF's Expanded Admissions Policy when it was in place; École Élémentaire de la Vallée de Pemberton denied three of the four admissions applications made pursuant to that policy. Given the conclusions that I reached in Chapter VII, The Number of Children, this student must be removed from the "known demand", placing the known demand at 47 children.

3. The Uptake Rate

[2317] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, competing educational programmes and the experience in other communities with similar characteristics.

[2318] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[2319] The plaintiffs say that the CSF seeks a new K-7 school with nominal capacity for 95 students, or operating capacity for 88 students, with room for future growth. The plaintiffs say this would give École Élémentaire de la Vallée de Pemberton space for four classrooms for Kindergarten to Grade 7 instruction, and allow it to reconfigure École Élémentaire de la Vallée de Pemberton's current three-division enrolment to accommodate the increased enrolment the CSF expects with the construction of a new school facility.

[2320] While under cross-examination, Mr. Allison accepted that École Élémentaire de la Vallée de Pemberton would require more than a 400% proxy participation rate to fill its proposed school. In other words, the school that the CSF requested would only be about 24% full with 100% participation of the 23 children with a Mother-Tongue Rightsholder parent in Pemberton. Even if the CSF were to admit every child in Pemberton in the Knowledge Category or Regular Home Use Category, the school the CSF requested would only be about 60% full.

[2321] Mr. Allison admitted that the CSF's requested capacity was based on an assumption of continuous growth rather than Dr. Landry's data. He suggested there must be a problem with the census data concerning Pemberton. However, he also admitted it was possible that some children of non-rightsholders were enrolled at École Élémentaire de la Vallée de Pemberton; he did not know if some could have been admitted without passing through an admissions committee.

[2322] As I explain in Chapter XVI, Introduction to Part 3: The Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, the CSF's projection of 88 to 95 students at École Élémentaire de la Vallée de Pemberton is not realistic.

[2323] The evidence shows the École Élémentaire de la Vallée de Pemberton has a very high participation rate. There are purportedly 47 children of rightsholders enrolled at École Élémentaire de la Vallée de Pemberton. The total universe of Mother-Tongue rightsholders' children is only 23 children. This suggests that École Élémentaire de la Vallée de Pemberton has a 204% proxy participation rate. Even if

all children in the Knowledge and Regular Home Use Categories were included in the proxy universe, the CSF's participation rate would be more than 80%.

[2324] To explain the high participation rate, the plaintiffs argue that the census figures for Pemberton are under-representative. They say it is likely that there are more children of rightsholders than are identified by Dr. Landry's analysis, as they say that many children of rightsholders do not speak French regularly at home. They also point to affidavit evidence which suggests some parents might not have been included in the census counts. I addressed these arguments in Chapter VII, The Number of Children, where I conclude that some unquantifiable number of children of Education and Sibling Rightsholders live in each community, but that the number cannot be quantified.

[2325] The defendants suggest there must be a significant numbers of non-rightsholders enrolled at École Élémentaire de la Vallée de Pemberton.

[2326] I infer based on the evidence from CSF educators that principals do not always rigorously test whether parents meet admission criteria. I therefore find that there are likely a significant number of non-rightsholders enrolled at École Élémentaire de la Vallée de Pemberton, which explains its very high proxy participation rate. This is particularly so in light of the fact that the CSF performed a survey of all parents of students attending École Élémentaire de la Vallée de Pemberton concerning their rightsholder status, and did not disclose it. I infer that the plaintiffs did not do so because it was not favourable to their position.

[2327] The proxy participation rate in Pemberton is very high: more than 200%. This is so even after taking into account that there are likely some children of Education and Sibling Rightsholders not included in the proxy universe of rightsholders, and that many children of non-rightsholders attend École Élémentaire de la Vallée de Pemberton. It is also relevant that the CSF faces little competition in Pemberton. There is only one elementary school aside from the CSF programme. While that school offers French immersion, I am prepared to conclude that for some parents, a Francophone programme with small class sizes and an integrated

technology programme is very attractive. The lack of competition likely contributes to the very high participation rate.

[2328] Given that the participation rate is very high, and there is little upward room for the participation rate to grow, I conclude that École Élémentaire de la Vallée de Pemberton is likely approaching the top end of its participation rate.

[2329] Given the high participation rate in Pemberton, it is difficult to draw inferences from other communities about the likely enrolment if École Élémentaire de la Vallée de Pemberton were to move to a newly-built, homogeneous school facility. The closest parallel is École Mer-et-Montagne in Campbell River. There, the CSF programme was first located in leased space in a heterogeneous secondary school with a separate building for the elementary programme. As I describe in Chapter XXXVIII, Site and School Acquisition Projects, the CSF opened a newly-built homogeneous elementary school there in 2011/12. It now serves children in Kindergarten through Grade 8. Enrolment grew from 45 students in 2011/12 to 94 students in 2014/15. 11 children were admitted pursuant to the CSF's Expanded Admissions Policy while it was in effect. Excluding those 11 children, enrolment grew by 84%. Some of that growth came from the addition of two new age cohorts.

[2330] Dr. Castonguay, using Dr. Landry's methodology, calculated 78 children age 5-14 living in the École Élémentaire Mer et Montagne catchment area that had a Mother-Tongue Rightsholder parent in 2011/12. Assuming that the number of eligible students in the catchment area remained constant over time, the participation rate was about 106% in 2014/15.

[2331] It is harder to estimate how that participation rate changed from the time École Élémentaire Mer et Montagne opened because the school did not have middle school grades prior to the construction of the new school. An imperfect solution is to remove the 11 non-rightsholders and the further 11 students in the middle school grades in 2014/15 from the count of enrolment in 2014/15, then calculate the participation rate and compare it to the participation rate in 2011/12. This analysis shows that the participation rate grew from 57.6% to 92%, by about 34%. Of course,

this is not a perfect formula because the total universe includes students in middle school years, so the absolute participation rates must be treated with caution.

[2332] The experience in Campbell River shows that enrolment may increase substantially when a programme moves from a hybrid homogeneous/heterogeneous environment to a newly-constructed homogeneous elementary/middle school. However, it is not clear that the CSF could expect the same magnitude of increase in enrolment in Pemberton. This is because École Élémentaire Mer et Montagne opened with a much lower participation rate than exists at École Élémentaire de la Vallée de Pemberton presently. As a result, I will exercise caution when drawing inferences based on that school.

[2333] Taking into account all the surrounding circumstances, including that there are likely many children of non-rightsholders enrolled at École Élémentaire de la Vallée de Pemberton, I conclude that about 55 children in Kindergarten to Grade 8 would be likely to take advantage of a minority programme in Pemberton in a newly-constructed homogeneous school. Enrolment of 50 children reflects a 240% proxy participation rate: growth by about 35%. I note that Mr. Tardif testified that his own projections foresaw enrolment of 60 children.

D. Entitlement

[2334] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[2335] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools are those within the catchment area of the minority language school, as they are the reasonable alternatives for rightsholder parents. However, in some cases, where a minority language school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more

limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[2336] There are two SD48-Sea-to-Sky elementary schools in the CSF's Pemberton catchment area. One of those schools, Blackwater Creek Elementary, is located outside Pemberton, in the community of Devine. It is an isolated rural school with only nine students. No CSF students live in the catchment area of that school. As a result, it is not a realistic option for reasonable rightsholder parents in the area, and is not a proper comparator school.

[2337] The only other elementary school in the CSF's Pemberton catchment area is Signal Hill Elementary. That school is the only realistic public school alternative that a reasonable rightsholder in Pemberton would consider.

2. Location on the Sliding Scale

[2338] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[2339] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[2340] In the plaintiffs' submission, the Area Standards contemplate small schools like the one that the CSF has requested, and that the Ministry approved new schools with capacity for less than 100 students in Big White in 2004 and in Port Clements in

2007. The defendants respond that the schools built at Big White and Port Clements are anomalous.

[2341] The Court has limited evidence about the school at Big White, which is another ski resort. The school at Port Clements, though, was built to serve a very remote community in Haida Gwaii. The Minister's options were to build a school or not. There was no option for a space sharing arrangement. Thus, as the defendants say it is not cogent to apply what was found pedagogically appropriate and financially practical in that area with the minority language situation in Pemberton.

[2342] I have determined that if the Province were to build a homogeneous elementary school for minority language students in Pemberton, 55 children would be likely to attend that school. The Province rarely builds schools to that capacity. Where it has, the school was built to serve an isolated and remote community; a new school was the only practical way of providing those children with an education. In Pemberton, there are other options, including heterogeneous instruction.

[2343] As I see it, 55 elementary-age children are not entitled to a distinct, newly-constructed homogeneous facility fully equivalent to what is available to the majority in Pemberton. In Pemberton, the sole comparator school, Signal Hill Elementary, has operating capacity for 499 students. Its enrolment in 2014/15 was 438 students. While the CSF is entitled to some deference concerning what is pedagogically appropriate for its students, providing a homogeneous school for 55 elementary students would deprive them of the pedagogical benefit of interacting with a larger population, and would not be cost-effective in light of the size of the comparator school. It is not practical for the linguistic minority to have a distinct, newly-built, homogeneous facility equivalent to that of the majority.

[2344] At the same time, 55 children will normally be divided into three small divisions. Thus, the numbers warrant more than just basic elementary instruction. The number therefore falls in the middle of the sliding scale, and warrants minority

language instruction with access to the core facilities required to provide minority language education.

3. Global Educational Experience

[2345] The plaintiffs argue that École Élémentaire de la Vallée de Pemberton's students receive a substandard educational experience because: École Élémentaire de la Vallée de Pemberton's classrooms are substandard; students do not have equivalent access to core facilities and limited learning assistances space; students at École Élémentaire de la Vallée de Pemberton are subject to negative environmental factors; and because École Élémentaire de la Vallée de Pemberton provides a substandard Francophone environment. I consider those factors together with other elements relative to the overall educational experience.

a) Francophone Experience

[2346] Reasonable rightsholder parents would find it very attractive that the CSF typically provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I discussed in Chapter XV, Linguistic and Cultural Programming.

[2347] However, the Francophone experience in Pemberton is limited. Given its location, the evidence is that École Élémentaire de la Vallée de Pemberton is not prominent in the Pemberton community. The plaintiffs submit this has a detrimental impact on the CSF's ability to attract students and foster Vitality in Pemberton.

[2348] Mr. Tardif claimed that, out of all the CSF schools he worked in, École Élémentaire de la Vallée de Pemberton proved the most difficult in which to create a cohesive Francophone culture. He attributed this to the lack of space. However, on cross-examination, Mr. Milman (counsel for the defendants) suggested, and Mr. Tardif agreed, that there is a correlation between the proportion of Francophones in a heterogeneous environment and the strength of the Francophone language and culture in the school. École Élémentaire de la Vallée de Pemberton students make up only about 10% of the student population at Signal Hill

Elementary. Mr. Tardif nevertheless maintained that the problems creating a cohesive culture related to a lack of space, and not the low number of CSF students.

b) Classrooms

[2349] École Élémentaire de la Vallée de Pemberton has three divisions: a Kindergarten/Grade 1 split with 22 students; a Grade 2/3 split with 17 students; and a Grade 4-7 split with 9 students.

[2350] The Kindergarten/Grade 1 split class and the Grade 2/3 split class are both housed in portable classrooms behind Signal Hill Elementary. Mr. Bonnefoy confirmed that the portables are in good condition, and are joined by a temporary roof. The CSF also renovated the portables prior to their installation so they have sprinkler and plumbing systems.

[2351] According to Mr. Tardif, the portables have low ceilings and little natural light. He finds it difficult to affix materials to the wall to create learning centres. The portables are in a busy area of the Signal Hill Elementary site, and there have been issues with ants and mice.

[2352] The defendants argue that Dr. Earthman found that there is no link between being educated in portables and educational outcomes. I accept this is the case. However, for the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, the relationship between amenities and educational outcomes is not something that a reasonable rightsholder parent would have the expertise to know and consider.

[2353] École Élémentaire de la Vallée de Pemberton added its third division in 2012. After SD48-Sea-to-Sky refused the CSF's request to add another portable, the CSF negotiated to use a space on the second floor of the Pemberton Community Centre as a classroom (the "Community Centre Classroom").

[2354] In his evidence, Mr. Tardif explained that the Pemberton Community Centre is located about six minutes walking distance from Signal Hill Elementary. I note

that this description has changed over time. In 2008/09, Mr. Tardif suggested to Mr. Bonnefoy occasional use of the Community Centre for counselling services. At that time, he stated that the Community Centre was a two-minute walk away. He refused to say in his evidence that the Community Centre is a convenient distance from Signal Hill Elementary.

[2355] École Élémentaire de la Vallée de Pemberton uses the Community Centre Classroom for a Grade 4-7 split class. In 2014/15, that class had nine students. Mr. Tardif reported that the Community Centre Classroom is about the same size as a standard classroom. It has high ceilings and ample natural light. Students use a public washroom about 15 feet away from the classroom. Because of that, Mr. Tardif arranges extra supervision so an adult can always accompany a student to the washroom.

[2356] By comparison, Mr. Tardif described the classrooms at Signal Hill Elementary as airy, with high ceilings and natural light. The rooms are large enough to include both desks and learning centres.

[2357] The evidence shows that in addition to the École Élémentaire de la Vallée de Pemberton portables, Signal Hill Elementary has a modular classroom on its site. Mr. Miller's evidence in his examination for discovery is that modular structures are "superior to a portable in every way." The Joint Fact Finder's Report stated that the modular is currently used to deliver a Strong Start programme.

[2358] The objective evidence from in the Joint Fact Finder's Report reveals that École Élémentaire de la Vallée de Pemberton's portable classrooms have a size advantage over the classrooms at Signal Hill Elementary. The CSF portables are 89.2 square metres, while the average classroom size for Signal Hill Elementary is about 75.1 square metres. The largest classroom at Signal Hill Elementary is about 10 square metres smaller than the École Élémentaire de la Vallée de Pemberton portable classrooms.

c) Access to Core Facilities

[2359] The plaintiffs argue that École Élémentaire de la Vallée de Pemberton does not have equitable access to the gymnasium, library, music instruction and learning assistance spaces at Signal Hill Elementary.

i. Gymnasium

[2360] Signal Hill Elementary has a standard elementary school gymnasium, with high ceilings and a screen divider. The gymnasium has a storage area, and exterior access.

[2361] Initially, École Élémentaire de la Vallée de Pemberton shared the Signal Hill Elementary gymnasium. According to Mr. Tardif, in 2004/05, École Élémentaire de la Vallée de Pemberton had two blocks for physical education each week for its two divisions.

[2362] École Élémentaire de la Vallée de Pemberton lost that time in 2005/06. By special request, École Élémentaire de la Vallée de Pemberton was allowed to use the gymnasium for 30 minutes every morning before the school day began at Signal Hill Elementary. Because of that, until 2014/15, École Élémentaire de la Vallée de Pemberton's school hours were 8:25 a.m. to 2:40 p.m. instead of 9:00 a.m. to 3:00 p.m. like Signal Hill Elementary.

[2363] To ameliorate the situation, École Élémentaire de la Vallée de Pemberton uses space at the Pemberton Community Centre for physical education: a space known as the "Great Hall". The Great Hall is a multi-use room that is the same length, but much narrower than a standard gymnasium. It has grommets for volleyball and other sports, but no lines or indications on the floor for specialized sports.

[2364] Mr. Tardif reported that students in Grades 4 through 7 use the Great Hall for two periods of physical education per week. One further block is allocated to each of the Kindergarten/Grade 1 and the Grade 2/3 split classes. According to

Mr. Tardif, it can take students in younger grades a long time to dress and travel to the Pemberton Community Centre for physical education.

[2365] For 2014/15, SD48-Sea-to-Sky changed the Signal Hill Elementary school hours. In July 2014, Mr. Ikebuchi, Secretary-Treasurer for SD48-Sea-to-Sky, wrote to Mr. Allison and indicated that CSF students would no longer be able to use the gymnasium before regular school hours. Mr. Tardif was able to make arrangements, so Mr. Ikebuchi later revised the letter and noted that CSF students could continue to use the gymnasium before school until 8:45 a.m. Mr. Tardif reported that, as a result, École Élémentaire de la Vallée de Pemberton students access the gymnasium every morning, but for only 20 minutes, from 8:25 to 8:45.

ii. Library

[2366] École Élémentaire de la Vallée de Pemberton does not have its own library.

[2367] Mr. Tardif described the Signal Hill Elementary library. He explained that the room has six round tables, with a circulation desk near the front. For some time, École Élémentaire de la Vallée de Pemberton was allowed to use the library for three blocks of time each week in the morning. More recently, a preschool programme was operated out of the library in the morning, which made it difficult for Mr. Tardif to schedule library time for École Élémentaire de la Vallée de Pemberton students.

iii. Music Instruction

[2368] École Élémentaire de la Vallée de Pemberton does not have its own music room.

[2369] Signal Hill Elementary has a dedicated music room, which is bigger than a normal classroom. On a few occasions, École Élémentaire de la Vallée de Pemberton has used that space for assemblies when the gymnasium was unavailable. While École Élémentaire de la Vallée de Pemberton was allowed to use the music room in 2006/07, in recent years, Mr. Tardif's requests to use the music room have been refused.

iv. Learning assistance and Administrative Space

[2370] École Élémentaire de la Vallée de Pemberton does not have dedicated space for learning assistance. Mr. Tardif explained that in 2004/05, École Élémentaire de la Vallée de Pemberton had access to two desks in the hallways of Signal Hill Elementary that were used for administrative and learning assistance purposes. When Mr. Tardif was present at École Élémentaire de la Vallée de Pemberton he would also occasionally use the Signal Hill Elementary Vice Principal's office, a desk in the library, or meet parents at a nearby coffee shop.

[2371] The CSF has struggled to find space for the École Élémentaire de la Vallée de Pemberton school counsellor. According to Mr. Tardif, SD48-Sea-to-Sky staff repeatedly denied requests for access to permanent space for counselling at Signal Hill Elementary. Whatever space École Élémentaire de la Vallée de Pemberton finds for counselling at Signal Hill Elementary tends to only be available intermittently or to lack soundproofing for confidential matters.

[2372] As a result, starting in 2008/09, the CSF began renting an office at the Pemberton Community Centre for counselling and learning assistance. According to Mr. Tardif, the space is rented by the hour.

[2373] According to the Joint Fact Finder's Report, there are three classrooms at Signal Hill Elementary for special education. Those rooms range from 15 square metres to 45.6 square metres.

[2374] While the CSF does not have any owned or leased dedicated learning assistance space, it does have very small classes. The grade 4-7 split class had only nine students in 2014/15, yet it was located in the Community Centre Classroom, which was described as being about the same size as a standard classroom. The CSF's portables are also quite large, which might allow spaces for one-on-one work. However, these spaces could not be used for confidential matters like counselling.

d) Environmental Factors

[2375] The CSF points to evidence of environmental factors that Dr. Earthman and Dr. Roberts believe could have an impact on learning outcomes. Of course, a reasonable rightsholder parent would not be aware of their impact on educational outcomes, as I describe in Chapter XVI, Introduction to Part 3, the Community Claims.

[2376] Noise can be a problem in the École Élémentaire de la Vallée de Pemberton portables. Mr. Tardif reported that the portables have thin walls, and sound penetrates when Signal Hill Elementary students are outside during their recess time. There is also noise associated with the ventilation system and noise that travels through the walls between the two portables.

[2377] Mr. Tardif also testified about cooling issues in the portables. He advised that the portables lack air conditioning, and it can be distractingly warm for students on hot days, usually five or six days each spring.

[2378] There is no objective, reliable evidence concerning the extent of heating and cooling problems or noise issues at Signal Hill Elementary.

e) Other Aspects of the Educational Experience

i. Class Sizes

[2379] When commenting about the positive aspects of École Élémentaire de la Vallée de Pemberton on cross-examination, Mr. Tardif pointed to the small class sizes, which Mr. Tardif conceded allows each student more time with the teacher.

[2380] With the exception of Kindergarten, class sizes at Signal Hill Elementary are significantly larger than at École Élémentaire de la Vallée de Pemberton. At Signal Hill Elementary, Kindergarten classes have an average of 20 students, primary classes have about 22 students, and Grade 4-7 classes have about 24 students. At École Élémentaire de la Vallée de Pemberton, class sizes are 22 children for

Kindergarten, 19 students in primary grades and 9 students at the intermediate level. This is something that some parents would find very attractive.

ii. Student to Staff Ratios

[2381] The CSF's student-to-teacher ratio is better than that of SD48-Sea-to-Sky. The CSF has 15 students to every teacher, and 4 special needs students to every special needs teacher. SD48-Sea-to-Sky has close to 18 students to every teacher, and about 10.5 special needs students to every special needs teacher.

iii. Technology

[2382] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students.

[2383] Signal Hill Elementary has a total of 78 desktop computers, 12 iPads and 20 laptop computers. Those amenities are shared among 438 children. Given École Élémentaire de la Vallée de Pemberton's better ratio of students to technology, it is fair to say that technology is better integrated into the classroom at École Élémentaire de la Vallée de Pemberton than Signal Hill Elementary.

f) Analysis

[2384] The proportionality analysis mirrors the perspective used in the equivalence analysis: it takes a substantive equivalence approach, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with the question, as the government could meet the appropriate entitlement standard by funding a range of amenities and services. When performing the proportionality analysis, courts may consider *per capita* space, but must be cautious not to stray into a formal equivalence analysis. The overall question is what is practical to provide for the number of students, and whether the children are receiving an education that meets that standard.

[2385] École Élémentaire de la Vallée de Pemberton, like other CSF schools, offers a unique pedagogical programme that enculturates children into the French language and culture. However, it is not prominent in the community and has a less cohesive Francophone culture than other schools. In my view, the lack of a cohesive Francophone identity at École Élémentaire de la Vallée de Pemberton is predominantly related to the small size of the programme. With current enrolment of 48 students and a maximum enrolment of 55 students, it is not reasonable to expect that the programme will have a strong presence and identity in the community.

[2386] École Élémentaire de la Vallée de Pemberton's classroom situation is far from ideal. Rather than occupying classrooms in a school, École Élémentaire de la Vallée de Pemberton uses two portable classrooms and the Community Centre Classroom a short walk from Signal Hill Elementary. On the other hand, the spaces that École Élémentaire de la Vallée de Pemberton uses are large, with ample space in light of its small class sizes. Overall, though, a reasonable rightsholder parent would likely see the educational experience in portables as being inferior to the experience in a proper classroom inside a school. It is also clear that if École Élémentaire de la Vallée de Pemberton had a more visible presence, it would be better able to serve as a cultural institution for the minority language community.

[2387] École Élémentaire de la Vallée de Pemberton also struggles to access the core facilities necessary for an educational programme that is more than basic instruction. École Élémentaire de la Vallée de Pemberton has limited access to a school gymnasium. It has adjusted its hours to use the Signal Hill Elementary before school hours. It also uses a hall area at the Pemberton Community Centre as a gymnasium, which is not ideal due to travel times. École Élémentaire de la Vallée de Pemberton's access to the library is subject to the needs and priorities of Signal Hill Elementary. The CSF also has limited space for learning assistance and counselling. Reasonable rightsholder parents would find some of these limitations, particularly those concerning the gymnasium and the library, to be unappealing.

[2388] Of lesser importance, students do not have access to a music room; music is taught in the classroom. This is less problematic than the lack of gymnasium because a music room is not essential to music education the way a gymnasium is essential to physical education.

[2389] On the other hand, a reasonable rightsholder parent would likely find École Élémentaire de la Vallée de Pemberton's class sizes and technology programme to be superior to those of Signal Hill Elementary.

[2390] Weighing all the factors, I find that a reasonable rightsholder parent would find that the quality of education offered at École Élémentaire de la Vallée de Pemberton is not proportionate to its numbers. With potential possible enrolment of 55 children, École Élémentaire de la Vallée de Pemberton is entitled to more than simply instruction: it is entitled to access to core facilities for an educational programme. École Élémentaire de la Vallée de Pemberton does not have proper access to those facilities. Even after taking into account École Élémentaire de la Vallée de Pemberton's small numbers, reasonable rightsholder parents would find meaningful differences between the education at École Élémentaire de la Vallée de Pemberton and Signal Hill Elementary that would deter them from enrolling their children at École Élémentaire de la Vallée de Pemberton.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2391] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of the relationship between École Élémentaire de la Vallée de Pemberton and its host school, Signal Hill Elementary, as well as the CSF's dealings with SD48-Sea-to-Sky and the Ministry in connection with École Élémentaire de la Vallée de Pemberton.

[2392] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the

Province's capital funding system. With respect to Pemberton, I make findings that are of particular relevance to Chapter XXXV, Leases, and Chapter XXXVIII, Site and School Acquisition Projects.

1. The CSF's Capital Plan Requests

[2393] When the CSF took jurisdiction in Pemberton, CSF students from that community attended École Élémentaire La Passerelle in Whistler. When École Élémentaire La Passerelle moved to Spring Creek Elementary, to the south of the CSF's Whistler catchment area and father from Pemberton, the CSF began considering opening a programme in Pemberton. That programme opened in 2004/05 in classrooms at Signal Hill Elementary. As enrolment at Signal Hill Elementary grew, École Élémentaire de la Vallée de Pemberton moved to its current location in portables and the nearby Pemberton Community Centre.

[2394] The CSF did not make any capital requests concerning Pemberton during Dr. Ardanaz's or Mr. Bonnefoy's time as Secretary-Treasurer for the CSF.

[2395] The CSF made its first capital request for the Pemberton area around the same time that it initiated this litigation. In the CSF's June 2010 Capital Plan Submission for 2010/11, the CSF requested the Pemberton Elementary Project, seeking capacity for 40 Kindergarten and 75 Elementary students. Like most other projects that year, the CSF stated it was its highest priority and sought funding for it in the first two years of the Ministry's capital budget (when the Ministry only funds approved projects in the third year of its capital budget). This ranking was not reflected by the Echo Report.

[2396] The Minister did not request Capital Plan Submissions in 2011. In the CSF's November 2012 Capital Plan Submission for 2012/13 and September 2013 Capital Plan Submission for 2013/14 the CSF requested the Pemberton Elementary Project again, with the same priority as it had in 2010 (albeit with a 20-student decrease in requested Kindergarten capacity in September 2013, coinciding with the start of full-day Kindergarten province-wide).

[2397] In support of its September 2013 capital request, the CSF submitted to the Ministry an In-House PIR for the Pemberton Elementary Project dated August 2013. That PIR identified two potential sites that the CSF was interested in acquiring from private parties.

[2398] In the Echo Report for the 2013/14 submission, the Pemberton Elementary Project is ranked NPIR. In the feedback he provided to Mr. Allison, Mr. Cavelti expressed concern about the CSF's enrolment projections, as the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school.

[2399] The CSF submitted a revised In-House PIR for Pemberton dated October 2014. The CSF indicated it had engaged Mr. McRae to provide ten-year cohort retention enrolment projections. Mr. Allison provided the Ministry with those projections in a subsequent email dated October 27, 2014. Those projections assume that the construction of a new facility will have no impact on enrolment, and are based on pure demographics. The CSF did not provide any projections or analysis of participation rate.

[2400] As of the conclusion of evidence in August 2015, the Province had not supported any capital projects for the CSF in Pemberton.

2. History of Arrangements with SD48-Sea-to-Sky

a) Early Tenure at Signal Hill Elementary

[2401] The CSF first considered opening a programme in Pemberton in 2003 or 2004, at the urging of local parents who argued there would likely be rapid population growth in Pemberton, creating an opportunity to open a new programme. CSF officials met with parents to forecast enrolment, then opened a programme at Signal Hill Elementary for the 2004/05 school year.

[2402] Mr. Bonnefoy explained that in its first year, École Élémentaire de la Vallée de Pemberton used two classrooms in Signal Hill Elementary, and had access to the shared library, computer space and gymnasium. With time, though, École

Élémentaire de la Vallée de Pemberton lost access to the gymnasium during school hours. École Élémentaire de la Vallée de Pemberton students had gymnasium class in the morning before Signal Hill Elementary's regular start time.

[2403] In 2007, the CSF faced another dispute with SD48-Sea-to-Sky.

Ms. Edwards, Secretary-Treasurer for SD48-Sea-to-Sky, informed Mr. Bonnefoy that due to growing enrolment at Signal Hill Elementary, École Élémentaire de la Vallée de Pemberton should expect to lose access to more common areas in the school.

Ms. Edwards' view was that the CSF was being provided with access to those spaces free of charge. Mr. Bonnefoy interpreted the lease differently, and thought it included access to common areas in the school on a pro rata basis given the proportion of CSF students in the school.

b) Loss of Space at Signal Hill Elementary

[2404] The issues with space sharing intensified in the summer of 2009 when CSF staff asked for additional space for learning assistance and administration. SD48-Sea-to-Sky staff stated that the CSF might be able to use administrative and clerical space on Friday mornings. However, the CSF was told that it could no longer access extra classroom space in the mornings as it had been doing previously.

[2405] At that meeting, SD48-Sea-to-Sky also raised the possibility that there might not be classroom space for the CSF at Signal Hill Elementary in 2010/11.

Mr. Bonnefoy suggested adding portables to the property for the CSF's use. At that time, the Ministry was implementing full-day Kindergarten, and SD48-Sea-to-Sky expressed concern that if portables were added for the CSF, there might not be room to add modular structures for Signal Hill Elementary students.

[2406] The CSF examined some other options in Pemberton. While SD48-Sea-to-Sky had some surplus schools, one was in poor repair and was being leased to the local First Nations community, while the other was located 15 minutes outside town.

[2407] As I discuss in some detail in Chapter XXXV, Leases, in August 2009, the Ministry advised the CSF and all majority-language school districts that the Ministry would not pay the CSF's leases for 2009/10.

[2408] On October 8, 2009, Mr. Bonnefoy wrote to Ms. Edwards and formally requested to add two portables to the Signal Hill Elementary site. In November 2012, SD48-Sea-to-Sky denied that request. However, Ms. Edwards indicated she was collecting more information and intended to bring the matter to her Board again.

[2409] In December 2009, the CSF brought the future eviction of École Élémentaire de la Vallée de Pemberton to the Ministry's attention. However, Mr. Stewart testified that SD48-Sea-to-Sky and the CSF resolved the issue without Ministry involvement.

[2410] On December 23, 2009, Ms. Edwards confirmed that the SD48-Sea-to-Sky Board of Trustees had approved the placement of two portables on the Signal Hill Elementary site for the CSF. Mr. Bonnefoy negotiated a three-year term for the lease. Additionally, SD48-Sea-to-Sky charged the CSF all fees associated with the installation of the portables, even for one hour of time for the SD48-Sea-to-Sky Director of Facilities and Services to provide the CSF with a legal description of the site and site view plan drawings. Mr. Bonnefoy raised with Ms. Edwards that SD48-Sea-to-Sky was charging the CSF more administrative fees than the CSF typically saw. He suggested that the CSF was being penalized.

[2411] Mr. Bonnefoy, working under contract with the CSF following his departure from the CSF at the end of 2009, located two portables, arranged for them to be professionally installed, and worked with a contractor to install sprinklers and washrooms in them. They were installed at Signal Hill Elementary for the 2010/11 school year.

[2412] Mr. Stewart recalled becoming involved in the issue when Mr. Bonnefoy asked the Ministry to fund both the acquisition of the portables and their installation.

[2413] The evidence shows that when Mr. Allison requested funding for the portables in May 2010, Mr. Cavelti initially refused that request. After Mr. Allison pushed back, Mr. Cavelti sought Mr. Stewart's advice. Despite Mr. Cavelti's initial refusal, in January 2011, Mr. Stewart recommended to the Minister that she reimburse the CSF for the portables and their installation. Ultimately, the Province funded \$176,385 for the portables.

[2414] Thereafter, SD48-Sea-to-Sky received a modular structure for Signal Hill Elementary. At that time, the Province was funding the construction of modular classrooms on majority school board sites to provide them with space to offer full-day Kindergarten. Mr. Allison expressed frustration to the Court that SD48-Sea-to-Sky received a modular structure while the CSF received portables.

[2415] Mr. Stewart explained why the Minister did not fund modular structures for the CSF through the full-day Kindergarten Capital Envelope. The first modulars were not available until about February 2011, five months after the CSF needed portables. The CSF told the Minister that it did not need space for full-day Kindergarten because it already offered those services, so the Minister had not planned to acquire any modulars for the CSF. Further, Mr. Stewart implied that the CSF's request came at the beginning of the full-day Kindergarten programme, and the Minister did not know whether it would have any excess funds in the envelope that it could allocate to the CSF. Notably, when there were some excess funds in that envelope at the end of the programme, the Minister used them to provide the CSF with a modular structure to relieve overcrowding at École Élémentaire Rose-des-Vents (Vancouver (West)).

c) Use of the Pemberton Community Centre

[2416] École Élémentaire de la Vallée de Pemberton continued to operate two divisions in portables at Signal Hill Elementary through the 2011/12 school year, but began examining other options. In 2012, the CSF identified a vacant lot for sale, about one acre in size, centrally located in Pemberton (the "Weushke Property"). The seller was asking \$719,000 for the property.

[2417] On January 24, 2012, Ms. Alexa Greenhill, President of the CSF, sent a Positioning Letter to Minister George Abbott asking to acquire the Weushke Property and place modular classrooms on it. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made. According to Mr. Allison, the CSF did not receive a response to this letter.

[2418] By the spring of 2012, the CSF had become concerned that students who took the bus to school were not able to access morning before-school physical education classes. SD48-Sea-to-Sky senior staff suggested that the CSF look into leasing the Great Hall at the Pemberton Community Centre.

[2419] Around the same time, the CSF came to expect that it would need to add a third division in Pemberton for the 2012/13 school year. Indeed, in 2012/13, École Élémentaire de la Vallée de Pemberton's enrolment increased from 24 to 32 students, an increase of 33%. In May 2012, Mr. Allison asked Ms. Edwards to lease an unused portable at Signal Hill Elementary, but was told that there were no portables available.

[2420] As a result, in the summer of 2012, the CSF arranged to lease space at the Pemberton Community Centre for physical education and to add another division. Eventually, a lease was negotiated at a rate of \$17.60 per square foot. École Élémentaire de la Vallée de Pemberton was also given permission to use wall spaces and bulletin boards, and to post a sign above the doorway, which it did.

[2421] Since then, the CSF has continued to push SD48-Sea-to-Sky for better access to facilities in Pemberton. In January 2014, Mr. Hébert, President of the CSF, wrote to Mr. Price, Chair of SD48-Sea-to-Sky, to request a meeting between the two school boards. Mr. Hébert asked for better access to Signal Hill Elementary facilities, and the addition of a modular structure to the Signal Hill Elementary field. Mr. Price responded by suggesting the issues were more appropriately dealt with by staff than the boards of trustees.

3. Conclusions

[2422] The CSF did not begin requesting capital projects in Pemberton until 2010, when it commenced this litigation. The CSF did not rank any of those projects against others in order of priority. The capital funding system did not respond to its request. At the times of those requests, École Élémentaire de la Vallée de Pemberton had only 24 to 43 children, so this is not surprising.

[2423] The heterogeneous sharing arrangements between École Élémentaire de la Vallée de Pemberton and Signal Hill Elementary are not ideal. Over time, the CSF has lost progressively more access to Signal Hill Elementary facilities, particularly the gymnasium. Further, the CSF and SD48-Sea-to-Sky have had disputes about what amenities the CSF is permitted to access pursuant to its lease. SD48-Sea-to-Sky has refused CSF requests to use its classroom space before school, and has refused repeated requests to develop a better sharing arrangement.

[2424] The CSF has also faced eviction by SD48-Sea-to-Sky in response to its own enrolment needs. As Signal Hill Elementary's enrolment has grown, École Élémentaire de la Vallée de Pemberton lost its classroom space and had to move to portable classrooms. The Province paid for that space. It has also paid for the CSF's lease of space at a nearby community centre as well as the lease at Signal Hill Elementary. While the Ministry has assisted the CSF in that way, the assistance has resulted in the Ministry funding a substandard education for the minority in Pemberton.

[2425] Overall, responsibility for the situation lies with the capital funding system: particularly the aspect of the funding system that requires the CSF to use leased, heterogeneous space instead of funding Expansion Projects. That policy materially contributed to the *Charter* breach.

[2426] Notably, I do not find that the Ministry refused the CSF assistance in this instance. The CSF at no time sought assistance from the Ministry to negotiate a

better space sharing arrangement with SD48-Sea-to-Sky. The CSF also did not use the self-help mechanism available to it, the *Education Mediation Regulation*.

[2427] Further, in my view, the breach is not caused by the Province's approach to ranking Expansion Projects. Given the very low numbers in Pemberton, the numbers are not likely to ever warrant homogeneous instruction in a stand-alone school equivalent to schools afforded to the majority in Pemberton.

F. Justification

[2428] I conclude that a reasonable rightsholder parent would find meaningful differences between the global educational experiences at École Élémentaire de la Vallée de Pemberton and Signal Hill Elementary that would deter them from choosing a minority language education. That breach is caused by the aspect of the Ministry's capital funding system that requires the CSF to lease heterogeneous space in some instances. The next question is whether the defendants can justify that measure.

[2429] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". It is my view that the particular infringing measure in this instance-- that the Ministry pays for the CSF to lease heterogeneous space in instances where its enrolment is low instead of funding Expansion Projects-- is likewise designed to further the fair and rational allocation of public funds.

[2430] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I am satisfied that there is a rational connection between the fair and rational allocation of public funds and a system that requires the CSF to operate out of leased heterogeneous space in some instances.

By paying for CSF leases where numbers are small instead of acquiring sites and building new schools, the Ministry is able to save large, one-time outlays of funds in favour of smaller regular expenditures.

[2431] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[2432] The extent to which the measure minimally impairs the plaintiffs' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. In this case, I find that the requirement that the CSF lease heterogeneous space in Pemberton was minimally impairing. The CSF did not request any capital projects for Pemberton until 2010, when this litigation began. The project is sought cost more than \$8 million, not including a site acquisition. The CSF's enrolment in every year of the programme until about 2013 was between 20 and 35 students. Students had access to instructional space, and the Ministry funded the acquisition of portables for the CSF as well as its lease. There is only one elementary school in Pemberton, so there were no other schools or amenities in the area to accommodate the CSF. Given those circumstances and the deference owed to the government, the lease of heterogeneous space impaired the s. 23 rights of Pemberton rightsholders as little as possible while still allocating limited public funds.

[2433] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[2434] With reference to the situation in Pemberton, the salutary effects of requiring the CSF to lease heterogeneous space are the savings the Ministry was able to

generate by not funding the CSF's project requests for Pemberton since 2010: more than \$8 million, less the cost of paying the CSF's lease of space. Given very limited public funds, in 2011 the Ministry was able to commit those funds to projects in other areas of the Province where the need is greater-- areas like SD36-Surrey where about 7,500 were housed in portables as of August 2014, and areas like Vancouver (West) where the CSF was experiencing severe overcrowding, had to convert its multipurpose space into classroom space, has at least three modular structures on the campus and requires some students to attend school in a nearby church basement.

[2435] I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of majority school districts.

[2436] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and Southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[2437] The deleterious effects, at the local level, concern the inferior educational experience afforded to the linguistic minority. In Pemberton, about 39 students are housed in portables and nine attend school at the Pemberton Community Centre. Students also have limited access to core facilities like the gymnasium and the library. They do, however, have access to those facilities. It just is not as advantageous as the CSF would like. Those deficiencies are not outweighed by the excellent Francophone programming, École Élémentaire de la Vallée de Pemberton's highly advanced technology programme and small class sizes. Given the already very high participation rate in Pemberton, I do not consider that the CSF is losing out on significant enrolment.

[2438] But the deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[2439] As a result, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. Thus, the cost of the infringement at the systemic level is relatively low. While a more prominent institution would enhance the Vitality of the minority language community, even with the best possible facilities, only about seven more students would be likely to attend École Élémentaire de la Vallée de Pemberton.

[2440] Weighing those effects together, I find that the salutary effects of requiring the CSF to lease heterogeneous facilities in Pemberton outweigh the deleterious effects. The cost savings to the Ministry of remedying the situation would exceed

the benefits that would flow to the minority from the construction of a new facility. This is particularly so given the very low number of students that would ever enrol at a CSF programme in Pemberton. I therefore conclude that the infringement in Pemberton is justified.

G. Remedy

[2441] I conclude that although rightsholders are not receiving what they are entitled to in Pemberton, that breach is justified as a reasonable limit. If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Because I have done so, I do not find it necessary to address what remedy would have been appropriate to respond to the situation in Pemberton.

H. Summary

[2442] I conclude that the best estimate of the number of children in Kindergarten through Grade 8 likely to take advantage of a CSF school in Pemberton in a newly-constructed homogeneous school is about 55 children. That number falls in the middle of the sliding scale, and warrants instruction with proportionate access to the core facilities required to provide minority language education.

[2443] I find that a reasonable rightsholder parent would conclude that the global educational experience offered at École Élémentaire de la Vallée de Pemberton is of a substandard quality even given the small number of children attending the programme. With potential possible enrolment of 55 children, École Élémentaire de la Vallée de Pemberton is entitled to more than simply instruction: it is entitled to access to core facilities for an educational programme. École Élémentaire de la Vallée de Pemberton does not have proper access to those facilities.

[2444] The primary cause of the breach is the Ministry's policy of funding leases for the CSF instead of Expansion Projects for the CSF's smaller school programmes. In my view, the defendants have shown that breach is justified as a reasonable limit in a free and democratic society. In my view, paying for École Élémentaire de la Vallée

de Pemberton to operate out of leased, heterogeneous space is justified in light of the very low number of students in Pemberton, the high cost of remedying the situation by building a new school, the fact that the CSF has not sought Ministry assistance securing better access to facilities and the much greater need for Expansion Projects to improve access to education in other areas of the Province.

XIX. ÉCOLE ÉLÉMENTAIRE LES AIGLONS (SQUAMISH)

[2445] École Élémentaire Les Aiglons is located in Squamish. It is the third and final CSF school in the Coast Mountain region of British Columbia. École Élémentaire Les Aiglons is a homogeneous, French-language Kindergarten to Grade 7 school on a heterogeneous university campus. Before 2015/16, the school was a heterogeneous school that shared space with SD48-Sea-to-Sky's Garibaldi Highlands Elementary. In 2014/15, École Élémentaire Les Aiglons' enrolment was 111 students.

[2446] In Squamish, the CSF proposes to acquire a new site and construct a homogeneous elementary/secondary school (the "Squamish Elementary/Secondary Project"). In 2014, the CSF estimated that project would cost nearly \$21 million, excluding the cost of acquiring a site and preparing it for construction.

A. The Evidence

[2447] Mr. Bonnefoy and Mr. Allison both provided evidence about the circumstances at École Élémentaire Les Aiglons. Mr. Palmer and Mr. Stewart testified about their dealings with the CSF and SD48-Sea-to-Sky concerning the CSF's Squamish programmes.

[2448] The Court also heard from Ms. Drapeau, who is currently the principal of École Élémentaire Les Aiglons. On moving to BC in 2006, Ms. Drapeau taught as a teacher-on-call for the CSF and French immersion programmes in the Coast Mountain region before taking a permanent position at École Élémentaire Les Aiglons teaching Grades 1 and 2. She later became principal part time while continuing to teach. I did not find Ms. Drapeau to be a credible witness. She was

highly partisan, and would become argumentative and evasive when challenged about uncontroversial matters.

[2449] The Joint Fact Finder's Report described schools in SD48-Sea-to-Sky. A member of the Fact-Finding Team visited Garibaldi Highlands Elementary and performed measurements to confirm room dimensions. The same member visited Valleycliffe Elementary. The Joint Fact Finder's Report also cites District and Ministry Data. I find this to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Squamish Catchment Area

[2450] As in Whistler and Pemberton, Dr. Kenny found no traces of Francophone missionary and fur-trading activity in the Coast Mountain region. By the 1960s, though, about 7% of Squamish's population came from a French-language background.

[2451] Ms. Drapeau testified that it is possible to live one's life in Squamish entirely in French. I consider that Ms. Drapeau exaggerated this aspect of her evidence. However, I accept that there is an active and prominent Francophone community in Squamish.

[2452] École Élémentaire Les Aiglons is a homogeneous school located in portables on leased space at Capilano University, creating a heterogeneous campus environment. For most of the duration of the trial, École Élémentaire Les Aiglons operated in a leased heterogeneous environment at Garibaldi Highlands Elementary. There is no Francophone secondary education in Squamish, nor are there any Francophone early learning programmes.

[2453] École Élémentaire Les Aiglons is one of three minority schools that serve rightsholders living in the territory of SD48-Sea-to-Sky. Its catchment area is composed of Squamish and its environs. SD48-Sea-to-Sky owns and operates seven elementary schools and two secondary schools in the École Élémentaire Les

Aiglons catchment area. SD48-Sea-to-Sky offers French immersion beginning in Kindergarten.

2. Conclusions

[2454] When analyzing the Squamish claim, I will take into account that the Francophone language and culture have a relatively strong presence in Squamish despite the lack of a historic Francophone presence. I will also consider the city's modest size, and that École Élémentaire Les Aiglons competes with a number of neighbourhood schools as well as French immersion beginning with Kindergarten.

[2455] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[2456] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[2457] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[2458] Dr. Landry estimated that in 2011 there were 99 elementary-age children (age 5-13) living in the catchment area for the Squamish Elementary/Secondary Project that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 113 children of Mother-Tongue Rightsholders in the catchment area, an increase of 10%-15%.

[2459] I note that Dr. Landry also found 170 children of non-Francophones in the catchment area in the Knowledge Category, and 45 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in Squamish.

[2460] At the secondary level, Dr. Landry reported 35 children of Mother-Tongue Rightsholders age 14-17 in the catchment area in 2011. Projecting that number forward to 2023, Mr. McRae foresaw 45 children of Mother-Tongue Rightsholders: growth by close to 50%. I do not find Dr. Landry's counts of 175 children in the Knowledge Category or 15 in the Regular Home Use Category to be helpful evidence.

[2461] I find that a reasonable proxy for the total universe of rightsholders in the catchment area for the Squamish Elementary/Secondary Project into the reasonably foreseeable future is about 113 elementary-age children and 45 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[2462] The evidence shows that enrolment at École Élémentaire Les Aiglons has grown from 14 students in Kindergarten through Grade 4 in the 1996/97 school year, to 111 students in Kindergarten through Grade 7 in the 2014/15 school year. In its earliest years, the grades offered at École Élémentaire Les Aiglons varied significantly. Since the CSF began offering a Kindergarten to Grade 7 programme in

2007/08, enrolment has more than doubled, from 51 to 111 students. The biggest jumps occurred 2010/11, when enrolment grew from 60 to 76 students (16 students; 27%) and in 2011/12, when enrolment grew from 76 to 99 students (23 students; 30%).

[2463] École Élémentaire Les Aiglons admitted six children of non-rightsholders pursuant to its Expanded Admissions Policy when it was in place. Removing them from the equation, the best estimate of known demand is 105 children.

[2464] Since the CSF does not operate a secondary programme in Squamish, actual demand for that programme is nil. There is no evidence of any surveys to illustrate potential demand for that programme.

3. The Uptake Rate

[2465] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[2466] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[2467] The plaintiffs say that the CSF seeks a new K-12 school with capacity to accommodate nominal capacity for 240 students or operating capacity of 229 students. In the plaintiffs' submission, such a facility would provide space for one Kindergarten division, one K/1 split division, five elementary divisions and three secondary classrooms. The plaintiffs note that in recent years École Élémentaire Les Aiglons has operated with six elementary divisions, so its request for seven classrooms is not unreasonable. The plaintiffs also suggest that if École Élémentaire Les Aiglons could achieve secondary grade cohorts of 10 students per year, its enrolment could reach 50 students, which they say justifies its request for three secondary classrooms.

[2468] While under cross-examination, Mr. Allison accepted that the CSF would require a 179% proxy participation rate to fill its proposed 240-student capacity school. In other words, the school that the CSF requests would only be 55% full with 100% participation of the 134 children of Mother-Tongue Rightsholders living in the catchment area. Despite anticipated growth, the CSF would require a 105% participation rate to fill the requested school by 2023.

[2469] Moreover, it was also put to Mr. Allison that even if all the children in the catchment area in the Regular Home Use Category were to attend, École Élémentaire Les Aiglons would still need to achieve a 124% participation rate to fill the proposed school to capacity in 2011. With 100% participation, the proposed school would only be 81% full.

[2470] As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their projection of 240 children likely to attend École Élémentaire Les Aiglons is not realistic.

[2471] École Élémentaire Les Aiglons appears to have a very high participation rate. There are 105 children of rightsholders enrolled at École Élémentaire Les Aiglons. I conclude that into the reasonably foreseeable future, the proxy universe

at the elementary level is about 113 children. École Élémentaire Les Aiglons therefore has a 93% proxy participation rate.

[2472] To explain the high participation rate, the plaintiffs suggest that the census figures are under-representative. Relying on parent affidavit evidence, they suggest there must be a very high number of Education and Sibling Rightsholders in the area. I address these arguments in Chapter VII, The Number of Children, where I conclude that some number of children of Education and Sibling Rightsholders live in each community, but that the number cannot be quantified to any degree.

[2473] The defendants counter that the most reasonable explanation for the high participation rate is that École Élémentaire Les Aiglons has admitted some children of non-rightsholders.

[2474] I infer based on the evidence from CSF educators that principals do not always rigorously test whether parents meet admission criteria. I therefore find there are likely a significant number of non-rightsholders enrolled at École Élémentaire Les Aiglons, which explains its very high proxy participation rate. This is particularly so in light of the fact that the CSF performed a survey of all parents of students attending École Élémentaire La Passerelle (Whistler), École Élémentaire de la Vallée de Pemberton (Pemberton) and École Élémentaire du Pacifique (Sechelt) concerning their rightsholder status, and did not disclose it. I infer that the plaintiffs did not do so because it was not favourable to their position.

[2475] At the elementary level, the proxy participation rate at École Élémentaire Les Aiglons is very high: nearly 95%. This is so even after taking into account that there are likely some children of Education and Sibling Rightsholders not included in the proxy universe of rightsholders, and that many children of non-rightsholders attend École Élémentaire Les Aiglons. Enrolment has grown significantly, doubling over the course of about eight or nine years.

[2476] École Élémentaire Les Aiglons faces competition from a number of neighbourhood schools, and competition with early French immersion. The same

cannot be said for the other schools in the Coast Mountain region-- École Élémentaire La Passerelle (Whistler) or École Élémentaire de la Vallée de Pemberton (Pemberton)-- which also have very high proxy participation rates. Given the competition in Squamish, I consider that there is likely more unmet demand in Squamish than exists in Whistler or Pemberton. However, given the already high participation rate, I consider that the room for growth is not substantial.

[2477] Given the high participation rate in Squamish, it is difficult to draw inferences from other communities about the likely result on elementary enrolment if École Élémentaire La Passerelle were to move to a homogeneous school facility and add secondary grades for the first time. The closest parallel is École Au-cœur-de-l'île in Comox. In Comox, the CSF initially operated leased, heterogeneous elementary, middle and secondary programmes. The CSF opened a new homogeneous elementary/secondary school in 2011/12 with enrolment of 99 children in Kindergarten to Grade 6. By 2014/15, enrolment had grown to 156 children in those grades: growth of about 57%.

[2478] Dr. Castonguay, using Dr. Landry's methodology, counted 228 children age 5-12 living in the École Au-cœur-de-l'île catchment area that have a Mother-Tongue Rightsholder parent in 2011/12. Assuming the universe of Francophones in the area remained constant, the participation rate grew from 43% to about 68%.

[2479] The experience in Comox shows that elementary enrolment and participation rate may increase substantially when a programme moves from a heterogeneous elementary school to a new homogeneous school that includes secondary space. However, it is not clear that the CSF could expect the same magnitude of an increase in enrolment in Squamish. The CSF already has an exceptionally high participation rate as compared to the participation rate in Comox prior to the construction of École Au-cœur-de-l'île. There is less room for the École Élémentaire Les Aiglons participation rate to grow. As a result, I infer that École Élémentaire Les Aiglons will see less enrolment growth than École Au-cœur-de-l'île did.

[2480] Taking into account all the surrounding circumstances, including that there are likely many children of non-rightsholders enrolled at École Élémentaire Les Aiglons, I conclude that the best estimate of the number of children in Kindergarten through Grade 7 likely to take advantage of a Francophone programme in Squamish in a newly-constructed homogeneous school with secondary space is 135 children. This represents nearly a 120% participation rate. It also would reflect enrolment growth of nearly 30%: less than the growth experienced in Comox, but greater than the anticipated growth in Whistler because of the higher unmet demand. However, it also suggests that École Élémentaire Les Aiglons will ultimately achieve a lower participation rate than the CSF will in Whistler to account for the fact that École Élémentaire Les Aiglons competes with early French immersion from Kindergarten.

[2481] At the secondary level, there is no evidence of actual demand. The total universe of children is only 45 children. At that level, École Élémentaire Les Aiglons will compete with French immersion and two secondary schools. If the secondary programme is located within the walls of a newly constructed, K-12 school, it will not be able to offer the same breadth of programmes as a majority secondary school would due to the small numbers of rightsholders' children. The CSF will likely experience significant attrition as age cohorts approach the secondary years. I note that the CSF's cohorts at the Grade 7 level at École Élémentaire Les Aiglons have typically consisted of three or fewer students, with two anomalous years: the Grade 7 cohort in 2013/14 had 13 students, and the cohort in 2012/13 had five students. On the other hand, the evidence of high participation rates at École Élémentaire Les Aiglons suggests that École Élémentaire Les Aiglons could achieve a higher secondary school participation rate than the CSF sees in other communities.

[2482] There is no precedent to assist to determine how a new facility might affect secondary enrolment. The Court has no evidence of the CSF starting new secondary programmes in a K-12 school, except for possibly Surrey, which is not comparable given its urban setting. In all other instances in the evidence, CSF secondary programmes in homogeneous K-12 facilities started in heterogeneous secondary facilities.

[2483] Given the balance between an anticipated high participation rate, coupled with current low demand at the Grade 7 level, expected attrition in secondary grades and the types of services the CSF could realistically offer a small number of secondary students, I consider that 35 children are likely to participate in a secondary programme in Squamish. This represents a 77% proxy participation rate.

D. Entitlement

[2484] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[2485] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Given the distribution of the École Élémentaire Les Aiglons student population, the appropriate elementary comparator schools are the six elementary schools and two secondary schools SD48-Sea-to-Sky operates in the École Élémentaire Les Aiglons catchment area: Brackendale Elementary, Garibaldi Highlands Elementary, Mamquam Elementary, Squamish Elementary, Stawamus Elementary, Valleycliffe Elementary, Don Ross Secondary and Howe Sound Secondary.

2. Location on the Sliding Scale

[2486] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[2487] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent

homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[2488] I have determined that if the Province were to build a homogeneous elementary/secondary school for minority language students in Squamish, 135 elementary-age children and 35 secondary-age children would be likely to attend that school. In Squamish, the majority of elementary schools have a much higher capacity. The average elementary operating capacity at Squamish elementary schools is 311 students. Only Valleycliffe Elementary, with operating capacity for 181 students, has operating capacity for fewer than 200 students.

[2489] However, there is evidence that in many communities in the province schools are built with a capacity of about 150 children. Moreover, there is evidence that the Francophone community in Squamish is strong, and that an institution like a homogeneous school would be of benefit to them. I therefore infer that it is pedagogically appropriate and cost effective for École Élémentaire Les Aiglons' anticipated population to be educated in a homogeneous school.

[2490] However, given the small size of the proposed school as compared to other schools in Squamish, it is not practical in terms of cost and pedagogy for École Élémentaire Les Aiglons to offer equivalent programmes and services to the local majority schools. Those schools were generally built to accommodate much larger populations.

[2491] I therefore find that at the elementary level, the numbers likely to participate in an École Élémentaire Les Aiglons programme at a newly-built elementary/secondary school fall in the middle-high end of the sliding scale, warranting a homogeneous school with core facilities that are proportionate to what is available at majority comparator schools in light of École Élémentaire Les Aiglons' size.

[2492] At the secondary level, though, 35 secondary students only just passes the threshold for warranting instruction, and falls near the bottom of the sliding scale.

3. Global Educational Experience

[2493] The evidence concerning the global educational experience at École Élémentaire Les Aiglons is unique because of how that programme changed while the trial was ongoing. At the start of the plaintiffs' case, École Élémentaire Les Aiglons was leasing heterogeneous space at Garibaldi Highlands Elementary. Part way through the plaintiffs' case, École Élémentaire Les Aiglons lost some classroom space and was given advance notice of an impending eviction. While Ms. Drapeau was testifying, the CSF was evaluating options for École Élémentaire Les Aiglons' future. By the time the defendants were presenting their case, the CSF had decided to move École Élémentaire Les Aiglons to portables located on the Capilano University campus.

[2494] The result of the evolution of the situation is that all of the evidence concerning the global educational experience at École Élémentaire Les Aiglons concerns its time at Garibaldi Highlands Elementary. The court heard that École Élémentaire Les Aiglons uses portables at Capilano University, but there is no evidence about what other core facilities École Élémentaire Les Aiglons currently has access to.

[2495] As a result, the plaintiffs do not argue that the facilities for École Élémentaire Les Aiglons do not meet the proper standard. Their argument is based on the problems that École Élémentaire Les Aiglons faced finding space. However, they do plead that École Élémentaire Les Aiglons' facilities are substandard, relying on evidence concerning Garibaldi Highlands Elementary.

[2496] It seems to me that given that École Élémentaire Les Aiglons occupies portables at an English-language university, it does not have access to a homogeneous minority language school with facilities proportionate to what is offered at majority schools in light of its small size. A reasonable rightsholder parent

would find the global educational experience at École Élémentaire Les Aiglons was meaningfully inferior to the experience at majority schools, even after taking into account the school's small population. Indeed, Mr. Palmer and Mr. Allison both testified that the Ministry and the CSF saw the leasing arrangement at Capilano University as temporary. The real issue is where responsibility for the current situation falls: with the defendants or with the CSF.

[2497] I acknowledge that there is no Francophone secondary programme in Squamish. The CSF proposes to include such a programme in its proposed elementary/secondary school. I found that there are about 35 children likely to take advantage of such a programme or facility. The CSF takes the position that it is pedagogically appropriate to educate 35 secondary students together. It is entitled to some deference to its assessment. If the CSF were to offer such a service in a heterogeneous environment, as it does in other communities, then the service could also prove to be cost-effective. Given the very small number of secondary students likely to attend a secondary programme in Squamish and the absence of any demand, in my view, it is only pedagogically appropriate and cost-effective for those 35 children to receive basic minority language instruction in a heterogeneous environment.

[2498] Since there is no secondary instruction offered at the secondary level, the numbers are not currently receiving the heterogeneous instruction that they are entitled to, contrary to s. 23 of the *Charter*.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2499] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of the relationship between École Élémentaire Les Aiglons and its former host school, Garibaldi Highlands Elementary, as well as the CSF's dealings with

SD48-Sea-to-Sky and the Ministry in connection with École Élémentaire Les Aiglons. This is the central issue for the Squamish Community Claim.

[2500] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Squamish, I will make findings that are of particular relevance to Chapter XXXV, Leases and Chapter XXXVI, Expansion Projects and the Enrolment Driver.

1. The CSF's Capital Plan Requests

[2501] When the CSF took jurisdiction over Squamish in the late 1990s, its programme was located in leased, heterogeneous space at Mamquam Elementary, then moved to Stawamus Elementary.

[2502] Dr. Ardanaz explained that the CSF learned that it might be able to acquire Stawamus Elementary from SD48-Sea-to-Sky. The CSF requested that project as an unranked project in its June 1999 Capital Plan Submission for 2000/01. SD48-Sea-to-Sky never declared Stawamus Elementary surplus, so the project never went forward.

[2503] In 2002/03, École Élémentaire Les Aiglons was evicted again and moved to Garibaldi Highlands Elementary: a newer facility. After that move, the CSF did not make any capital requests for Squamish until 2003, when it began requesting an unranked future asset transfer from SD48-Sea-to-Sky. The CSF requested that project through 2005.

[2504] Mr. Bonnefoy explained that in the fall of 2007, the CSF was still operating in leased space at Garibaldi Highlands Elementary. While Garibaldi Highlands Elementary was in good condition, the CSF was concerned about École Élémentaire Les Aiglons' lack of visibility, scheduling problems, enrolment growth and a lack of long-term security of tenure. I elaborate on these below. As a result, in its October 2007 Capital Plan Submission for 2008/09, the CSF requested a new Grade 1 to 7 elementary school in Squamish (the "Squamish Elementary Project") with capacity

for 40K-75 Elementary students. The CSF informed the Ministry it was its seventh-highest priority project.

[2505] The CSF moved to ward-based capital planning with its May 2009 Capital Plan Submission for 2009/10. That year, the CSF requested the Squamish Elementary Project as its third and lowest-ranked project in its South Coast ward.

[2506] Coinciding with the start of Mr. Allison's tenure and this litigation, the CSF submitted its June 2010 Capital Plan Submission for 2010/11. Once again, the CSF requested the Squamish Elementary Project as a project in the South Coast ward. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[2507] The Ministry did not request Capital Plan Submissions in 2011. In the CSF's November 2012 Capital Plan Submission for 2012/13, the CSF requested the Squamish Elementary Project again, with the same priority as the previous year. However, the CSF increased its requested elementary capacity from 75 to 150 spaces.

[2508] In its September 2013 Capital Plan Submission for 2013/14, the CSF's plans for Squamish changed. Instead of requesting the Squamish Elementary Project, the CSF requested the Squamish Elementary/Secondary Project for the first time, seeking capacity for 40 Kindergarten, 125 Elementary and 75 secondary students. The CSF continued with its lack of sequential prioritization and its requests for accelerated funding.

[2509] In support of the request, the CSF submitted an In-House PIR to the Ministry which is dated August 2013. In that PIR, the CSF identified two possible sites for the school.

[2510] The Echo Report for the CSF's 2013/14 submission assigns the Squamish Elementary/Secondary Project a threshold ranking of NPIR. Mr. Cavelti was primarily concerned with the CSF's enrolment projections, in particular that the CSF focused on the universe of eligible students rather than the number of students that would actually attend a new school.

[2511] The CSF submitted a revised In-House PIR for the Squamish Elementary/Secondary Project dated October 2014. Unlike the first In-House PIR, the CSF provided historical enrolment data for École Élémentaire Les Aiglons. The CSF also updated the census data, and indicated it had engaged Mr. McRae to provide 10-year cohort retention enrolment projections. Mr. Allison provided the Ministry with those projections in a subsequent email dated October 27, 2014. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[2512] As of the conclusion of evidence in August 2015, the Province had not supported any capital projects for the CSF in Squamish.

2. The CSF's Tenure at SD48-Sea-to-Sky Schools

[2513] École Élémentaire Les Aiglons began as a Programme Cadre at Mamquam Elementary, where it shared space with a majority programme. Dr. Ardanaz testified that SD48-Sea-to-Sky moved École Élémentaire Les Aiglons to Stawamus Elementary sometime thereafter, where it once again shared space with a majority school.

[2514] Meanwhile, in July 1998, the Ministry approved an addition to Garibaldi Highlands Elementary in Squamish as part of the ongoing capital programme designed to reduce portables across the Province. Thereafter, Ms. Edwards, Secretary-Treasurer of SD48-Sea-to-Sky, told Dr. Ardanaz that SD48-Sea-to-Sky could no longer accommodate École Élémentaire Les Aiglons at Stawamus

Elementary. She offered the CSF space at Garibaldi Highlands Elementary, where the CSF moved for 2002/03.

[2515] Dr. Ardanaz explained that Garibaldi Highlands Elementary was a newer and nicer building than the previous facilities the CSF had occupied in Squamish. The CSF was given some spaces grouped together in one wing of the school, but had other classrooms that were dispersed around the building based on grade level. According to Ms. Drapeau, Garibaldi Highlands Elementary operates as a heterogeneous, triple track (English/French/French immersion) school serving students from Kindergarten through Grade 7. All students then attend Don Ross Secondary.

[2516] Ms. Drapeau advised that Garibaldi Highlands Elementary is located in a residential neighbourhood, adjacent to forested land with running trails that are shared with the community.

[2517] Ms. Drapeau explained that École Élémentaire Les Aiglons lacked visibility. Garibaldi Highlands Elementary had two signs, one of which was visible from the street. It was only after 2008 that École Élémentaire Les Aiglons was allowed to place a sign outside the Garibaldi Highlands Elementary building, but it was not visible from the street. Inside the school, Ms. Drapeau was only allowed to post a sign directing visitors to the École Élémentaire Les Aiglons administrative space after 2008, and even then it was a small one, the size of a standard piece of paper.

[2518] According to Ms. Drapeau, École Élémentaire Les Aiglons had the least desirable classrooms at Garibaldi Highlands Elementary. Some classrooms had few windows and looked onto a wall of concrete; another had no windows or outside access at all. However, Ms. Drapeau never raised her concerns with Garibaldi Highlands Elementary administration at the time. Further, Ms. Drapeau conceded that at least one third of the École Élémentaire Les Aiglons classrooms were comparable to the nicest rooms at Garibaldi Highlands Elementary. Given that concession and my general concerns about Ms. Drapeau's credibility, I do not give any weight to Ms. Drapeau's argument that École Élémentaire Les Aiglons'

classrooms were in worse condition than the Garibaldi Highlands Elementary classrooms.

[2519] Ms. Drapeau also explained that École Élémentaire Les Aiglons lacked space to bring its students from different grades together, which formed part of the CSF's *Pédagogie 2010* model. Of course, Ms. Drapeau also advised that École Élémentaire Les Aiglons had its own multipurpose room for that purpose for a number of years, and later facilitated gatherings in the school gymnasium and outdoors.

[2520] Ms. Drapeau described the space sharing arrangement for the Garibaldi Highlands Elementary gymnasium. The Garibaldi Highlands Elementary principal assigned École Élémentaire Les Aiglons its physical education blocks without consulting with Ms. Drapeau. Ms. Drapeau explained that some of the blocks assigned to École Élémentaire Les Aiglons were less desirable: for example, Monday mornings and Friday afternoons. However, the Garibaldi Highlands Elementary principal also accommodated École Élémentaire Les Aiglons by grouping its physical education blocks together so École Élémentaire Les Aiglons could schedule cultural performances. Even still, Ms. Drapeau testified that she found it challenging, sometimes, to schedule performances because the groupings were only two days each week.

[2521] Ms. Drapeau explained that the gymnasium at Garibaldi Highlands Elementary was very busy, making it difficult for École Élémentaire Les Aiglons to meet the prescribed physical education times for its students. With some combined divisions, students in Grades 1 to 3 at École Élémentaire Les Aiglons came close to meeting the prescribed 90-minute physical education time each week. It was more difficult for students in Grades 4 through 7 to share the gymnasium because of their different curriculums and abilities.

[2522] Ms. Drapeau explained that in 2012/13, Garibaldi Highlands Elementary gave École Élémentaire Les Aiglons access to the gymnasium at lunch on Fridays so that École Élémentaire Les Aiglons could start its own sports teams to compete in

CSF leagues. Ms. Drapeau was disappointed at what she saw as a lack of time. However, she conceded that École Élémentaire Les Aiglons students were invited to play on the Garibaldi Highlands Elementary teams.

[2523] When École Élémentaire Les Aiglons opened a sixth division in 2012/13, its access to the gymnasium did not increase. (Of course, its enrolment that year only increased by three students). Instead, Garibaldi Highlands Elementary accommodated École Élémentaire Les Aiglons by offering additional access to the multipurpose room for primary student physical education. Ms. Drapeau declined in favour of sharing space among École Élémentaire Les Aiglons divisions because there is expensive music equipment in the multipurpose room.

[2524] According to Ms. Drapeau, École Élémentaire Les Aiglons' library space was limited. It had a small corner in the library for its books, with four shelves and about two metres of a counter. Garibaldi Highlands Elementary administrators refused Ms. Drapeau's request to remove a work table so École Élémentaire Les Aiglons could add more bookshelves. École Élémentaire Les Aiglons was given only limited library access, which made it challenging to schedule the École Élémentaire Les Aiglons' teacher librarian (who was also responsible for teaching Grade 3 and coordinating École Élémentaire Les Aiglons' First Nations programme).

[2525] Garibaldi Highlands Elementary also has a staff room, which École Élémentaire Les Aiglons staff could use. About six times each year École Élémentaire Les Aiglons staff were asked to leave for private meetings and events for Garibaldi Highlands Elementary staff. École Élémentaire Les Aiglons staff had full access to other spaces, like the art supply and photocopier rooms.

[2526] If École Élémentaire Les Aiglons had school in session and Garibaldi Highlands Elementary did not, several areas of the building, entrances and exits were not available to École Élémentaire Les Aiglons; even the lights in some washrooms could not be turned on.

[2527] According to Ms. Drapeau, sharing space with Garibaldi Highlands Elementary presented challenges related to the distinct linguistic cultures of the two schools. Announcements took place in English for many years. Staff relations could be difficult, with some Garibaldi Highlands Elementary staff complaining about École Élémentaire Les Aiglons staff speaking French among themselves when Garibaldi Highlands Elementary staff were present.

[2528] Ms. Drapeau conceded that Garibaldi Highlands Elementary made changes to ameliorate the issues. After February 2014, portions of the school announcements were read in French. After École Élémentaire Les Aiglons staff and Garibaldi Highlands Elementary staff discussed the importance of École Élémentaire Les Aiglons staff speaking French, the issue between the staffs resolved. According to Ms. Drapeau, the issue did not prevent her from speaking French in the hallways, and she did not feel uncomfortable doing so. Ms. Drapeau conceded that although she sometimes did not feel welcome at Garibaldi Highlands Elementary, sometimes she did.

[2529] When Ms. Drapeau began working at École Élémentaire Les Aiglons, it had four divisions and four classrooms: three in one wing and a fourth in a different wing. École Élémentaire Les Aiglons also delivered special education in a room slightly smaller than a classroom that was first designed to be storage space, as well as a small office.

[2530] In 2007/08, with 51 students, École Élémentaire Les Aiglons began leasing a fifth classroom, which served as a multipurpose room. École Élémentaire Les Aiglons used it for assemblies, meeting with parents, special education and administration.

[2531] In 2008/09, with 52 students, École Élémentaire Les Aiglons began using a sixth classroom, which became the new multipurpose room. École Élémentaire Les Aiglons used it to teach English; to deliver special education services and counselling; to store materials for the teacher librarian, APÉ, and musical instruments; and to hold assemblies. The room that was formerly used as the

multipurpose room became administrative space. According to Ms. Drapeau, the multipurpose space was used every minute of the day, five days per week. École Élémentaire Les Aiglons ceased using the small storage rooms it had previously used for special services. The CSF used the same set of rooms for 2009/10, with 60 students.

3. 2010: Proposed Move to Stawamus Elementary as a Stand-alone Facility

[2532] In June 2010, Mr. John Hetherington, then the Secretary-Treasurer of SD48-Sea-to-Sky, mentioned to Mr. Allison that SD48-Sea-to-Sky was considering relocating École Élémentaire Les Aiglons back to Stawamus Elementary so it could start French immersion at Garibaldi Highlands Elementary. He suggested that École Élémentaire Les Aiglons might have it as a stand-alone, homogeneous facility, and asked for Mr. Allison's perspective. Mr. Allison responded that the CSF Board of Trustees was not likely to appreciate the idea because some parents had settled near Garibaldi Highlands Elementary.

[2533] Mr. Allison suggested a meeting between the two Boards of Trustees, which Mr. Hetherington agreed might go forward in September 2010. Mr. Hetherington also invited Mr. Allison to participate in SD48-Sea-to-Sky's consultation concerning its proposed school reconfiguration, advising that École Élémentaire Les Aiglons could be affected by the decisions taken.

[2534] The consultation documents solicit written feedback by September 30, 2010. Mr. Allison did not participate in the consultation, as he thought his previous email to Mr. Hetherington indicating that the CSF would not want to move to Stawamus Elementary was sufficient. Mr. Allison admitted that he did not tell the CSF Board of Trustees that there was a potential option for the CSF to move to a homogeneous school at Stawamus Elementary. While he pointed to several potential reasons why he did not-- that the school had not been closed, that he had not seen the facility-- he did not give a reasonable explanation for why he did not pursue that option.

4. 2010 to 2014: Loss of Space and Eviction from Garibaldi Highlands Elementary

[2535] In June 2010, Mr. Hetherington also agreed to allow École Élémentaire Les Aiglons to begin leasing a seventh classroom, but only for one year. So, École Élémentaire Les Aiglons added a fifth division in 2010/11, in a different area of the school. At that point, École Élémentaire Les Aiglons had 76 students in five divisions with seven classrooms. École Élémentaire Les Aiglons continued with those five divisions with 99 students in 2011/12.

[2536] On April 13, 2012, CSF and SD48-Sea-to-Sky administrators and senior staff met to discuss arrangements for the coming year. The CSF asked to begin leasing an eighth classroom at École Élémentaire Les Aiglons, as well as two rooms for itinerant teachers and learning assistance. Instead, École Élémentaire Les Aiglons lost space. In 2012/13, one year later than anticipated, Garibaldi Highlands Elementary took back the use of one classroom, depriving École Élémentaire Les Aiglons of its multipurpose room. École Élémentaire Les Aiglons' learning assistance moved to a small office only accessible through a teacher preparation office.

[2537] At the same time, with 102 students, École Élémentaire Les Aiglons added a sixth division. To accommodate the classroom, Ms. Drapeau moved École Élémentaire Les Aiglons' administrative space into the storage room that the school had previously used for special services. In the result, for 2012/13, École Élémentaire Les Aiglons had six divisions in six classrooms, and also had use of an office and a storage space the size of a small classroom.

[2538] Ms. Drapeau described the new administrative space as a very busy and full room. The room was also used for photocopiers, mail, teacher preparation, fridges for a lunch programme, first aid, storage and other special education services and counselling. Ms. Drapeau described challenges starting the school year because of a delay waiting for SD48-Sea-to-Sky staff to move École Élémentaire Les Aiglons' materials to that room.

[2539] In 2013/14, École Élémentaire Les Aiglons had 111 students in six divisions, and the use of the same rooms as the school had in 2012/13: six classrooms, each used for a division; a room slightly smaller than a classroom for administrative space; and a small office for learning assistance and counselling. École Élémentaire Les Aiglons could also reserve use of a second small office if it was not in use.

[2540] This was not to continue in the long term. In July 2013, Mr. Ikebuchi, who had become Secretary-Treasurer of SD48-Sea-to-Sky, notified Mr. Allison that Garibaldi Highlands Elementary would require an additional classroom in the future. In November 2013, Mr. Ikebuchi told Mr. Allison that SD48-Sea-to-Sky could not guarantee École Élémentaire Les Aiglons space for 2014/15.

[2541] Despite the anticipated loss of space, in December 2013 Mr. Allison requested more space of SD48-Sea-to-Sky: seven, and ideally eight classrooms for the 2014/15 school year. Mr. Ikebuchi responded that, as discussed, SD48-Sea-to-Sky would be unable to provide additional classrooms, and that initial numbers indicated that Garibaldi Highlands Elementary might require some of the space then occupied by École Élémentaire Les Aiglons.

[2542] On receiving Mr. Ikebuchi's response, Mr. Allison sought assistance from Mr. Stewart. He explained École Élémentaire Les Aiglons' space needs and asked the Ministry to intervene to ensure École Élémentaire Les Aiglons would have space going forward. He also asked the Ministry to fund the purchase and installation of modular classrooms at Garibaldi Highlands Elementary to provide space for École Élémentaire Les Aiglons students.

[2543] Mr. Allison's evidence was that he received no response to his letter. Mr. Stewart maintained that he likely contacted Mr. Ikebuchi to hear his side of the dispute. Mr. Ikebuchi told Mr. Stewart he was not in favour of adding portables to Garibaldi Highlands Elementary for the CSF. Mr. Stewart's evidence was that he relied on the two senior staff to sort out their differences.

[2544] In January 2014, Mr. Hébert, president of the CSF, wrote to Mr. Price, chair of SD48-Sea-to-Sky, to request a meeting and requesting space for École Élémentaire Les Aiglons either at Garibaldi Highlands Elementary or in another school. Mr. Price responded by suggesting that the issues were more appropriately dealt with by staff than the Boards of Trustees.

[2545] On January 28, 2014, Mr. Ikebuchi confirmed to Mr. Allison that École Élémentaire Les Aiglons would lose one classroom at Garibaldi Highlands Elementary for 2014/15, when SD48-Sea-to-Sky planned to add early French immersion to that school. He also advised that he expected that École Élémentaire Les Aiglons would lose a further three classrooms in 2015/16, and another in 2016/17. Mr. Allison asked if SD48-Sea-to-Sky had other space; Mr. Ikebuchi responded in the negative.

[2546] Mr. Allison asked Mr. Ikebuchi for a formal letter of SD48-Sea-to-Sky's intent. That letter goes further than what Mr. Ikebuchi initially advised: it issues formal notice to École Élémentaire Les Aiglons to consolidate its programme by one classroom space for 2014/15 year, and to find an alternate site for the programme by July 15, 2016. SD48-Sea-to-Sky later clarified that SD48-Sea-to-Sky expected École Élémentaire Les Aiglons to vacate Garibaldi Highlands Elementary for the 2015/16 school year.

[2547] With eviction looming, Mr. Allison sought Mr. Stewart's assistance again. Mr. Stewart explained in his evidence that he did not think that SD48-Sea-to-Sky was being unreasonable. It seemed to Mr. Stewart that Mr. Ikebuchi was simply trying to accommodate SD48-Sea-to-Sky's enrolment as was his duty under the *School Act*.

[2548] Nevertheless, Mr. Stewart agreed to meet with Mr. Ikebuchi and Mr. Allison. At the February 14, 2014 meeting, Mr. Ikebuchi and Mr. Allison discussed short- and long-term solutions for accommodating École Élémentaire Les Aiglons. Mr. Ikebuchi refused Ms. Allison's idea of adding portables to Garibaldi Highlands Elementary, simply stating that it was not possible. Mr. Allison also suggested that SD48-Sea-to-

sky could relocate some of its Garibaldi Highlands Elementary programme to Stawamus Elementary, and received no specific response from Mr. Ikebuchi.

[2549] The attendees also discussed other options for the long term future of École Élémentaire Les Aiglons. That included a discussion about the CSF possibly opening a school in a modular structure in January 2015. Mr. Ikebuchi and Mr. Allison disagreed about which district should receive a new school in Squamish if a new school were to be built in the area.

[2550] Mr. Stewart retired shortly thereafter. In March 2014, Mr. Allison sent a Positioning Letter to Mr. Stewart's successor, Assistance Deputy Minister Deborah Fayad, in connection with the CSF's space needs in Squamish. Mr. Allison asked the Ministry to approve the CSF's request to build a new, homogeneous Kindergarten to Grade 12 facility in Squamish to accommodate 240 students, with space for future enrolment growth. In the alternative, Mr. Allison asked to place modular or portable classrooms on the Garibaldi Highlands Elementary site to accommodate École Élémentaire Les Aiglons. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

5. March and April 2014: Proposed Move to Stawamus Elementary

[2551] Shortly after Mr. Allison requested assistance from Assistant Deputy Minister Deborah Fayad, officials from the two districts met again. SD48-Sea-to-Sky officials proposed that the CSF and SD48-Sea-to-Sky could build a school together. Mr. Allison "totally" rejected that idea. SD48-Sea-to-Sky also proposed that École Élémentaire Les Aiglons could move to Stawamus Elementary. That school had 80 students at the time, and capacity for 195. SD48-Sea-to-Sky officials proposed that École Élémentaire Les Aiglons could have five classrooms at Stawamus Elementary, as well as administrative space.

[2552] On March 17, 2014, Mr. Allison sent a fresh Positioning Letter to Assistant Deputy Minister Fayad, requesting funding for three portables at Stawamus

Elementary, as well as funding for two new school buses and equipment for École Élémentaire Les Aiglons if it were to relocate. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[2553] Mr. Palmer and Mr. Allison discussed the CSF's requests by telephone. According to Mr. Allison, Mr. Palmer said the Ministry would not fund the CSF's requests. By Mr. Palmer's account, he told Mr. Allison that given the urgency, he would recommend to the Minister that the CSF be allowed to use its Restricted Capital Reserve to acquire portables, and would look at recommending the approval of funding for equipment. However, he told Mr. Allison that the bus transportation costs were operational in nature, and were not likely to be supported. He suggested that Mr. Allison write to the Minister to request access to Restricted Capital to acquire the portables. For the reasons that I gave in Chapter II, Introduction, concerning Mr. Allison's credibility, and because his account is corroborated by the following events, I prefer Mr. Palmer's evidence.

[2554] Assistant Deputy Minister Fayad provided an official response to Mr. Allison's letters on April 3, 2014. She wrote that the cost of acquiring portables and equipment was the CSF's responsibility, and that the CSF could use its operating funds, or ask to access Restricted Capital. For transportation, she confirmed that the CSF would be expected to cover the costs from its operating funds or establish a fee for transportation as other school boards had done.

[2555] In light of Assistant Deputy Minister Fayad's response, Mr. Hébert, president of the CSF, sent a Positioning Letter to Minister Fassbender on April 7, 2014. He requested emergency capital funding for the CSF to relocate to Stawamus Elementary, likening the CSF's situation to circumstances where a school is destroyed by fire or a roof collapses. Alternatively, Mr. Hébert asked for approval to use the CSF's Restricted Capital to fund the relocation. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[2556] Mr. Allison explained that SD48-Sea-to-Sky was pressuring the CSF to advise whether it would move to Stawamus Elementary or stay at Garibaldi Highlands Elementary for the 2014/15 school year. Mr. Allison also found three used portables that the CSF could acquire, and took a risk by acquiring them prior to receiving the Minister's response.

[2557] The risk was well taken. Minister Fassbender's response came on May 15, 2014, approving the CSF's use of \$625,000 in Restricted Capital for three portables and equipment to support École Élémentaire Les Aiglons at Stawamus Elementary. He confirmed the Ministry would not fund the CSF's additional transportation costs. He, too, pointed to policies in some districts that charged fees for transportation.

[2558] Mr. Palmer stated that the Ministry's policy requires all school boards to use operating funds to purchase portables. To the best of Mr. Palmer's knowledge, the Ministry has only made an exception for the CSF, and only then because of the urgency of the situation.

[2559] Based on Mr. Hébert's letter and his telephone call with Mr. Allison, Mr. Palmer believed that the CSF had decided to move École Élémentaire Les Aiglons to Stawamus Elementary. He began working on that solution with SD48-Sea-to-Sky staff.

[2560] Mr. Allison visited Stawamus Elementary around April 9, 2014, with Ms. Drapeau, Mr. Rick Hume (Facilities Director, SD48-Sea-to-Sky) and the outgoing and incoming principals from Stawamus Elementary. Mr. Allison saw many benefits to moving to Stawamus Elementary, including better access to the gymnasium and library. CSF students would also form a larger share of students in the school. On the other hand, some CSF students would be located in portables, and many students would have to travel a greater distance to attend school.

[2561] Ms. Drapeau testified about the same visit to Stawamus Elementary. She advised that the school is at the top of a hill. A set of power lines crosses the

school's small parking lot. By Ms. Drapeau's description Stawamus Elementary was old, but well kept. It appeared bright and freshly painted. She described the administrative area as "cute". She noticed that the school had a small gymnasium, with wood floors and a stage. The school also had a long multipurpose room. A classroom had been converted to a library.

[2562] Stawamus Elementary has two wings of classrooms. According to Ms. Drapeau, she was told that École Élémentaire Les Aiglons could have five classrooms in a dedicated wing of the school. Another room was proposed to be the CSF office. According to Ms. Drapeau, with the addition of three portables this would have accommodated École Élémentaire Les Aiglons' six divisions and provided the CSF with special education and counselling space.

[2563] Ms. Drapeau initially reacted positively to the idea of moving to Stawamus Elementary. She liked that École Élémentaire Les Aiglons would have adjacent classrooms, although in follow up conversations the principal of Stawamus began to hesitate at that prospect. She told Mr. Allison she was in favour of the move, but she also suggested that the CSF should be prepared for some parents to withdraw from the École Élémentaire Les Aiglons programme.

6. May 2014: Parent Backlash

[2564] On May 8, 2014, Ms. Drapeau sent a letter to parents informing them of the proposed move to Stawamus Elementary. The CSF did not consult with SD48-Sea-to-Sky in advance of that letter. Several days later, Mr. Hume told Mr. Allison that the plans to add portables to Stawamus Elementary were on hold.

[2565] Then, Mr. Allison was called to a meeting at the SD48-Sea-to-Sky office.

[2566] At that meeting, the SD48-Sea-to-Sky officials informed the CSF officials that they were not happy about the letter than had been sent to parents. They asked that all further communication about the project be vetted through SD48-Sea-to-Sky. While under cross-examination, Mr. Allison conceded it was likely that SD48-Sea-to-Sky officials were upset that the CSF had acted unilaterally. While Mr. Allison was

adamant that he had no duty to seek permission from SD48-Sea-to-Sky, he also agreed that Squamish is a small community, and that SD48-Sea-to-Sky had a legitimate interest in the communication because parents of SD48-Sea-to-Sky students were likely to learn about the letter and the idea.

[2567] Ms. Drapeau explained that after she sent the letter, many parents contacted her and expressed disappointment. Several parents and École Élémentaire Les Aiglons staff members raised concerns about the power lines near Stawamus Elementary, and potential electro-magnetic fields. The staff union representative also wrote to expressing concern about the toll the uncertainty was taking on staff.

[2568] Ms. Pascale Rivest-Gadbois, the parent of an École Élémentaire Les Aiglons student, testified about her reaction to the letter. She was disappointed because Stawamus Elementary was located farther from her home than was Garibaldi Highlands Elementary. Her husband also suggested to her that there might be a risk to sending their daughter to a school near powerlines, leading her to perform her own research. Not finding anything conclusive, she was concerned by the risk of the unknown. Shortly after receiving the May 8, 2014 letter, she and her husband reluctantly enrolled their daughter in French immersion at Garibaldi Highlands Elementary instead of École Élémentaire Les Aiglons for the coming year.

[2569] Around the end of May 2014, there was a meeting of École Élémentaire Les Aiglons parents in connection with the proposed move to Stawamus Elementary. Mr. Allison and Ms. Drapeau also attended, but representatives from SD48-Sea-to-Sky were not invited.

[2570] Shortly before the meeting, Mr. Allison received the results of an informal École Élémentaire Les Aiglons APÉ survey, which suggested parents had mixed opinions about moving to Stawamus Elementary. Some, but not all parents were concerned about potential electro-magnetic fields at Stawamus Elementary.

[2571] At the parent meeting, many parents commented about electro-magnetic field safety and transportation times if the CSF were to move. Mr. Allison grew concerned about enrolment decline. He conceded there was an atmosphere of fear around the electro-magnetic field issue.

[2572] The CSF investigated the concerns about electro-magnetic field. The CSF received two reports from SD48-Sea-to-Sky, both of which concluded there was no reason to fear electro-magnetic fields at Stawamus Elementary. Those reports were posted on an École Élémentaire Les Aiglons website for parent review. However, the reports did not satisfy Mr. Allison that the school was safe; he preferred that the CSF commission its own study.

[2573] The CSF contacted BC Hydro to arrange for a test of electro-magnetic field levels using their equipment, but parents urged that a test by BC Hydro was not sufficiently independent. Eventually, the CSF engaged Mr. Jim Waugh, an independent consultant, to perform tests on behalf of the CSF.

[2574] Mr. Allison confirmed that Mr. Waugh was the only person to respond to the CSF's requests for proposal. Mr. Allison advised that he did not do any independent assessment of Mr. Waugh's background; he did not even google Mr. Waugh's name.

[2575] The CSF received Mr. Waugh's study in June 2014. Mr. Waugh concluded that Stawamus Elementary was not safe. However, he did not compare the data he collected to the standards acceptable to Health Canada or any other Canadian or international health organization. This caused Mr. Allison some concern, as he wanted parents to have all the information possible to assess the report's conclusion. However, Mr. Allison refused to admit any doubt of Mr. Waugh's credentials or conclusions.

[2576] Despite Mr. Allison's concerns, Mr. Waugh's results were communicated directly to École Élémentaire Les Aiglons parents. The CSF sent this report, which says that the electro-magnetic fields were unsafe, directly to all parents. The SD48-Sea-to-Sky reports, which say that the school was safe, were posted on a website.

Mr. Allison refused to admit that the CSF's actions contributed to the culture of fear of Stawamus Elementary and electro-magnetic fields.

[2577] In the letter to parents accompanying the Waugh Report, the CSF also made what seems to me to be a positioning statement: The CSF apologized to parents that they had to choose between "two options which, in the CSF's opinion, do not allow the CSF to offer your children the instruction in the French language in buildings equivalent to that of the majority which is guaranteed to you by the [Charter]."

[2578] Mr. Allison conceded that some parents expressed some concerns about Mr. Waugh's report, as well as his credentials. For Ms. Gadbois-Rivest's part, while she saw Mr. Waugh's report, it had no bearing on her deliberations because she had already decided not to enrol her daughter at Stawamus Elementary.

[2579] Later, Mr. Waugh provided an updated report that included international standards for electro-magnetic field exposure (Health Canada has no such guidelines). Notably, his report advises that the readings at Stawamus Elementary fall far below the standards. Most countries set an exposure limit of 1,000 milligauss. The highest reading at Stawamus Elementary, in the northwest corner of the school, was 50 milligauss. I do not take this statement to be the truth; I only rely on it to illustrate what the CSF chose to share with parents.

[2580] Ms. Drapeau did not know whether the second Waugh Report was ever communicated to parents, but she believed it likely would have been posted on the École Élémentaire Les Aiglons PAC website. Unlike the first Waugh report, it was not sent directly to the parents.

[2581] Mr. Allison sent both of Mr. Waugh's reports to SD48-Sea-to-Sky. He did not recall SD48-Sea-to-Sky expressing concern about the safety of the school, or the safety of the students currently in the school.

[2582] While Mr. Allison was under cross-examination, it was suggested to him that his decision to put Mr. Waugh's first report before the parents substantiated their fears. Mr. Allison was evasive and uncooperative at this point in his cross-examination. He simply maintained that parents had the right to know what Mr. Waugh concluded.

[2583] Ms. Drapeau explained that by early June 2014 École Élémentaire Les Aiglons had transferred 10 students registered in Kindergarten and Grade 1 to the Garibaldi Highlands Elementary French immersion programme. Many parents indicated in a survey that they would leave the school if it were relocated to Stawamus Elementary. Ms. Drapeau had come to believe that moving to Stawamus Elementary would cost École Élémentaire Les Aiglons some of its enrolment. However, Ms. Drapeau refused to admit that the CSF's letter to parents attaching Mr. Waugh's report had any impact on parents' reactions. She said that parents had made up their minds before the Waugh Report was distributed.

[2584] Ms. Drapeau initially suggested that no parents raised concerns about Mr. Waugh's credibility. However, the record shows that at least one parent wrote to Ms. Dreapeau and wanted to share her views on Mr. Waugh's credentials on the École Élémentaire Les Aiglons blog. Another parent pointed to some zoning concerns, and suggested to Ms. Drapeau it might be a mistake to take Stawamus Elementary off the table.

[2585] Notably, the evidence shows that not all parents were in agreement. In December, 2014, Mr. Allison received an email from an École Élémentaire Les Aiglons parent who suggested that his children would continue to attend École Élémentaire Les Aiglons no matter where it relocated. Mr. Allison conceded that at least one other parent expressed the same view. The parent suggested that Stawamus Elementary was the "ripest fruit for picking", and that parents were less concerned about electro-magnetic fields than they were about change. Mr. Allison refused to admit that parents might be afraid of change. He disagreed with the

parent's view that any decrease in enrolment would be a temporary "blip" related to a moment of uncertainty.

7. June 2014: Planning for 2014/15

[2586] In light of parent concerns, the CSF examined two alternative sites: Capilano University and Camp Easter Seals.

[2587] Mr. Allison initially examined leasing classrooms at Capilano University. University administration offered several classrooms. However, École Élémentaire Les Aiglons would have to vacate the classrooms at the end of each school day so they could be used for adult education in the evenings. For obvious reasons, that was not a reasonable option for the CSF.

[2588] One parent suggested that École Élémentaire Les Aiglons might use a camp operated by Easter Seals in the summer months ("Camp Easter Seals"). Ms. Drapeau explained that the camp had several buildings: a mess hall, two dormitories, an art hall and a pool. Ms. Drapeau tried to imagine converting a staff room and dormitories into classrooms, and using a cafeteria for physical education. They also discussed adding portables to the site for a division, special education and counselling. According to Ms. Drapeau, the prospect was a "nightmare". Mr. Allison agreed that Camp Easter Seals was not suitable because it was a camp, not a school. However, he hoped the CSF could build a modular facility on the site.

[2589] Ms. Drapeau explained that the CSF nevertheless engaged architects to consider converting Camp Easter Seals into a school. She explained that they identified a number of concerns: about windows that would not open; necessary zoning changes; permits for adding portables; and so on.

[2590] On June 6, 2014, Mr. Allison confirmed with Mr. Ikebuchi that the CSF would not move to Stawamus Elementary because the CSF "had a better option ahead". According to Mr. Allison and Ms. Drapeau, that option was Camp Easter Seals. However, Ms. Drapeau confirmed that by June 3, 2014, it had already become clear that there were problems with that idea. In addition to the facility concerns, a survey

showed parents were not in favour of that idea, either. In connection with the 2014/15 school year, Mr. Allison renewed his request to add portables to the Garibaldi Highlands Elementary site, which Mr. Ikebuchi refused.

[2591] École Élémentaire Les Aiglons parents and CSF administrators met again on June 11, 2014. Parents were told that the CSF believed that Camp Easter Seals was not an option, and that the CSF believed enrolment would drop if the school moved to Stawamus Elementary. So, they discussed ways that the CSF could reconfigure École Élémentaire Les Aiglons to remain at Garibaldi Highlands Elementary for one year with one fewer classroom.

[2592] Ms. Drapeau confirmed that by the end of June 2014, it was decided that École Élémentaire Les Aiglons would stay at Garibaldi Highlands Elementary for 2014/15. Enrolment at École Élémentaire Les Aiglons dropped in several upper-level grades, although many parents who had enrolled in French immersion re-enrolled their children at École Élémentaire Les Aiglons. Ms. Rivest-Gadbois was one such parent.

[2593] Meanwhile, École Élémentaire Les Aiglons parents began intervening in the CSF's dealings with SD48-Sea-to-Sky. The École Élémentaire Les Aiglons APÉ gave SD48-Sea-to-Sky officials the confirmation they were seeking about the CSF's plans for 2014/15. The parents also reiterated the request for portables. Ms. Drapeau did not object. SD48-Sea-to-Sky refused the parents' request, too.

[2594] Ms. Drapeau agreed that Ministry class size limits would allow École Élémentaire Les Aiglons to accommodate its entire enrolment in five divisions. Nevertheless, for the 2014/15 school year, École Élémentaire Les Aiglons stayed at Garibaldi Highlands Elementary with six divisions. The mid-sized storage room previously used as École Élémentaire Les Aiglons' administrative space was converted into a small classroom. It holds a 15-student division. École Élémentaire Les Aiglons' administrative equipment was moved to offsite storage. The secretary moved into the small office formerly used for learning assistance. Ms. Drapeau

moved her desk into the Grade 1 classroom. The CSF was, however, given access to another small room, which it uses for learning assistance.

8. July - October 2014: Planning for 2015/16 and Beyond

[2595] Mr. Allison sent another Positioning Letter to Assistant Deputy Minister Fayad on July 24, 2014. This time he asked for a new stand-alone elementary/secondary school in Squamish, or alternatively a K-7 school on a site large enough to accommodate the eventual addition of a secondary wing. In the meantime, he asked the Ministry to intervene to find a short-term solution to accommodate École Élémentaire Les Aiglons students for 2015/16. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[2596] Mr. Palmer reviewed Mr. Allison's July 24, 2014, letter to Assistant Deputy Minister Fayad. He took it from the letter that a capital project in Squamish was more urgent than the CSF's other project requests. Since the CSF seemed to be pursuing several options and dealing with the concerns, it was Mr. Palmer's opinion that there was no need for the Ministry to intervene.

[2597] On reviewing the letter, Mr. Palmer noticed that Mr. Allison referred to the need for a site large enough to accommodate the addition of a secondary wing "in due course or when ordered by the Supreme Court of British Columbia". He took the reference to the ongoing litigation to be both threatening and irrelevant to the discussion.

[2598] On August 1, 2014, Mr. Allison received an email from Assistant Deputy Minister Fayad indicating that the Ministry was considering its response, which gave Mr. Allison some hope that the Ministry would assist. However, when the official response came in September 2014, Assistant Deputy Minister Fayad simply encouraged the CSF to continue to work with SD48-Sea-to-Sky and the Squamish community to identify space.

[2599] Mr. Allison continued searching for sites, this time contacting Quest University, a private university. Mr. Allison enquired about leasing a floor of their building or leasing or purchasing land to build a temporary or permanent school. Quest University refused, but put Mr. Allison in touch with an individual who owned forested lands north of Quest University. Mr. Allison pursued the ideal of buying or leasing land from that person, and was trying to arrange meetings when he testified in October 2014.

[2600] By the time Mr. Allison was testifying in the early months of 2015, the CSF had begun negotiating with Capilano University to add portables to its site. Mr. Palmer approved the CSF's use of the portables it acquired for Stawamus Elementary on a different site.

[2601] In December 2014, the Stawamus Elementary opportunity arose again, but this time Mr. Ikebuchi offered it for acquisition as a homogeneous facility. Mr. Allison responded that the CSF was not interested in acquiring Stawamus Elementary on a long-term basis, but proposed a short-term lease. He prepared a proposal based on the lease costs at Garibaldi Highlands Elementary.

[2602] Mr. Allison copied Mr. Palmer on his email suggesting a short-term lease of Stawamus Elementary. Mr. Palmer inferred that as of January 2015, the CSF was ready to move to Stawamus Elementary, at least temporarily until a new school might be built. Since Mr. Allison made a formal lease proposal, Mr. Palmer saw no need for the Ministry to intervene.

[2603] Mr. Allison believed that the SD48-Sea-to-Sky Board would consider his proposal at a board meeting in mid-January 2015. As of the end of his direct evidence on January 23, 2015, he had not heard the results of the meeting.

[2604] Mr. Palmer gave evidence about the events that occurred after Mr. Allison finished his testimony. Mr. Allison kept Mr. Palmer apprised of the negotiations; however, Mr. Palmer did not become directly involved. Mr. Palmer suggested that the Ministry does not have the institutional capacity to become involved in inter-

district negotiations. Further, he thought it at least somewhat important that the Ministry remain neutral.

[2605] In February 2015, Mr. Palmer was copied on an email from Mr. Allison to Mr. Ikebuchi showing the negotiations between the two districts. The proposals envisioned the CSF paying lease costs of \$105.00 per square metre. It would have cost \$242,865 per year for the CSF to lease Stawamus Elementary as a homogeneous facility, or \$169,995 for the CSF to lease five classrooms and add two portables.

[2606] Mr. Allison's email indicates that the CSF Board of Trustees voted against relocating to Stawamus Elementary at that cost. Mr. Allison pointed to two reasons: a lack of certainty that the CSF would not have to share its facility, and that the CSF could not wait for SD48-Sea-to-Sky to provide final confirmation later in February or March 2015.

[2607] Mr. Palmer did not think either reason given by Mr. Allison was legitimate. He pointed out that the CSF was already sharing space at Garibaldi Highlands Elementary, and also did not think a two-to-four week wait was prejudicial.

[2608] Mr. Palmer advised that he was initially unsure of the CSF's plans for École Élémentaire Les Aiglons in 2015/16. On February 23, 2015, Mr. Allison told Mr. Palmer that École Élémentaire Les Aiglons would relocate to Capilano University. Mr. Allison stated that the CSF "did not have much choice in the matter, and this [was] the only option in the circumstances that [would respond] to the [CSF's] short-term needs in Squamish". Mr. Palmer disagreed with Mr. Allison's suggestion that the CSF had no other options, pointing to Stawamus Elementary.

[2609] In his letter, Mr. Allison gave several reasons for the decision: First, he suggested Capilano University would provide École Élémentaire Les Aiglons with a homogeneous facility. He also pointed to ongoing difficulties in the CSF's relationship with SD48-Sea-to-Sky, the need to provide École Élémentaire

Les Aiglons parents with a final decision quickly, and the views of École Élémentaire Les Aiglons parents.

[2610] On May 5, 2015, Mr. Allison sent Mr. Palmer a complete copy of the lease between the CSF and Capilano University for the 2015/16 school year. The cost of basic rent for that property came to \$156,528. Thus, the lease at Capilano University proved less expensive than the lease of Stawamus Elementary. I note that at this point the Ministry had frozen the CSF's lease funding (as I discuss in Chapter XXXV, Leases), creating an incentive for the CSF to reduce lease costs.

9. Secondary Programme

[2611] Currently, the CSF does not offer a Francophone secondary programme in Squamish. According to Ms. Drapeau, SD48-Sea-to-Sky refused the CSF's requests to rent space at an SD48-Sea-to-Sky secondary school.

[2612] In 2012/13, according to Ms. Drapeau, local media suggested that SD48-Sea-to-Sky was considering a reconfiguration that would see Grade 7 students move from elementary to secondary schools. Ms. Drapeau was concerned that would make it harder for the CSF to access surplus secondary space. It also seems to have had an impact on the CSF's ability to retain École Élémentaire Les Aiglons students through Grade 7 once their peer group has moved to secondary school.

10. Conclusions and Findings of Fact

[2613] The CSF has been requesting a new elementary school in Squamish since its October 2007 Capital Plan Submission for 2008/09. That year, it was a mid-ranked project: its seventh-highest priority. The Capital Plan Submissions consistently sought an elementary school until the September 2013 Capital Plan Submission for 2013/14, when the CSF began seeking an elementary/secondary school.

[2614] I have also considered the sealed evidence related to the circumstances in Squamish. Those documents persuade me that the Ministry recognizes the CSF's needs in Squamish, and that the primary impediment to the CSF's proposed project

moving forward at this point is a lack of sufficient immediate funding for Expansion Projects.

[2615] École Élémentaire Les Aiglons and Garibaldi Highlands Elementary did not have an easy relationship. École Élémentaire Les Aiglons did not have choice of gymnasium blocks and had limited access to and space in the library. Some of the challenges had an impact on the Francophone identity of the school. A lack of signage reduced its visibility and the role it could play as a point of pride for the community. École Élémentaire Les Aiglons was not given a distinct wing of the school, which would have been its preference and would have assisted it to maintain a distinct presence in the school. Once it began losing space in 2012/13, Ms. Drapeau had to make special arrangements for space to bring students together and implement *Pédagogie 2010*.

[2616] The inter-district relationship was also problematic at times. SD48-Sea-to-Sky put its own needs first, and refused the CSF's requests to add portables to Garibaldi Highlands Elementary. The evidence shows that SD48-Sea-to-Sky also experienced legitimate frustrations with the CSF. When the CSF was working with SD48-Sea-to-Sky on the move to Stawamus Elementary, the CSF unilaterally informed its parents about the move when the project was not finalized. The CSF also had much smaller class sizes than did Garibaldi Highlands Elementary, but insisted it required more space in a time of growing enrolment at Garibaldi Highlands Elementary. This caused some consternation on the part of SD48-Sea-to-Sky. Neither school board routinely took the other's needs and perspectives into account.

[2617] The CSF's arrangements with SD48-Sea-to-Sky show how the CSF's leasing arrangements can cause insecurity of tenure for the CSF. SD48-Sea-to-Sky was insistent on year-to-year leases. Due to SD48-Sea-to-Sky's growing enrolment at Garibaldi Highlands Elementary, the CSF was vulnerable to the loss of space.

[2618] SD48-Sea-to-Sky has evicted École Élémentaire Les Aiglons on three occasions. In the 1990s, École Élémentaire Les Aiglons was evicted from Mamquam Elementary, and offered space at Stawamus Elementary. A few years

later, it was evicted from Stawamus Elementary and moved to Garibaldi Highlands Elementary. Most recently, it was evicted from Garibaldi Highlands Elementary and was offered space at Stawamus Elementary.

[2619] On the one hand, when the CSF faced these evictions, the CSF was left to deal with SD48-Sea-to-Sky on its own, without assistance from the Ministry. Over the course of the dispute concerning the CSF's loss of space at Garibaldi Highlands Elementary, Ministry staff took a hands-off approach. Mr. Stewart did not intervene directly when Mr. Allison sought his assistance in December 2013, preferring to allow the districts to work out their differences on their own. While he attended a meeting between Mr. Ikebuchi and Mr. Allison, he acted as a facilitator and always remained neutral as between the two districts. Mr. Palmer likewise declined to become involved, despite receiving several Positioning Letters. He thought it appeared the CSF was evaluating options and making progress, and suggested the CSF did not directly ask him to intervene. He, too, cited a desire to remain impartial between the two districts.

[2620] This is very different from the way the Ministry intervened in earlier disputes in other areas. For example, the Ministry intervened directly to assist the CSF to secure space when it faced evictions in Nanaimo and Comox. In Vancouver, Ministry staff identified and facilitated the transfer of the Oakridge Site to the CSF. In the CSF's early years, when Mr. Miller and Mr. Owen were involved, Ministry staff did not hesitate to advocate for the CSF's need for space and to use powers of persuasion to help the CSF resolve its problems. In more recent years, the Ministry has ceased taking this approach, and left the CSF to resolve matters for itself.

[2621] The Minister made one extraordinary decision to assist the CSF by approving the CSF's use of Restricted Capital to acquire three used portables and purchase equipment for a programme at Stawamus Elementary.

[2622] On the other hand, even if the Ministry had offered the CSF greater assistance, the problem would not have been remedied because the CSF refused to take the one step that would have immediately provided it with equivalent facilities:

It refused the option of moving to Stawamus Elementary in favour of moving to portables on the Capilano University campus.

[2623] I have reviewed the evidence in the Joint Fact Finder's Report concerning Stawamus Elementary, which show the school to be older, but to have very large classrooms. I also consider that the school is on the opposite side of Squamish from Garibaldi Highlands Elementary, but that the maps show that École Élémentaire Les Aiglons' population is distributed across the region.

[2624] The evidence shows that Stawamus was once an attractive option for the CSF. École Élémentaire Les Aiglons was located in leased, heterogeneous space at Stawamus Elementary for a period of time near the CSF's inception. The CSF proposed acquiring that school in its June 1999 Capital Plan Submission for 2000/01.

[2625] More recently, the CSF has not followed up on options to move to Stawamus Elementary as a homogeneous facility. As early as 2010, Mr. Hetherington proposed that École Élémentaire Les Aiglons could use Stawamus Elementary as a stand-alone facility. Although Mr. Allison was invited to make submissions concerning the decisions around Stawamus Elementary, he did not do so. He likewise did not bring the idea to the CSF Board of Trustees.

[2626] Stawamus Elementary was also suggested for the CSF when it faced eviction from Garibaldi Highlands Elementary in 2014. There would have been many benefits to moving to Stawamus Elementary at that time, including better access to the gymnasium and library. École Élémentaire Les Aiglons' classrooms likely would have been adjacent to one another, giving it a greater Francophone presence and culture.

[2627] In December 2014, the CSF was given an option to acquire Stawamus Elementary and use it as a homogeneous facility. Mr. Allison would not consider long-term tenure there. The CSF considered and refused short-term tenure at the

school. Instead, the CSF chose to relocate its programme to homogeneous portables on a heterogeneous campus.

[2628] The primary reason that the CSF gave for not moving to Stawamus Elementary was a fear of enrolment decline. The evidence shows that some parents were concerned about the potential for electro-magnetic field at Stawamus Elementary. However, the concerns were not universal, and some parents were vacillating.

[2629] The CSF made no attempt to persuade parents that Stawamus Elementary would be a good option for École Élémentaire Les Aiglons. Rather, the CSF took actions that inflamed parent concerns, and made Stawamus Elementary appear unattractive. The CSF distributed letters to parents that suggested that Stawamus was not equivalent to the facilities used by the majority. It hired an expert with a disputable reputation to test the electro-magnetic fields. The CSF distributed reports directly to parents suggesting that the electro-magnetic field levels were unsafe. Contrary reports that both pre- and post-dated that report were only posted on a website, and were not distributed directly to parents.

[2630] Overall, I conclude that the CSF is responsible for the current lack of appropriate facilities at École Élémentaire Les Aiglons because it chose to move to portables at the Capilano University campus. It had the option to move to Stawamus Elementary, which would have provided it with a short-term solution, and potentially a long-term solution, to its needs in Squamish. That option would have given the CSF better security of tenure and access to facilities, and potentially a homogeneous school. Instead, the CSF took an approach that left it only with a very short-term, temporary solution.

[2631] Rather than working with its community to achieve those ends, the CSF incited greater fear among parents and made the Stawamus Elementary option appear unattractive. I infer based on the totality of the evidence of Mr. Allison's behaviour that his actions were calculated to attempt to lever the government into providing the CSF with a new school. If the CSF accepted space at Stawamus

Elementary, École Élémentaire Les Aiglons' immediate needs would have been met and the Ministry would have been less likely to approve the Stawamus Elementary/Secondary Project.

[2632] With reference to responsibility for the absence of secondary instruction, I find that SD48-Sea-to-Sky has refused to accommodate the CSF's requests for heterogeneous instructional space. The CSF has not raised this particular issue with the Ministry, and I find that the Ministry did not refuse the CSF assistance with respect to that issue. As a result, in my view, the lack of secondary instruction arises out of SD48-Sea-to-Sky's decision to refuse to provide the CSF with access to space for minority language education. It is compounded by the CSF's decision not to take steps to remedy the situation, by, for example, notifying the Ministry of the issue or invoking the *Education Mediation Regulation*. I note that the CSF witnesses conceded it is not appropriate for the Ministry to intervene in disputes between the CSF and majority school boards unless the CSF asks.

[2633] Instead of taking the steps open to it, the CSF elected to pursue more facilities than it was reasonably entitled to: a full-scale capital project for an elementary/secondary school. Given the very low secondary numbers in Squamish, the numbers are not likely to ever merit secondary instruction in a homogeneous school-- it would be disproportionate to build secondary facilities for such a small number. In my view, the fact that the CSF asked for more than it was entitled to does not divert the cause of the breach from the decisions taken by SD48-Sea-to-Sky and the CSF to the capital funding system of the Province.

F. Justification

[2634] I conclude that a reasonable rightsholder parent would find that the global educational experience at École Élémentaire Les Aiglons is substandard. That breach is caused by the CSF's decision not to move to Stawamus Elementary. The remaining question is whether that breach is justified.

[2635] As I outline in Chapter IX, Justification, the section 1 justification test focuses on whether the “infringing measure” can be justified. I do not find that current situation at École Élémentaire Les Aiglons arises out of the Ministry’s capital funding regime. Instead, the “infringing measure” seems to be the decision taken by the CSF, particularly its concerted effort to avoid taking an adequate, acceptable elementary facility to try to force the Province’s hand into building a new facility, at great cost. There was no argument that the CSF’s decision ought to justify any rights breach. In light of that, I cannot say whether the breach in Squamish is justified.

[2636] I do consider that the Ministry refused the CSF assistance in recent years when it faced eviction from SD48-Sea-to-Sky’s facilities. I consider those facts in Chapter XXXV, Leases. There, I conclude that in order to meet its duty to ensure that facilities are provided where the numbers so warrant, the Ministry must craft a law or policy to ensure that the CSF will receive the assistance it needs to acquire appropriate space. However, the Ministry would have been ineffective here because the CSF was engaging in tactical maneuvering for the purpose of this litigation.

[2637] With respect to the absence of secondary instruction, I find that the CSF is owed some deference to its judgment that it is pedagogically appropriate to offer instruction to 35 secondary students in Squamish. Since there is no secondary instruction in that area, rightsholders are not receiving the heterogeneous secondary instruction that they are entitled to. The analysis therefore turns to whether the infringement is justified.

[2638] I do not find that the absence of secondary instruction arises out of the operation of the Ministry’s capital funding system. Rather, the “infringing measure” seems to be the decision taken by SD48-Sea-to-Sky to refuse the CSF space, as well as the CSF’s failure to exercise either of the two dispute resolution mechanisms available to it: requesting assistance from the Ministry or invoking the *Education Mediation Regulation*.

[2639] The Court has not heard SD48-Sea-to-Sky's side of the story, and has no direct evidence concerning its amenities and reasons for refusing the CSF's request. All the evidence concerning its reasons is hearsay. There was no argument attempting to justify SD48-Sea-to-Sky's decision, nor was their argument attempting to justify the CSF's failure to take self-help steps. In light of that, I cannot say whether the lack of heterogeneous secondary space is justified.

G. Remedy

[2640] The plaintiffs submit that the appropriate and just remedy is to order the Province to construct the Squamish Elementary/Secondary Project. In their submission, the new school would increase the community's Vitality and lead to increased enrolment, pointing to the evidence of Dr. Martel and Dr. Landry. They also urge that the new school should be built without delay to prevent assimilation.

[2641] In my view, given that the CSF is responsible for the breach at the elementary level in Squamish, no orders should issue against the defendants for that situation. Further, I am persuaded based on the sealed evidence, that the Province recognizes the CSF's needs in Squamish and that the Ministry's expansion programme will soon respond to it. In light of the fact that a decision by SD48-Sea-to-Sky and actions by the CSF are at the root of the absence of secondary space, neither should any orders issue against the Ministry for the absence of secondary space. Thus, the appropriate remedies are declarations confirming the CSF's ability to act within its jurisdiction to remedy the current situations.

[2642] As a result, I declare:

- a) Rightsholders under section 23 of the *Charter* living in Squamish are entitled to have their elementary-age children (age 5-13) receive minority language education in homogeneous facilities with space for 135 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the experience at comparator elementary schools.

- b) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary school programme in Squamish (for children age 5-13) with homogeneous instructional space offering a global educational experience proportionate to the experience at comparator elementary schools for about 135 students (or such other numbers and facilities as the parties agree to).
- c) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme in Squamish (for children age 14-17) with heterogeneous instructional space for about 35 secondary students (or such other numbers and facilities as the parties agree to).

[2643] The CSF and the Ministry will need to work together to achieve that objective. As I develop further in Chapter XXXV, Leases, the Ministry must fund the CSF's reasonable lease costs for that programme provided that the CSF complies with the valid provincial conditions for securing that funding.

[2644] As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[2645] Further, given that several *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and a Capital Envelope for the CSF.

[2646] The plaintiffs also seek *Charter* damages against the Province for the situation in Squamish. In light of the fact that the Province is not responsible for the breaches in Squamish, *Charter* damages are not an appropriate and just remedy.

H. Summary

[2647] I conclude that the best estimate of the number of students in Kindergarten through Grade 7 likely to take advantage of a minority language education programme in Squamish in a newly-constructed homogeneous facility is 135 children. I also consider that 35 children are likely to participate in a secondary programme in Squamish.

[2648] The number of elementary students in Squamish falls in the middle-to-high end of the sliding scale, warranting homogeneous instruction with proportionate facilities. At the secondary level, the numbers warrant only heterogeneous minority language instruction, at the low end of the sliding scale. I find that given that elementary students operate out of portables on a heterogeneous university campus and there is no secondary instruction available, the numbers are not receiving the global educational experience to which they are entitled.

[2649] In my view, the CSF is responsible for the current elementary facilities in Squamish. It chose them to ensure it did not accept facilities that would have met its needs and to guarantee that students received a demonstrably inferior global educational experience. It did so for the purpose of positioning itself for this litigation. The situation at the secondary level seems to arise out of a decision taken by SD48-Sea-to-Sky not to provide the CSF with space for its programme, and the CSF's failure to exercise self-help by approaching the Ministry for assistance or invoking the *Education Mediation Regulation*. There was no argument that any of those decisions were justified.

[2650] Given that the CSF is responsible for the breach at the elementary level, and that SD48-Sea-to-Sky, a non-party, lies at the heart of the absence of secondary instruction, no orders should issue against the Ministry for the breaches in Squamish. I consider declarations confirming the CSF's jurisdiction to remedy the situation to be the most appropriate remedies.

XX. ÉCOLE ÉLÉMENTAIRE DU PACIFIQUE (SECHELT)

[2651] Sechelt is located in the Sunshine Coast region of British Columbia. There, the CSF operates École Élémentaire du Pacifique, a homogeneous French-language school on a heterogeneous campus. École Élémentaire du Pacifique is housed in leased space: a building known as the Trail Building on SD48-Sea-to-Sky's Sechelt Elementary campus. In 2014/15, the school's enrolment was 77 students.

[2652] In Sechelt, the CSF proposes to acquire a site and construct a homogeneous elementary/middle (K-7) school to serve students on the Sunshine Coast (the "Sechelt Elementary Project"). In 2014, the CSF estimated that project would cost more than \$9 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[2653] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all described their experience with École Élémentaire du Pacifique. Mr. Stewart and Mr. Palmer also testified about their dealings with the CSF and SD46-Sunshine Coast concerning École Élémentaire du Pacifique.

[2654] The Court also heard evidence from Ms. Picard, who is the principal for the CSF's programmes in Sechelt. Ms. Picard moved to Sechelt in 1988, where she taught French immersion before teaching for the Programme Cadre and later the CSF. Her role changed again in 2004/05, when she designed Francophone math and French courses for École Virtuel. She has since split her time as an administrator at École du Pacifique, the heterogeneous Sechelt Francophone Secondary Programme at Chatelech Secondary and for École Virtuel.

[2655] The Joint Fact Finder's Report describes École Élémentaire du Pacifique and comparator schools in SD46-Sunshine Coast. A member of the Fact-Finding Team examined District and Ministry Data and visited all but one schools in the catchment area. He measured and reported observations of storage spaces,

multipurpose rooms, library space and equipment, computer facilities, and gymnasium storage. Playgrounds and parking areas were obtained from the Sunshine Coast Regional District Property Information and Mapping System. I find it to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Sechelt Catchment Area

[2656] Dr. Kenny observed a French-language community in Sechelt with deep historical roots. He noted that Francophone Oblate missionaries were present in the area as of the second half of the 19th century, and established Sechelt. Francophones were also involved in the colonial settlement of the Sechelt area.

[2657] Despite its Francophone roots, Sechelt is a predominantly Anglophone area. There was limited evidence at trial concerning Francophone community organizations in Sechelt.

[2658] Dr. Kenny noted that the Programme Cadre in Sechelt was inaugurated in 1989; he connected the late arrival of the Programme Cadre to the small size of the community. After SD46-Sunshine Coast cancelled its French immersion programme in 1991, the Programme Cadre and French immersion programmes merged.

[2659] Today, École Élémentaire du Pacifique operates as a homogeneous, Kindergarten to Grade 7 French-language elementary school. Since 2010/11, it has included within its walls a preschool for children age 3 to 5, Les Petits du Pacifique. École Élémentaire du Pacifique has no Strong Start or before- and after-school care programme. The CSF also offers a heterogeneous secondary programme at Chatelec Secondary School, but that programme does not form part of the CSF's claim for a new school in Sechelt.

[2660] École Élémentaire du Pacifique primarily operates out of the homogeneous Trail Building and two homogeneous portables that are leased from SD46-Sunshine Coast. École Élémentaire du Pacifique also has exclusive use of a library building and access to a shared gymnasium, which are both in stand-alone buildings. The

campus has two other school buildings that formerly operated as Sechelt Elementary. Now, those buildings house SD46-Sunshine Coast's English-language Strong Start programme and alternative secondary school.

[2661] The catchment area for École Élémentaire du Pacifique consists of the entire territory of SD46-Sunshine Coast. École Élémentaire du Pacifique is located in the centre of the catchment area, in Sechelt. The catchment area extends to the northwest through Halfmoon Bay and past Madiera Park. To the southeast, it includes the communities of Roberts Creek, Gibsons and Langdale. École Élémentaire du Pacifique's students are dispersed throughout most of those communities.

[2662] SD46-Sunshine Coast operates nine elementary schools. It does not offer French immersion instruction at the elementary level.

2. Conclusions

[2663] When analyzing the Sechelt claim, I will take into account that École Élémentaire du Pacifique's catchment area is a large one with a small population. The catchment area includes a number of small, rural communities, making transportation a particularly important concern. I will also take into account that Sechelt, more than other communities in British Columbia, has a deep Francophone history, making the need for remediation particularly strong in Sechelt.

[2664] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[2665] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[2666] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[2667] Dr. Landry estimated that in 2011 65 elementary-age children (age 5-13) living in the Sechelt Elementary Project's catchment area had a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 69 elementary-age children of Mother-Tongue Rightsholders in the catchment area, a slight increase in the population of eligible students.

[2668] I note that Dr. Landry also found 85 children of non-Francophones in the catchment area in the Knowledge Category, and 45 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in Sechelt.

[2669] I find that a reasonable proxy for the total universe of rightsholders' children in the catchment area for the Sechelt Elementary Project into the reasonably foreseeable future is 70 elementary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[2670] École Élémentaire du Pacifique serves students in Kindergarten to Grade 7, and has done so consistently since 1996/97 when 37 students were enrolled at the school. Enrolment was between 50 and 60 students between 1997/98 and 2000/01. Enrolment saw a significant jump in 2001/02 school year, to 72 students (an increase of 29%). Enrolment continued to grow until it peaked at 100 students in 2007/08. Since then, enrolment has decreased gradually, and sat at 77 students as of the 2014/15 school year. Since 2010/11, enrolment has ranged from a low of 77 students to a high of 84 students.

[2671] The CSF admitted seven non-rightsholders to École Élémentaire du Pacifique pursuant to its Expanded Admissions Policy when it was in force. Given the conclusions that I reached in Chapter VII, The Number of Children, these students must be removed from the “known demand”, placing the current known demand at 70 children.

3. The Uptake Rate

[2672] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[2673] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC’s Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[2674] The plaintiffs say that the CSF seeks a school with operating capacity for 113 students in Kindergarten to Grade 7, on a site with space to accommodate growth (particularly at the secondary level). That would allow the CSF space for six classrooms: four for general instruction, one for Kindergarten and one for learning assistance and specialized coursework like Francisation, English and music instruction. Interestingly, this is about the same amount of space that École Élémentaire du Pacifique has now, except that those rooms are divided between buildings and portables.

[2675] While Mr. Allison was under cross-examination, it was put to him that for the CSF to fill its proposed school by 2023, the CSF would require a 164% proxy participation rate. Counsel also suggested to him that even if the CSF were to enrol all children in the Regular Home Use Category, the CSF would require a participation rate of 103% to fill its proposed school by 2023. Mr. Allison admitted that was the case.

[2676] As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their projection of 113 children likely to attend a CSF school is not realistic.

[2677] Sechelt appears to have a very high participation rate. There are 70 children of rightsholders enrolled at École Élémentaire du Pacifique. The total universe of reasonably foreseeable Mother-Tongue rightsholders' children is likewise about 70 children. École Élémentaire du Pacifique therefore has a 100% proxy participation rate.

[2678] To explain the high participation rate, the plaintiffs suggest that the census figures for Sechelt are under-representative. In their submission, given that 84 students were enrolled at École Élémentaire du Pacifique in the 2011/12 school year, more than the 65 children of Mother-Tongue rightsholders identified by Dr. Landry lived in the catchment area in 2011. They suggest that a significant number of children of Education and Sibling Rightsholders live in the catchment area, pointing to some parent affidavit evidence. I address these arguments in

Chapter VII, The Number of Children, where I conclude that some number of children of Education and Sibling Rightsholders live in each community, but that the number cannot be quantified to any degree.

[2679] The defendants counter that there may be significant numbers of non-rightsholders enrolled at École Élémentaire du Pacifique.

[2680] I infer based on the evidence from CSF educators that principals do not always rigorously test whether parents meet admission criteria. I therefore find that there are likely a significant number of non-rightsholders enrolled at École Élémentaire du Pacifique, which explains its very high proxy participation rate. This is particularly so in light of the fact that the CSF performed a survey of all parents of students attending École Élémentaire du Pacifique concerning their rightsholder status, and did not disclose it. I infer that the plaintiffs did not do so because it was not favourable to their position.

[2681] The participation rate in Sechelt is very high. This is so even after taking into account that there are likely some children of Education and Sibling Rightsholders not included in the proxy universe of rightsholders, and that there are some children of non-rightsholders attending the programme. It is also relevant that SD46-Sunshine Coast does not offer French immersion at the elementary level. It is likely that the lack of competition contributes to a very high participation rate. I therefore conclude that École Élémentaire du Pacifique is likely approaching the top end of its participation rate.

[2682] Due to the high participation rate in Sechelt, it is hard to draw inferences from other communities. The closest parallel is École Mer-et-Montagne in Campbell River. There, the CSF programme was first located in leased space in a heterogeneous secondary school with a separate building for the elementary programme. As I describe in Chapter XXXVIII, Site and School Acquisition Projects, the CSF opened a newly-built homogeneous elementary school there in 2011/12. It now serves children in Kindergarten through Grade 8. Enrolment grew from 45 students in 2011/12 to 94 students in 2014/15. Eleven children were admitted

pursuant to the CSF's Expanded Admissions Policy while it was in effect. Excluding those 11 children, enrolment grew by 84%. Some of the growth came from the addition of two new age cohorts.

[2683] Dr. Castonguay, using Dr. Landry's methodology, counted 78 children age 5-14 living in the École Élémentaire Mer et Montagne catchment area that had a Mother-Tongue Rightsholder parent in 2011/12. Assuming the number of eligible students in the catchment area remained constant over time, the participation rate was about 106% in 2014/15.

[2684] It is harder to estimate how that participation rate changed from the time École Élémentaire Mer et Montagne opened because the school did not have middle school grades prior to the construction of the new school. An imperfect solution is to remove the 11 non-rightsholders and the further 11 students in the middle school grades in 2014/15 from the count of enrolment in 2014/15, then calculate the participation rate and compare it to the participation rate in 2011/12. This analysis shows that the participation rate grew from 57.6% to 92%, by about 34%. Of course, this is not a perfect formula because the total universe includes students in middle school years, so the absolute participation rates must be treated with caution.

[2685] The experience in Campbell River shows that enrolment may increase substantially when a programme moves from a hybrid homogeneous/heterogeneous environment to a newly-constructed homogeneous elementary/middle school. However, it is not clear that the CSF could expect the same magnitude of increase in enrolment in Sechelt. École Élémentaire Mer et Montagne opened with a much lower participation rate than exists at École Élémentaire du Pacifique presently. As a result, I will exercise caution when drawing inferences based on that school.

[2686] Taking into account all the surrounding circumstances, including that there are likely many children of non-rightsholders enrolled at École Élémentaire du Pacifique, I conclude that the best estimate of the number of children in Kindergarten through Grade 7 likely to take advantage of a Francophone programme in Sechelt in a newly-constructed homogeneous school is about 90

children, growth of about 28%. This reflects a 129% proxy participation rate. The participation rate will grow by just less than it did at École Élémentaire Mer et Montagne, reflecting that there is less room for enrolment growth at École Élémentaire du Pacifique because of the already-high participation rate. The growth also places enrolment at about where it peaked in 2007/08.

D. Entitlement

[2687] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[2688] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be the schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents. However, in some cases, where a minority language school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[2689] In this case, the CSF has drawn a very large catchment area that includes some rural communities where no École Élémentaire du Pacifique students actually reside. I find that the appropriate comparator schools are those in Halfmoon Bay, Sechelt, Davis Bay, Roberts Creek, Gibsons and Langdale, where the majority of École Élémentaire du Pacifique parents live: Langdale Elementary, Gibsons Elementary, Kinnikinnick Elementary, Cedar Grove Elementary, West Sechelt Elementary, Roberts Creek Community Elementary, Halfmoon Bay Elementary, Davis Bay Elementary and Madeira Park Elementary.

[2690] The École Élémentaire du Pacifique catchment area also includes Pender Harbour Elementary/Secondary, which is located past Madeira Park in Kleindale. That school appears to serve a remote, rural community at some distance from

École Élémentaire du Pacifique. Given that École Élémentaire du Pacifique is, and the CSF seeks, a K-7 school, and that no École Élémentaire du Pacifique students come from that community, I do not consider it to be an appropriate comparator school.

2. Location on the Sliding Scale

[2691] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[2692] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its assessment of whether it is pedagogically appropriate to operate a programme.

[2693] The plaintiffs submit that it is pedagogically and financially feasible for the CSF to operate a distinct, equivalent homogeneous school in Sechelt, pointing to relatively low operating capacities at some SD46-Sunshine Coast schools: Madeira Park Elementary (101 students), Davis Bay Elementary (135 students) and Langdale Elementary (135 students). The CSF also points to the low enrolment at some SD46-Sunshine Coast schools: Madeira Park Elementary (72 students); Langdale Elementary (93 students) and Pender Harbour Elementary (94 students).

[2694] The evidence shows that some of the comparator schools have enrolment comparable to the 90 students I expect would ultimately attend École Élémentaire du Pacifique with a newly-constructed school. Madeira Park Elementary has enrolment of 72 children, and Langdale Elementary has enrolment of 93 children.

This shows that it could be pedagogically appropriate and cost effective for the CSF to operate a small, homogeneous school in the area.

[2695] However, the evidence also reveals that all of the remaining schools in the area have much greater enrolment than does École Élémentaire du Pacifique. The average enrolment at the comparator schools is 187 students. Excluding Madeira Park Elementary and Langdale Elementary, enrolment ranges from 132 children to 317 children. It would not be practical or cost effective for the CSF to have facilities that are fully equivalent to schools of that size.

[2696] I also note that schools in the Sechelt area usually are built to accommodate more than 90 students. Only Madeira Park Elementary, with operating capacity for 101 students, has capacity close to what the CSF would require in Sechelt. The average operating capacity of schools in the area is 215 students.

[2697] Thus, I conclude that in light of its size and the deference owed to the CSF, the number of rightsholders in Sechelt falls near the high end of the sliding scale. Rightsholders are entitled to a homogeneous facility with facilities that are proportionate to those at most comparator schools, and substantively equivalent to the facilities at smaller elementary schools: Madeira Park Elementary and Langdale Elementary. This is only very slightly below the full equivalence threshold.

3. Global Educational Experience

[2698] The plaintiffs say that the global educational experience at École Élémentaire du Pacifique is substandard due to the quality of a number of its facilities: the layout and mixed uses of the Sechelt Elementary campus; an unattractive exterior appearance; maintenance problems; the main entrance; the administrative areas; small classrooms; old washrooms; insufficient learning assistance space; unsightly hallways; its library; its gymnasium; environmental factors; and long transportation times. I will weigh those factors together with others that are relevant to the educational experience.

a) Campus Arrangement

[2699] The Sechelt Elementary Campus is home to a number of buildings, including but not limited to those used by École Élémentaire du Pacifique.

[2700] On the northwest side of the Sechelt Elementary Campus, one finds École Élémentaire du Pacifique's buildings: the Trail Building, and three portables. École Élémentaire du Pacifique uses one portable for a Grade 6/7 division, and a second portable for student services and special education. École Élémentaire du Pacifique no longer leases the third portable.

[2701] There are two other classroom complexes on the Sechelt Elementary Campus. The largest building, at the centre of the campus, formerly housed Sechelt Elementary. Since Sechelt Elementary closed in 2010, it has been renovated and is used by SD46-Sunshine Coast for its Strong Start programme.

[2702] At the southwest side of the campus, there is a third stand-alone classroom complex known as the Sunshine Building. The CSF used that space before it moved to the Trail Building. It is now SD46-Sunshine Coast's alternative secondary school.

[2703] Two further buildings- a gymnasium and a library- are also located on the southwest side of the campus. École Élémentaire du Pacifique has exclusive use of the library, and shares the gymnasium with the alternative school.

[2704] Additionally, there is a large playfield to the southeast of campus. There is also a smaller playfield to the northeast of the campus, separated from the rest of campus by a forested area.

[2705] Relying on testimony from Mr. Miller in his discovery, the plaintiffs suggest that a campus arrangement is not common in British Columbia. However, the Province points out, based on the Joint Fact Finder's Report, that several SD46-Sunshine Coast Elementary schools are housed in multiple buildings. Gibsons Elementary, Davis Bay Elementary and, until 2010, Sechelt Elementary, also had

multiple buildings on their campuses. Seven of nine comparator schools have portable classrooms.

b) Space-Sharing Arrangement

[2706] Ms. Picard described some of the problems that arose when École du Pacifique shared a campus with Sechelt Elementary. She explained that the two schools shared recess time, making it difficult to supervise students and ensure École Élémentaire du Pacifique students spoke French rather than English. If the two programmes held recess at different times, the noise from the schoolyard proved distracting for students in class.

[2707] The problems are different now that École Élémentaire du Pacifique shares the campus with the alternative secondary school. Alternative school students, who are older, occasionally congregate near the portable used for École Élémentaire du Pacifique Grade 6/7 instruction, making École Élémentaire du Pacifique students uncomfortable. Secondary students would also smoke near the Trail Building. Now, SD46-Sunshine Coast students and École Élémentaire du Pacifique students are not allowed near one another's buildings, and École Élémentaire du Pacifique exercises tight supervision to avoid influence from the alternative school students.

[2708] The public address system operates for the entire campus. When used for SD46-Sunshine Coast programmes, it can interrupt École Élémentaire du Pacifique classes. As a result, school staff disengaged the system.

[2709] On the other hand, I also take into account that École Élémentaire du Pacifique has a fully homogeneous facility, exclusive use of the library, as well as several portables, all pursuant to a lease arrangement paid by the Province.

[2710] As I see it, École Élémentaire du Pacifique operates a predominantly homogeneous facility. The current concerns with space sharing relate to the presence of older children on site. It appears as though the problems have been resolved through discussions between the different groups using the site.

c) Appearance and Visibility

[2711] Mr. Allison first visited École Élémentaire du Pacifique with Mr. Bonnefoy in 2009. Mr. Allison found the Trail Building difficult to locate, as it is to the rear of the site, at some distance from the entrance to the campus. His impression was that the Trail Building had the worst appearance out of any buildings on the site.

[2712] Relying on parent affidavit evidence, the plaintiffs suggest that École Élémentaire du Pacifique is less attractive than the other schools in SD46-Sunshine Coast. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I attach no weight to those observations.

d) Age and FCI

[2713] The FCI score for École Élémentaire du Pacifique is 0.36. This is better than the district average of 0.41, and the second-best FCI score out of all the comparator schools. However, given that École Élémentaire du Pacifique is located on a campus, it is not clear that the FCI score applies exclusively to the Trail Building and the CSF's facilities. As such, I give the relative FCI scores no weight.

[2714] The evidence shows that the average age of École Élémentaire du Pacifique is 54.1 years. Three schools are older: Madeira Park Elementary, Gibsons Elementary and Davis Bay Elementary. The other six are newer. Overall, a reasonable parent would find that École Élémentaire du Pacifique is of a comparable age to the comparator schools.

[2715] According to Ms. Picard, there are not enough electrical outlets to charge all École Élémentaire du Pacifique's laptops. The breakers are "blown" from time to time. The plaintiffs therefore suggest that École Élémentaire du Pacifique does not meet a modern standard. However, given École Élémentaire du Pacifique's age relative to the majority schools, I do not find it to be any less modern than comparator schools.

e) Main Entrance, Administrative and Hallway Space

[2716] Ms. Picard explained that the entrance to the Trail Building is very crowded, with little space for students to assemble. Mr. Bonnefoy likewise observed that the Trail Building had no reception area to speak of.

[2717] Overall, the space in École Élémentaire du Pacifique's entranceway is larger, on both an absolute and on a per student basis, than that in most SD46-Sunshine Coast schools. École Élémentaire du Pacifique has 26 m² of space in its main entrance. Kinnikinnick Elementary, with more than quadruple École Élémentaire du Pacifique's enrolment, has about double École Élémentaire du Pacifique's space, with 50 m² of space in its entranceway. Halfmoon Bay Elementary has slightly more, but a comparable amount of space, at 28 m². On the other hand, West Sechelt Elementary, Roberts Creek Elementary, Cedar Grove Elementary, Davis Bay Elementary and Madeira Park Elementary have less space in their main entrance than does École Élémentaire du Pacifique.

[2718] Ms. Picard's office is near the entrance. She described it as small, with little storage and limited meeting space. Mr. Bonnefoy confirmed that the administrative area is small. Ms. Picard advised that she compensates by meeting parents in the student services portable, but that poses concerns about confidentiality.

[2719] École Élémentaire du Pacifique has 23 m² of administrative space, or 0.3 m² per student in 2014/15. On average, SD46-Sunshine Coast schools have 37 m² of administrative space, or 0.23 m² per student based on 2014/15 numbers. In SD46-Sunshine Coast, administrative areas range from a high of 63 m² (Kinnikinnick Elementary), to a low of 19.4 m² (Langdale Elementary). Langdale Elementary is the only SD46-Sunshine Coast school with less administrative space than École Élémentaire du Pacifique, although four of nine schools have less than 30 m² of space.

[2720] École Élémentaire du Pacifique also has a staff room, which Ms. Picard advised is too small to accommodate all staff at one time. Since student population

is correlated with class size and therefore school staff, space per student is a helpful gauge for how crowded a staff room may be. École Élémentaire du Pacifique has 26 m² of staff room space, or 0.34 m² per student. SD46-Sunshine Coast schools have, on average, 42 m² of staff space, or an average of 0.27 m² per student. At SD46-Sunshine Coast schools, the area for a staff room ranges from 53 m² (Kinnikinnick Elementary) to 18 m² (Davis Bay Elementary). Only Davis Bay Elementary has less absolute space in its staff room than École Élémentaire du Pacifique.

[2721] École Élémentaire du Pacifique also has an infirmary, but Ms. Picard described it as being so small that the cot in the room cannot be left open when not in use. The adjacent photocopy room is also used to store the school's art supplies and physical education equipment, making it very crowded.

[2722] Ms. Picard commented that the hallway at École Élémentaire du Pacifique is "covered in lockers", which are unattractive. The only comparative evidence cited by the plaintiffs comes from the parent affidavits; those impressions are not credible for the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims. The Joint Fact Finder's Report reported that École Élémentaire du Pacifique has 111 m² of hallway space: less than half the majority school average of 286 m² of hallway space. On a per student measure, École Élémentaire du Pacifique has 1.44 m² per student of hallways space: only slightly less than the majority school average of 1.6 m² of hallway space.

[2723] Overall, I find that École Élémentaire du Pacifique is at a slight disadvantage when it comes to administrative, staff and hallway space. However, in my view, these are not things on which reasonable rightsholder parents would base their enrolment decisions. Parents might place slightly more weight on the size of a front entrance given that it can feed into the first impression of a school. On that measure, École Élémentaire du Pacifique has a comparable front entrance to what is offered at majority schools

f) Classrooms

[2724] The Trail Building has four classrooms. One classroom is used as a preschool. The other three classrooms are used for a Kindergarten/Grade 1 split, a primary classroom and intermediate classroom, respectively. Students in the Grade 6/7 split are taught in a nearby portable.

[2725] Ms. Picard explained that the classrooms at École Élémentaire du Pacifique are large, with large windows and ample natural light. That said, the abundance of windows mean that there is no storage on the exterior walls of each classroom.

[2726] The average classroom size at École Élémentaire du Pacifique is 70.3 m². The average classrooms size in SD46-Sunshine Coast schools is 85.6 m². The classrooms at École Élémentaire du Pacifique are smaller than those at all the comparator schools. The average classroom sizes in SD46-Sunshine Coast schools range from 100.4 m² (Gibsons Elementary) to 79.6 m² (West Sechelt Elementary).

[2727] Since the class sizes in SD46-Sunshine Coast and École Élémentaire du Pacifique are comparable, the CSF is at a disadvantage because its classrooms are 81% of the average size of SD46-Sunshine Coast classrooms. This is particularly troublesome because École Élémentaire du Pacifique uses split classes and needs sufficient space to instruct multiple grade levels in the same class. A reasonable rightsholder parent would find the smaller classrooms to be unattractive when making enrolment decisions for their children.

[2728] École Élémentaire du Pacifique has no multipurpose room, but it does have a portable for student services and special education. Only half of the comparator schools have multipurpose rooms. The other small comparator schools, Langdale Elementary and Madeira Park Elementary, likewise lack multipurpose rooms.

g) Washrooms

[2729] Ms. Picard advised that there are two washrooms at École Élémentaire du Pacifique, each with three stalls. The Grade 6/7 portable lacks plumbing, so students must walk to the nearby Trail Building to use those facilities.

[2730] The plaintiffs rely on parent comparison affidavits to support the contention that the École Élémentaire du Pacifique washrooms are in worse condition than those in comparator schools. For the reasons already given in Chapter XVI, Introduction to Part 3, the Community Claims, I do not find this evidence credible, and I draw no conclusions about the quality of the washrooms.

h) Special Education

[2731] École Élémentaire du Pacifique has no purpose-built space for learning assistance in the Trail Building. Of the nine comparator schools, only Langdale Elementary has no learning assistance space. The other comparator schools have an average of 70 m² learning assistance space, ranging from a high of 149 m² (Kinnikinnick Elementary) to a low of 21.4 m² (Roberts Creek Community School).

[2732] École Élémentaire du Pacifique uses one of its two portables for learning assistance. The portable has been renovated to create several distinct spaces for learning assistance, Francisation, counselling and speech language therapy. Additionally, the École Élémentaire du Pacifique counsellor uses an office in the library for confidential discussions. A table in the hallway of the Trail Building is often used for assessments.

[2733] The evidence reveals that École Élémentaire du Pacifique has adequate space for student services because it uses a portable to provide those services, which SD46-Sunshine Coast schools do not. When the portable is taken into account, École Élémentaire du Pacifique has 89 m² of special education space, or 1.15 m² of space per student. École Élémentaire du Pacifique could also lease the vacant portable at École Élémentaire du Pacifique again for special education again if it were to choose to do so. The fact that the CSF returned that portable to SD48-Sea-to-Sky shows that École Élémentaire du Pacifique's space is sufficient to meet its needs.

[2734] However, a reasonable rightsholder parent might find it problematic that their child would have to leave the building to access student services and learning assistance.

i) Library

[2735] The library at École Élémentaire du Pacifique is located at the opposite end of the Sechelt Elementary Campus from the Trail Building. Ms. Picard complained that students lose instruction time travelling between buildings.

[2736] Mr. Bonnefoy recalled that when École Élémentaire du Pacifique shared the campus with Sechelt Elementary, the CSF's library materials were stored on the library stage and had to be moved for performances.

[2737] Now, École du Pacifique has exclusive use of the library. It has some natural light from some skylights. École Élémentaire du Pacifique uses the stage for storage, and a kitchen for École Élémentaire du Pacifique's after-school care programme. The library is large enough to host some assemblies and meetings with parents. It is not large enough to host the entire Francophone community, so École Élémentaire du Pacifique rents space elsewhere for cultural events.

[2738] The École Élémentaire du Pacifique library is 161 m². Libraries at comparator schools range in size from 80 m² (Davis Bay Elementary) to a high of 188 m² (Halfmoon Bay Elementary, which includes their computer lab). École Élémentaire du Pacifique has the third-largest library. It is also 123% of the average library size in the comparator schools, which is 131 m².

[2739] Overall, I find that École Élémentaire du Pacifique has an adequate library. The only problem with the library is the fact that it is located outside the Trail Building.

j) Gymnasium

[2740] Ms. Picard explained that the gymnasium at École Élémentaire du Pacifique is of average size, with washrooms but no showers. There is no space for an

audience for sporting events. The gymnasium is also shared, first with Sechelt Elementary, and now with SD46-Sunshine Coast's alternative school and Strong Start programmes.

[2741] Dr. Ardanaz explained that when École Élémentaire du Pacifique used the Sunshine Building, the CSF had no problems negotiating for use of the gymnasium. Scheduling physical education time became more challenging after École Élémentaire du Pacifique moved to the Trail Building, but he conceded that sharing the gymnasium was "never really a problem".

[2742] Ms. Picard advised that École du Pacifique has more access to the gymnasium now than it did when it shared the campus with Sechelt Elementary. Ms. Picard is given a gymnasium schedule after SD46-Sunshine Coast has finished scheduling its activities. She finds that there is limited ability for her to schedule physical education in the afternoon. To compensate, École du Pacifique arranges structured afternoon physical education outdoors when the weather permits.

[2743] Ms. Picard also advised that the gymnasium, like the library, is at the opposite end of the Sechelt Elementary Campus from the Trail Building. Ms. Picard explained that it can take students in younger grades five minutes or more to walk there. She stated that trips to the gymnasium are therefore scheduled immediately after lunch to minimize lost instruction time. This seems to contradict her assertion there is little time for physical education in the afternoons.

[2744] The gymnasium used by École Élémentaire du Pacifique is 365 m². The gymnasiums at SD46-Sunshine Coast schools range in size from 159 m² (Madeira Park Elementary) to 384 m² (Halfmoon Bay Elementary). The average size of an SD46-Sunshine Coast gymnasium is 337 m², making the gymnasium used by École Élémentaire du Pacifique 108% of the average size of an SD46-Sunshine Coast gymnasium. Five comparator schools have smaller gymnasiums, and four have smaller.

[2745] Overall, while I am satisfied that the gymnasium at École Élémentaire du Pacifique is of an appropriate size, a reasonable rightsholder parent might find it problematic that the gymnasium is not located inside the school.

k) Environmental Factors

[2746] According to Ms. Picard, the heating system at École Élémentaire du Pacifique is noisy and disruptive. To remedy the problem, Ms. Picard turns the heating system off when students are in class, and back on again when they are on breaks.

[2747] The Grades 6/7 portable has some ventilation problems, with one area much warmer than the rest.

[2748] There is no credible evidence about noise at the comparator schools. However, the defendants point out that the HVAC system at École Élémentaire du Pacifique is similar to the system in six of nine comparator schools.

[2749] I draw no conclusions about the problems with noise and ventilation at École Élémentaire du Pacifique.

l) Transportation

[2750] École Élémentaire du Pacifique is in the centre of the CSF's Sunshine Coast catchment area. The catchment area encompasses a number of smaller communities. Ms. Picard explained that of the 77 students who attend the elementary school, one third live to the north, one third live in the centre (near Sechelt), and the last third live to the south, in the Gibsons area. Mr. Bonnefoy testified that École Élémentaire du Pacifique is in a good location for transportation purposes.

[2751] Since 2010/11, the CSF has contracted with SD46-Sunshine Coast to provide transportation services on the Sunshine Coast. Ms. Picard advised that École Élémentaire du Pacifique students are co-mingled with SD46-Sunshine Coast students on the buses. Some of the bus routes are complex. Ms. Picard explained

that some students take the bus from Lower Gibsons and Langdale to a secondary school, then board a second bus to École Élémentaire du Pacifique.

[2752] All École Élémentaire du Pacifique students are transported to school by bus. Fewer SD46-Sunshine Coast students are transported by bus. The closest comparator is Kinnikinnick Elementary, where 85% of students are transported to school by bus. At the opposite extremity, only 4% of students at Madeira Park Elementary take the bus to school. There is no evidence in the Joint Fact Finder's Report concerning bus ride times at comparator schools.

[2753] I find that almost all École Élémentaire du Pacifique students live closer to a majority school than the nearest majority school. This is to be expected given the small number of children of rightsholders in the area, and their dispersion through many small rural communities. While the numbers are together sufficiently large to warrant a homogeneous facility, those children are spread across a wide geographic distribution. Long transportation times are a reality for École Élémentaire du Pacifique students, and would be likely to deter some rightsholder parents from sending their children to École Élémentaire du Pacifique.

m) Other Factors

i. Francophone Experience

[2754] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I explain in Chapter XV, Linguistic and Cultural Programming. In Sechelt, there is no elementary-level French immersion, which makes École Élémentaire du Pacifique a particularly attractive option for rightsholders.

ii. Class Sizes

[2755] Overall, class sizes at École Élémentaire du Pacifique are comparable to, but generally smaller than, those in SD46-Sunshine Coast schools. The evidence shows that École Élémentaire du Pacifique has average class sizes of 21 children in

Kindergarten, 20 children in Grades 1-3 and 19 children in Grades 4-7. SD46-Sunshine Coast average Kindergarten classes are smaller than those at École Élémentaire du Pacifique, averaging 19 students. But, SD46-Sunshine Coast has the same class sizes for Grades 1-3 (20 students) and smaller class sizes for Grades 4-7 (24 students). Overall, a reasonable parent would find a small advantage to the class sizes at École Élémentaire du Pacifique as compared to those at SD46-Sunshine Coast schools.

iii. Student to Staff Ratios

[2756] There are likewise small differences between the student-to-teacher ratios in SD46-Sunshine Coast and for the CSF. Both have between 15 and 16 students to one teacher. The CSF's student to special needs teacher ratio is much better, with 4.44 special needs students to one teacher as compared to 13 teachers to one student at SD46-Sunshine Coast.

iv. Graduation Rates

[2757] The CSF's six-year completion rate is about 95%, while SD46-Sunshine Coast's is 80%. The CSF's first-time Grade 12 graduation rate is 88%, while that of SD46-Sunshine Coast is 83%. These are differences that would be of small importance to a reasonable rightsholder parent.

v. Technology

[2758] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students.

[2759] In SD46-Sunshine Coast, most schools have laptops for their classes located on decentralized carts rather than in a central computer lab. This means that teachers are likely able to integrate technology into their classroom work. However, laptops are not available on a one-laptop-to-one-child basis. They do not appear to have tablet computers. Thus, I conclude that technology is better

integrated at École Élémentaire du Pacifique than it is in the comparator schools. This is something that a reasonable rightsholder parent would find very attractive.

vi. Capacity Utilization

[2760] The level of crowding in a school would be of interest to a reasonable rightsholder parent.

[2761] Mr. Frith did not calculate École Élémentaire du Pacifique's square metres per student or operating capacity because that information was not available in the Ministry database.

[2762] I am able to use the formula I explained in Chapter XVI, Introduction to Part 3, the Community Claims, to calculate École Élémentaire du Pacifique's operating capacity. That formula works as follows: Kindergarten enrolment and classrooms are assigned operating capacity for 19 students. The remaining classrooms are assigned a weighted average enrolment based on the grade structure of the school. For most grade structures, the weighted average operating capacity is 23.29 students. The operating capacities for each room are added together to arrive at operating capacity for the entire facility.

[2763] École Élémentaire du Pacifique has one kindergarten classroom (19 students) and three elementary classrooms (23.29 students). Thus, École Élémentaire du Pacifique's operating capacity is about 89 students. I exclude from this capacity École Élémentaire du Pacifique's portables, per Ministry practice.

[2764] École Élémentaire du Pacifique's 2014/15 capacity utilization was average. In 2014/15, École Élémentaire du Pacifique was operating at 87% of its capacity. Capacity utilization at SD46-Sunshine Coast elementary schools ranged from a low of 47% (Kinnikinnick Elementary) to a high of 124% (West Sechelt Elementary). Average capacity utilization at SD46-Sunshine Coast schools in 2014/15 was 91%. Four schools had higher capacity utilization than École Élémentaire du Pacifique, and five had lower.

vii. Early Childhood Programming

[2765] Fewer than half of the comparator schools offer Strong Start. Ms. Marsan gave evidence about the preschool at École Élémentaire du Pacifique. She advised that the programme did not go ahead when parents first approached her about the idea in 2007. The programme eventually opened in 2011. Ms. Picard advised that sixteen children age three to five are in the class. Children are taught basic French skills. They are also invited to all school assemblies. Their parents have representatives on the Parent Advisory Council. École Élémentaire du Pacifique primary students have a “buddy system” with the preschool students.

[2766] École Élémentaire du Pacifique offers a preschool programme. It does not offer a Strong Start programme. The preschool programme is one that rightsholder parents would find very attractive when making enrolment decisions for their young children.

n) Analysis

[2767] The equivalence and proportionality analysis take the same perspective. They adopt a substantive equivalence analysis, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience.

[2768] The plaintiffs argue that École Élémentaire du Pacifique facilities have significant functional problems, compounded by long travel times. They say there is no evidence that the deficiencies are counterbalanced by the École Élémentaire du Pacifique programme or extra-curricular offerings. In their submission, given the “vastly superior facilities” available at SD46-Sunshine Coast schools, reasonable parents are discouraged from sending their children to École Élémentaire du Pacifique.

[2769] In my view, in most respects, the facilities at École Élémentaire du Pacifique are able to offer a comparable global educational experience majority schools, particularly the small ones: Madeira Park Elementary and Langdale Elementary.

When looking at the global educational experience, a reasonable rightsholder parent would find that École Élémentaire du Pacifique has facilities of a comparable age and state of repair, with a similar level of crowding, and a similar student-teacher ratio to the programmes at comparator schools.

[2770] Reasonable rightsholder parents would also find a few aspects of the École Élémentaire du Pacifique programme very attractive: among them, the sole opportunity for a Francophone education, the school's early childhood programming, and the integration of technology into the classroom.

[2771] On the other hand, reasonable rightsholder parents would find that students were housed in smaller classrooms than the majority. They would also have to travel between buildings to use the gymnasium, library and for student services. Moreover, their children would most likely have to travel to school by bus and might not have to do so to attend a majority school.

[2772] I conclude that a reasonable rightsholder parent is likely to find that the global educational experience at École Élémentaire du Pacifique is not equivalent to that afforded to the majority at smaller comparator schools. However, the rights breach is not a severe one. The amenities at École Élémentaire du Pacifique are generally adequate for the school's needs; many of the deficiencies complained of amount to inconveniences.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2773] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of École Élémentaire du Pacifique and the dealings of the CSF, SD46-Sunshine Coast and the Ministry in connection with it.

[2774] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the

Province's capital funding system. With respect to Sechelt, I make findings that are of particular relevance to Chapter XXXV, Leases, Chapter XXXVI, Expansion Projects and the Enrolment Driver and Chapter XXXVIII, Site and School Acquisition Projects.

1. The CSF's Capital Plan Requests

[2775] When the CSF assumed jurisdiction in the sunshine coast region, SD46-Sunshine Coast operated a Programme Cadre on the Sechelt Elementary Campus.

[2776] The CSF's earliest capital project requests in Sechelt focused on acquiring and renovating a surplus school. That project was the CSF's fourteenth-highest priority in its June 1998 Capital Plan Submission for 1998/99 and its fifth-highest priority in its September 1998 Capital Plan Submission for 1999/00.

[2777] The CSF's planning for Sechelt changed with its June 1999 Capital Plan Submission for 2000/01. That year, and again in its June 2000 Capital Plan Submission for 2001/02, the CSF asked for \$225,000 to renovate the Trail Building. The CSF did not prioritize that project against other requests. In its June 2001 Capital Plan Submission for 2002/03, the CSF did not make any capital project requests for Sechelt.

[2778] The CSF began asking to acquire an asset from SD46-Sunshine Coast (the "Sechelt Acquisition Project") again with its September 2002 Capital Plan Submission for 2003/04. That project was unranked in the September 2002 request. Following that, the CSF requested the Sechelt Acquisition Project in each of the October 2003 Capital Plan Submission for 2004/05 (twelfth-highest priority), the October 2004 Capital Plan Submission for 2005/06 (fourth-highest priority), the October 2005 Capital Plan Submission for 2006/07 (second-highest priority), the November 2006 Revised Capital Plan Submission for 2007/08 (fifth-highest priority) and the October 2007 Capital Plan Submission for 2008/09 (sixth-highest priority). Each year, the CSF asked for \$4.5 million for the project.

[2779] The CSF moved to ward-based capital planning with its May 2009 Capital Plan Submission for 2009/10. That year, the CSF asked to acquire the north half of the former Sechelt Elementary Campus (an empty field separated from the rest of campus by a treed area) and to build a new elementary school on that site. That project was the CSF's highest-priority project in the South Coast ward, and the CSF sought accelerated funding for it in the first year of the capital plan.

[2780] The CSF's planning changed in 2010, concurrently with Mr. Allison's first capital plan as Secretary-Treasurer and the start of this litigation. In its June 2010 Capital Plan Submission for 2010/11, the CSF asked for the Sechelt Elementary Project. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[2781] The Ministry did not request capital project submissions in 2011. In the CSF's November 2012 Capital Plan Submission for 2012/13 and its September 2013 Capital Plan Submission for 2013/14, the CSF requested the same project for Sechelt, with the same priority, as it had in 2010.

[2782] In support of its request for the Sechelt Elementary Project in 2013, the CSF submitted an In-House PIR, which is dated September 2013. In the PIR, the CSF identified four potential sites.

[2783] In the Echo Report for the September 2013 Capital Plan Submission for 2013/14, the Sechelt Elementary Project is ranked NPIR. Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in that PIR, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school.

[2784] The CSF submitted a revised In-House PIR for Sechelt dated October 2014. The CSF also indicated it had engaged Mr. McRae to provide ten-year cohort retention enrolment projections. Mr. Allison provided the Ministry with those projections in a subsequent email dated October 27, 2014. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the universe of potential students.

[2785] As of the conclusion of evidence in August 2015, the Province had not supported any capital projects for the CSF in Sechelt.

2. Leasing Arrangement with SD46-Sunshine Coast

[2786] École Élémentaire du Pacifique operates out of space leased from SD46-Sunshine Coast. During Mr. Bonnefoy's tenure as Secretary-Treasurer, the CSF always had year-to-year leases. He never attempted to negotiate a longer-term lease because the CSF hoped to build its own school.

[2787] From 1989 until the 1999/00 school year, École Élémentaire du Pacifique was housed in the Sunshine Building. Dr. Ardanaz and the CSF parents in the area believed that the Sunshine Building was ideally suited to École Élémentaire du Pacifique, as it was an appropriate size and in close proximity to the library and gymnasium on the campus.

[2788] As the 1999/00 school year approached, the CSF was told that École Élémentaire du Pacifique would have to leave the Sunshine Building, but could relocate to the Trail Building. Dr. Ardanaz explained that both the CSF and École Élémentaire du Pacifique parents attempted to convince SD46-Sunshine Coast to allow it to continue to use the Sunshine Building, but SD46-Sunshine Coast officials refused.

[2789] So, École Élémentaire du Pacifique moved to the Trail Building for the 1999/00 school year. Dr. Ardanaz recalled that the Trail Building was in much worse condition than the Sunshine Building, and appeared to have been abandoned. He recalled the Trail Building was dilapidated, had poor air quality, and a reputation

among children for having a mice infestation. He stated that the CSF faced a “severe” reaction from parents.

[2790] However, given that enrolment at École Élémentaire du Pacifique continued to increase and peaked at 100 students in 2007/08, the reaction was not that severe, and definitely not prolonged. Indeed, given École Élémentaire du Pacifique’s enrolment increases, the smaller Sunshine Building would not have been able to accommodate École Élémentaire du Pacifique in the long term. The Trail Building was better suited to its growing enrolment.

[2791] As enrolment increased, the CSF needed more space. At one point, École Élémentaire du Pacifique leased a third portable on the Sechelt Elementary campus. When first asked, SD46-Sunshine Coast refused the CSF’s request to lease that portable, so the CSF asked to place its own portable on the site. SD46-Sunshine Coast approved that request in March 2008, then withdrew its approval in May 2008. In the end, the CSF was allowed to lease 50% of the pre-existing portable. The CSF returned it to SD48-Sea-to-Sky a few years later, as its enrolment began to decline following its peak.

[2792] Pursuant to the lease arrangement between SD46-Sunshine Coast and the CSF, SD46-Sunshine Coast is responsible for maintenance and janitorial services at École Élémentaire du Pacifique.

[2793] According to Ms. Picard, sometimes École Élémentaire du Pacifique has to wait for its maintenance projects to be completed. École Élémentaire du Pacifique waited 35 days before a plugged toilet was fixed, and 87 days to receive a copy of a key. There was a 308-day wait for an emergency light and fire extinguisher needed to respond to a fire inspection. At the time she testified, Ms. Picard had been waiting 284 days for windows to be placed in some interior doors. However, Ms. Picard never raised wait times as a concern with either SD46-Sunshine Coast or the CSF. She also advised that SD46-Sunshine Coast tries to accommodate urgent requests before students arrive to school.

[2794] Ms. Picard reported that there is one janitor assigned to École Élémentaire du Pacifique. Ms. Picard is not satisfied with the quality of her work, but SD46-Sunshine Coast cannot accommodate the request for a different janitor.

[2795] Mr. Bonnefoy explained that in 2004 and 2005, the Trail Building appeared old, as did the portables the CSF used. At the same time, the Sechelt Elementary Building and other buildings used by SD46-Sunshine Coast on the same campus had received recent interior and exterior renovations. SD46-Sunshine Coast did not renovate the CSF's buildings at the same time it renovated its own. I note, however, that the CSF received AFG funding for the students enrolled in the Trail Building; SD46-Sunshine Coast did not. The CSF nevertheless refused to spend its AFG funds on École Élémentaire du Pacifique because it preferred not to spend its funds on facilities it did not own.

3. CSF's Efforts to Find a Long-Term Space in Sechelt

[2796] The CSF only began searching in earnest for a new site for École Élémentaire du Pacifique after Mr. Bonnefoy became Secretary-Treasurer in 2004. Mr. Bonnefoy suggested to SD46-Sunshine Coast and Ministry staff that the CSF might acquire the separate field north of the Sechelt Elementary campus and use it to build a new school. SD46-Sunshine Coast staff were not interested in that idea.

[2797] Mr. Bonnefoy also looked at Davis Bay Elementary, which it thought might be declared surplus, and Kinnikinnick Elementary, a larger school with low enrolment. The CSF chose not to move Kinnikinnick Elementary because it would have resulted in a fully heterogeneous school, and was not ideal for transportation purposes.

[2798] When Mr. Allison became Secretary-Treasurer in 2010, he, too, considered Davis Bay Elementary. He met with the Secretary-Treasurer for SD46-Sunshine Coast, who committed to keeping Mr. Allison informed of any decisions taken in connection with the school. In the end, Davis Bay Elementary was not closed.

[2799] As he researched potential sites in the Sechelt area, Mr. Allison came across a document purporting to be a SD46-Sunshine Coast facilities plan from December 2010. That facilities plan referred to a 4.7-acre site known as Selma Park, and indicated that SD46-Sunshine Coast held it by way of a Crown grant. The facilities plan also suggested SD46-Sunshine Coast considered Selma Park to be surplus. I ruled that the statement that Selma Park was surplus and held by Crown grant was hearsay, and not admissible for truth. I allowed it to be admitted only for narrative purposes to explain Mr. Allison's communications to the Ministry and SD46-Sunshine Coast.

[2800] On December 23, 2013, Mr. Allison wrote to Mr. Nicholas Weswick, Secretary-Treasurer of SD46-Sunshine Coast, and explained that the CSF was interested in obtaining Selma Park to build a new elementary school. He asked SD46-Sunshine Coast to abandon the Crown grant so it would revert to the Province and be available for the CSF.

[2801] Mr. Allison followed up his request to Mr. Weswick with a Positioning Letter to Mr. Stewart, who was then the Acting Assistant Deputy Minister of Education. Mr. Allison requested the Ministry intervene in the matter forthwith. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I only take from this letter that the CSF made that request.

[2802] Mr. Stewart responded that SD46-Sunshine Coast had not advised the Ministry that Selma Park was surplus to SD46-Sunshine Coast's needs. He suggested the Ministry would make inquiries with SD46-Sunshine Coast, and inform the CSF of the outcome.

[2803] Mr. Weswick replied to Mr. Allison on January 17, 2014, copying the Ministry. He stated that SD46-Sunshine Coast continued to require Selma Park for educational purposes. He also asked Mr. Allison to contact him to discuss other properties that SD46-Sunshine Coast might transfer to the CSF.

[2804] Mr. Stewart's evidence was that the Ministry would have considered SD46-Sunshine Coast's view to be the driving factor around any decision to press for the acquisition of Selma Park by the CSF. The Ministry did not investigate the statement that Selma Park was still required by SD46-Sunshine Coast.

[2805] Six months later, in July 2014, Mr. Allison replied to Mr. Weswick's letter, informing him about the CSF's site needs. Mr. Allison could not reconcile his delayed response with his position that the CSF's needs in Sechelt were "urgent". He merely noted the CSF had many top priorities at that time.

[2806] In a subsequent conversation, Mr. Weswick suggested subdividing the vacant north end of the Sechelt Elementary Campus to develop that area for the CSF. This was the same proposition that Mr. Bonnefoy had pursued, with no success, years earlier. Mr. Weswick had not discussed the idea with the SD46-Sunshine Coast Board of Trustees, but proposed he would bring it up at their next meeting.

[2807] Mr. Allison asked Mr. Weswick for the Board's response in September 2014. In a telephone conversation, Mr. Weswick told Mr. Allison that the Board of Trustees was not in favour of subdividing and disposing of a portion of the site.

[2808] Despite Mr. Weswick's negative response, Mr. Allison sent a Positioning Letter to Assistant Deputy Minister Fayad, asking the Ministry to announce funding for the CSF to purchase a portion of Sechelt Elementary to construct a new school. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made. In her response, Assistant Deputy Minister Fayad stated that the Minister could not consider the request until SD46-Sunshine Coast resolved to dispose of the site.

[2809] Mr. Palmer reported Mr. Allison and Mr. Weswick approached him about the subdivision and sale again at a BCASBO conference. However, he had not acted on the possibility because he was in the middle of his evidence when he was approached.

4. Conclusions

[2810] This CSF's relationship with SD46-Sunshine Coast is not its best with its majority board landlords. École Élémentaire du Pacifique was evicted from the Sunshine Building and moved to a less desirable building in 1999/00. SD46-Sunshine Coast likewise initially refused to lease a half portable to the CSF. The CSF has proven vulnerable to decisions taken by SD46-Sunshine Coast concerning its own facilities.

[2811] SD46-Sunshine Coast also prioritized renovations to its own facilities over renovations to the Trail Building. However, the CSF has not pursued tenant improvements despite receiving AFG funds for that purpose.

[2812] While École Élémentaire du Pacifique faces some long wait times for some maintenance work pursuant to the leasing arrangement, urgent matters are addressed promptly. The wait times are not so severe that Ms. Picard has raised the issue with SD46-Sunshine Coast. It is also not clear that wait times would be any less severe if the CSF managed maintenance itself. Indeed, there is some evidence that CSF-owned schools like École Élémentaire Anne-Hébert (Vancouver (East)) sometimes face long wait times for maintenance work.

[2813] I also conclude that the Ministry's capital funding system has not responded to the CSF's needs in Sechelt. The CSF has been requesting a capital project in Sechelt since 2002. After 2004, it was always in the top six priority projects, and was the second-highest priority project in the October 2005 Capital Plan Submission for 2006/07.

[2814] Of course, it must also be kept in mind that while there was never a credible site for the CSF to acquire in Sechelt. While the idea was there, and the CSF made efforts to find a site, none was made available by SD46-Sunshine Coast.

[2815] As I explain in more detail in Chapter XXXVI, Expansion Projects and the Enrolment Driver, in about 2005, the Ministry passed over the CSF's proposed project in Sechelt. The Minister supported two CSF projects that year (in Comox

and Campbell River). The Minister also supported several SD36-Surrey and SD75-Mission projects ahead of the CSF's proposed Sechelt project because SD36-Surrey was able to contribute some Local or Restricted Capital Reserve to those projects. It did so even though the proposed Sechelt project had a better Space Rank Score than the proposed majority school projects. Thus, in that instance, the fact that the CSF had to compete with majority school boards that were able to bring more Local or Restricted Capital Reserve to the table materially contributed to the current situation in Sechelt.

[2816] Thereafter, the Ministry did not fund any Expansion Projects between 2005 and 2011. In my view, given that the CSF continued to request projects in that period, and that the Sechelt project was so close to being approved in 2005, the lack of funds for Expansion Projects between 2005 and 2011 also materially contributed to the current situation.

[2817] The situation also illustrates the Minister's lack of power to assist the CSF. When the CSF was interested in pursuing Selma Park, it sought assistance from the Ministry. The Ministry did not assist because it had no power to do so without SD46-Sunshine Coast first making a decision to declare the site surplus.

[2818] Thus, the situation in Sechelt illustrates how the capital funding system's lack of mechanism for the Ministry to exercise power over school board assets, coupled with a lack of funding over time, have disadvantaged the CSF.

F. Justification

[2819] I conclude that a reasonable rightsholder parent would conclude that the global educational experience at École Élémentaire du Pacifique is substandard. That breach is caused by two aspects of the Province's funding regime: the policy by which the CSF's capital project proposals are compared against project approvals by majority boards (who have greater ability to contribute Local and Restricted Capital to projects), and the lack of capital funding for Expansion Projects between 2005 and 2011. The remaining question is whether the breach is justified.

[2820] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". It is my view that the particular infringing measure that weighs the CSF's proposed Expansion Projects against those requested by the majority is likewise intended to further the fair and rational allocation of public funds, as was the lack of Expansion Projects during a period of declining enrolment.

[2821] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I am satisfied there is a rational connection between the fair and rational allocation of public funds and a system that compares the CSF's needs to that of the majority. By weighing the CSF's needs against other needs for space across the Province, the Province seeks to ensure that all districts are treated equitably and that funds are spent where they are most needed. I also see a rational connection between fairly and rationally expending public funds and not building any new spaces for students between 2005 and 2011. Given that the Province had constructed tens of thousands of new spaces for students between the 1990s and 2005, it was rational to decide not to devote further public funds to that purpose when enrolment across the Province was declining.

[2822] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[2823] The extent to which the measure minimally impairs the plaintiffs' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. I find that the fact that the CSF's project requests were weighed against those of SD36-Surrey and SD75-Mission deprived rightsholders in Sechelt of a new site for a school in 2005. The Minister was dealing with limited public funds, and was allocating them between districts to achieve the public good of education. As I have noted, it is entitled to some deference in how it went about doing so. At that time, enrolment at École Élémentaire du Pacifique was only about 90 or 95 students, and students had access to a homogeneous school on a heterogeneous campus. The Ministry funded that lease. The CSF was also being provided with AFG funding that it could have put toward tenant improvements at École Élémentaire du Pacifique, but did not. The Minister approved funding for CSF expansion in Comox and Campbell River, with the CSF's agreement. Given those circumstances and the deference owed to government, at that time the comparison between the CSF's needs and that of the majority impaired the s. 23 rights of Sechelt rightsholders as little as possible while still allocating limited public funds.

[2824] Then, a lack of further funding for Expansion Projects deprived rightsholders of a new school between 2005 and 2011. In my view, the failure to support any Expansion Projects for the CSF in that period, to the detriment of the position of rightsholders in Sechelt, was not minimally impairing. The Province essentially implemented a blanket prohibition of Expansion Projects. It did not devote any funds to remedying the CSF's position or need for Expansion Projects in Sechelt or elsewhere. In those circumstances, it is entitled to less deference. In my view, the Ministry could have achieved its goal of fairly and rationally allocating limited public funds while still funding CSF Expansion Projects in some limited way. The Minister was not carefully weighing which capital projects ought to go forward and which should not. The Province simply did not fund any new Expansion Projects, at the expense of its constitutional obligations. Here, the Province fails the s. 1 justification test at the minimal impairment stage.

[2825] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[2826] With reference to the situation in Sechelt, the salutary effects of weighing the CSF's proposed Sechelt project against those of the majority include that the Ministry was able to move forward with three projects for SD36-Surrey and SD75-Mission. Doing so allowed it to create more absolute spaces for students, because SD36-Surrey and SD75-Mission could contribute some Local and Restricted Capital Reserve to those projects. During the Expansion Project funding freeze between 2005 and 2011 the salutary effects are primarily cost savings-- the savings the Ministry was able to generate by not funding the CSF's project requests for Sechelt. The CSF's proposed project is currently estimated to cost about \$9 million (not including site acquisition). Due to rampant construction cost escalation since 2009, the cost savings in 2005 would have been less than that.

[2827] The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[2828] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the

replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[2829] The deleterious effects, at the local level, concern the inferior educational experience afforded to the minority. In Sechelt, CSF students are educated in facilities that are inferior to majority schools: They endure long transportation times, have very small classrooms, are located on a heterogeneous campus and lose instruction time moving between buildings. Those deficiencies are not outweighed by the excellent Francophone programming, its highly advanced technology programme and its attractive playfields. However, in this case, the breach is a relatively minor one. Further, given the very high participation rate in Sechelt, the CSF is not losing out on significant enrolment.

[2830] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[2831] Weighing those effects together, I find that the deleterious effects outweigh the salutary effects. The cost savings to the Ministry of remedying the situation does not justify the deleterious effects on the global educational experience for rightsholders. While the system as a whole has resulted in generally fair outcomes

for the CSF, the CSF is at the bottom of the range. The benefits do not outweigh the poor global educational experience afforded to rightsholders' children in the area. I therefore conclude that the Province has failed to show proportionate effects.

G. Remedy

[2832] The plaintiffs suggest that the appropriate and just remedy is to construct a new K-7 school for the CSF in Sechelt. The plaintiffs ask that all or part of the Sechelt Elementary Campus or Selma Park be transferred to the CSF, and for an order that the Minister approve capital funds for the construction of a new school. In the plaintiffs' submission, that remedy would contribute to Vitality in Sechelt. They also stress the importance of granting the remedies without delay.

[2833] I address my approach to remedies in Chapter X, Remedies. There, I explain that I do not consider that the Minister has the power to order the transfer of Selma Park or Sechelt Elementary to the CSF as the plaintiffs suggest that it does.

[2834] As I outline in Chapter X, Remedies, the most appropriate and just remedy for the plaintiffs' Community Claims will typically be a declaration of the positive rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches. In this case, I do not consider a newly constructed school to be essential to remedying the CSF's situation in Sechelt. Certainly, that would be one way of remedying the relatively minor breach; however, such a remedy might not be proportionate given the other needs across the Province. The situation could be remedied by capital upgrades to the building currently housing École Élémentaire du Pacifique.

[2835] In the circumstances, I find that an appropriate remedy is to issue declaration. I declare that:

- a) Rightsholders under section 23 of the *Charter* living in the catchment area of École Élémentaire du Pacifique are entitled to have their elementary-age children (age 5-13) receive minority language education in

homogeneous facilities with space for 90 children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.

- b) The school facility presently housing École Élémentaire du Pacifique does not allow the CSF to offer a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.

[2836] The CSF and the Ministry will need to work together to ensure that the needs of Sechelt rightsholders are met. As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[2837] Further note also that Mr. Allison has stated he does not want to apply the CSF's AFG funds to do any more than the most minor repairs to facilities the CSF leases. , given that this and other *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[2838] As I see it, the CSF must use its AFG to fund necessary upgrades at École Élémentaire du Pacifique. Such obvious cosmetic needs such as painting, flooring, and toilets are appropriately within the means of the CSF.

[2839] The plaintiffs also argue that *Charter* damages ought to be granted concerning the breach in Sechelt. I describe my approach to *Charter* damages in

Chapter X, Remedies. There, I explain that in many instances where the government is acting in good faith pursuant to an unconstitutional law or policy, countervailing factors concerning the “public good” will tend to negate the plaintiffs’ claims for *Charter* damages. This ensures that government actors will continue to enforce laws without fear of retribution if they are later found to be invalid.

[2840] In this instance, I am satisfied that the Minister was always acting in good faith in connection when implementing its capital funding system in connection with the CSF’s needs in Sechelt. There are many competing needs for capital projects in the Province. Awarding damages in this instance could have a chilling effect by leading Government to allocate a disproportionate amount of funding to the CSF out of fear of retribution. I do not consider *Charter* damages to be an appropriate remedy.

H. Summary

[2841] I conclude that the best estimate of the number of children in Kindergarten through Grade 7 likely to take advantage of a minority language programme in Sechelt in a newly-constructed homogeneous school is about 90 children. That number falls just below the high threshold of the sliding scale. Rightsholders are entitled to a homogeneous facility with facilities that are proportionate to what is available at most comparator schools, and substantively equivalent to the facilities at smaller elementary schools, Madeira Park Elementary and Langdale Elementary.

[2842] A reasonable rightsholder parent is likely to find that the global educational experience at École Élémentaire du Pacifique is substandard compared to majority comparator schools. However, the rights breach is not a severe one. The amenities at École Élémentaire du Pacifique are generally adequate for the school’s needs; many of the deficiencies complained of amount to inconveniences. It is not the type of breach that requires a newly-constructed homogeneous school as a remedy.

[2843] In my view, the defendants have not shown that the breach is justified: the decision not to fund any Expansion Projects between 2005 and 2011 was not reasonably tailored to the objective of ensuring the fair and rational allocation of

public funds while still meeting the Province's constitutional obligations. Further, the deleterious and salutary effects of the measures are not proportionate.

[2844] I find that declarations are the most appropriate remedy. However, the Province will also be required to prepare a separate Capital Envelope to respond to this and other CSF needs across the Province.

XXI. ÉCOLE ÉLÉMENTAIRE DES SENTIERS-ALPINS (NELSON)

[2845] Nelson is located in the West Kootenay region of British Columbia. In the Nelson area, the CSF operates École Élémentaire des Sentiers-Alpins, a homogeneous, French-language school serving children in Kindergarten to Grade 8. The CSF opened École Élémentaire des Sentiers-Alpins in the 2006/07 school year. The programme began in leased space at the former Gordon Sargent Elementary. As its enrolment grew, it moved to the former Central Elementary, before moving to its current home at leasing the former A.I. Collinson Elementary in 2010/11 school year. In 2014/15, the school's enrolment was 84 students.

[2846] In Nelson, the CSF proposes to acquire a site and construct a homogeneous elementary/secondary (K-12) school to serve students from Nelson and its surrounding areas (the "Nelson Elementary/Secondary Project"). In 2014, the CSF estimated the project would cost more than \$21 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[2847] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all described their experience with minority language education in Nelson. The defendants' witnesses generally did not comment on the arrangements in Nelson due to their limited involvement.

[2848] Additionally, the Court heard from Ms. Bellerose, the vice principal and primary school teacher at École Élémentaire des Sentiers-Alpins. Ms. Bellerose moved to Nelson in the summer of 2008, and began teaching at École Élémentaire des Sentiers-Alpins in 2008/09.

[2849] The Joint Fact Finder's Report also comments on schools in SD8-Kootenay Lake and École Élémentaire des Sentiers-Alpins. In addition to reviewing Ministry and District Data, a member of the Fact-Finding Team visited 12 of 17 schools in SD8-Kootenay Lake. Room sizes were taken from architectural and mechanical construction drawings. I find this to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Nelson Catchment Area

[2850] Dr. Kenny observed that Kootenay region was originally explored by parties with some French-Canadian and Métis voyageur members. Some of its earliest non-aboriginal settlers were Francophone. Francophone missionaries, too, played a role in the early settlement of the region. Colonial settlement in the area was primarily driven by the gold rush, and included a few Francophones. Today, the region is predominantly Anglophone.

[2851] The West Kootenay region has an active Francophone association, the Association des Francophones de Kootenays Ouest (the "AFKO"). Ms. Godin, a rightsholder parent living in Nelson who testified for the plaintiffs, runs the AFKO's mobile library, called the Bibliobus.

[2852] Dr. Kenny observed that minority language education began later in the Kootenays than in other regions of British Columbia. In the mid-1990s, there were short-lived attempts to begin Programme Cadre classes in Kaslo and Nelson. In light of the lack of formal programmes, French-speaking parents in Nelson and Revelstoke organised pedagogical activities for their children through a "Mini Franco-Fun" programme. Many French-speaking parents home-schooled their children.

[2853] Today, École Élémentaire des Sentiers-Alpins operates as a homogeneous, Kindergarten to Grade 8 Francophone elementary school. École Élémentaire des Sentiers-Alpins includes within its walls a Strong Start programme. There is no Francophone secondary programme in the Nelson area.

[2854] École Élémentaire des Sentiers-Alpins operates in a school leased from SD8-Kootenay Lake, the former A.I. Collinson Elementary, which is located in a community known as Six Mile. As its name suggests, the community is located about six miles, or 10 kilometres, outside the city limits of Nelson. Six Mile is a rural community.

[2855] The catchment area for École Élémentaire des Sentiers-Alpins is a large one. It covers the entire territory of SD8-Kootenay Lake. It seems to be the largest catchment area in the claim. The map of the École Élémentaire des Sentiers-Alpins catchment area tendered at trial is printed at a scale of about one inch to 10 kilometres. All the other maps are printed at a scale of about one inch to either one or five kilometres.

[2856] Nelson lies at the centre of the catchment area. All of the students at École Élémentaire des Sentiers-Alpins live in that community and its direct environs. A number of rural communities lie at the boundaries of the catchment area: Slocan, Winlaw, Crescent Valley, Salmo, Creston, Crawford Bay and Kaslo. No École Élémentaire des Sentiers-Alpins students live in those communities, nor does the CSF transport students from those communities to École Élémentaire des Sentiers-Alpins.

[2857] SD8-Kootenay Lake operates 13 elementary schools, two elementary/middle schools, one middle school, one elementary/secondary school and four secondary schools. The different grade configurations reflect the fact that many of SD8-Kootenay Lake's schools are rural and serve very small communities that lie at some distance from one another.

[2858] In the City of Nelson, SD8-Kootenay Lake operates six schools: three elementary schools, one elementary/middle school, one middle school and one secondary school. Within about 25 kilometres of Nelson, SD8-Kootenay Lake additionally operates two further rural elementary schools. SD8-Kootenay Lake offers a late French immersion programme in Nelson that begins at Grade 6.

2. Conclusions

[2859] When analyzing the Nelson claim, I will take into account that École Élémentaire des Sentiers-Alpins' catchment area is a large one with a small population. The catchment area includes a number of small, rural communities, making transportation a particularly important concern. I will also take into account that despite the area's small but active Francophone presence, Francophone education has grown slowly in the region. Even so, École Élémentaire des Sentiers-Alpins does not compete with French immersion at SD8-Kootenay Lake until Grade 6.

[2860] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[2861] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[2862] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[2863] Dr. Landry estimated that in 2011 there were 144 elementary-age children (age 5-13) living in the Nelson Elementary/Secondary Project's catchment area that had a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 171 elementary-age children of Mother-Tongue Rightsholders in the catchment area, an increase of about 19%.

[2864] I note that Dr. Landry also found 145 children of non-Francophones in the catchment area in the Knowledge Category and 50 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children Education or Sibling Rightsholders in Nelson.

[2865] Dr. Landry and Mr. McRae also estimated the number of students eligible to attend a minority language secondary programme. Based on Dr. Landry's data, in 2011, there were 63 secondary-age (age 14-17) children of Mother-Tongue Rightsholders in the catchment area. Mr. McRae forecasted no change to this number. I do not find Dr. Landry's counts of 200 secondary-age children of non-Francophones in the Knowledge Category, or 20 in the Regular Home Use Category, to be helpful evidence.

[2866] I find that a reasonable proxy for the total universe of rightsholders' children in the Nelson Elementary/Secondary Project's catchment area into the reasonably foreseeable future is about 170 elementary-age children and 60 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[2867] As of 2014/15, École Élémentaire des Sentiers-Alpins served students in Kindergarten through Grade 8. École Élémentaire des Sentiers-Alpins moved to the former A.I. Collinson Elementary for the start of the 2010/11 school year. That year, the CSF offered five grade levels (K-4), and had 36 students. Since then, the CSF

has added four more grade levels. Its enrolment has increased by 48 students since the move, and sat at 84 students for 2014/15. In 2014/15, there were 22 students in the four new upper grades. I infer that while enrolment has been increasing every year, nearly half of that growth comes from the addition of more grade levels rather than growth in the size of the cohorts.

[2868] The CSF's records show that École Élémentaire des Sentiers-Alpins admitted 10 children pursuant to its Expanded Admissions Policy when it was in force. The defendants suggest this accounts for either 100% of the 10-student enrolment increase between 2013/14 and 2014/15, or 31% of the 32-student enrolment increase between 2012/13 and 2014/15.

[2869] Removing the children of non-rightsholders from the known demand, I conclude that existing demand is about 74 students in Kindergarten through Grade 8.

[2870] Since the CSF does not operate a secondary programme in Nelson, actual demand for that programme is nil. There is no evidence of any surveys to illustrate potential demand for that programme.

3. The Uptake Rate

[2871] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[2872] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most

instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to secondary school grades.

[2873] The plaintiffs say that the CSF seeks a new K-12 school with operating capacity for 229 students: 154 elementary students and 75 secondary students. That would allow it space for 2 Kindergarten classrooms, 5 elementary classrooms and 3 secondary classrooms. The defendants urge that to fill its requested school, the CSF would require a proxy participation rate of 103% in the year 2023.

[2874] Currently, 74 elementary-age children of rightsholders attend École Élémentaire des Sentiers-Alpins. Given the proxy universe of 170 elementary-age children, the participation rate at École Élémentaire des Sentiers-Alpins is 43%. This seems to leave considerable room for growth.

[2875] However, the CSF has drawn the catchment area for École Élémentaire des Sentiers-Alpins so large that it is very unlikely that some rightsholders would send their children to École Élémentaire des Sentiers-Alpins. The catchment area includes the City of Creston. The maps show that Creston's schools are located about 130-140 km away from École Élémentaire des Sentiers-Alpins. Parents from those areas would be very unlikely to send their children to a CSF school in Nelson. There is no evidence about the distribution of the universe of rightsholders children among the many communities in the catchment area.

[2876] I also take into account that there is no elementary-level French immersion in Nelson. As a result, the CSF likely already experiences strong participation from elementary-level children of rightsholders, and will continue to do so. I do not consider that the distance between Six Mile and Nelson is an especially strong deterrent for parents: There was no drop in enrolment due to the move to A.I. Collinson Elementary. The programme has only grown. However, I do accept that

with increased visibility, the CSF would likely achieve a modest increase to its enrolment.

[2877] The nearest corollary for the CSF's anticipated enrolment if it were to move to a school in Nelson proper is École L'Anse-au-Sable (Kelowna). Kelowna is the nearest community to Nelson where the CSF has a homogeneous elementary/secondary school. In Kelowna, the CSF initially acquired the former Gordon Elementary, which was not located in an ideal location, and which was in poor condition. The CSF moved to a better facility at a central location in the spring of 2005, part way through the 2004/05 school year. At that time, its enrolment was 103 students in Kindergarten to Grade 6. Its enrolment grew to 163 students in those grade levels over three years before stabilizing back at between 120-130 elementary-age students. Enrolment therefore grew by about 20%. Using Dr. Landry's data, and assuming that the universe of rightsholders in Kelowna remained stable over time, the elementary-age participation rate grew from 24% to 28%: growth by about 5%.

[2878] Of course, the analogy between École Élémentaire des Sentiers-Alpins and École L'Anse-au-Sable is not perfect. The Francophone community is larger and better established in Kelowna than it is in Nelson, which suggests it can usually expect a higher participation rate. As a result, the projections must be treated with some caution. École L'Anse-au-Sable at Gordon Elementary was also located within Kelowna city limits when it was at Gordon Elementary.

[2879] On the other hand, École L'Anse-au-Sable is not currently in a newly-built facility. If École Élémentaire des Sentiers-Alpins were to move to a newly-built facility in town, it could likely expect greater growth than École L'Anse-au-Sable. Further, I also consider that École Élémentaire des Sentiers-Alpins faces no competition for minority language education at the elementary level; in Kelowna's urban environment, there is much greater competition.

[2880] Taking into account all the surrounding circumstances, including the size of the catchment area and the imperfect analogy to École L'Anse-au-Sable, I conclude

that about 100 children in Kindergarten through Grade 8 would be likely to take advantage of a Francophone programme in the City of Nelson in a newly-constructed homogeneous school with space for a secondary programme. Enrolment of 100 children represents about a 60% proxy participation rate: growth by about 15%.

[2881] There is no reliable evidence of actual demand for a secondary programme in Nelson. The CSF secondary programme will compete with French immersion. If the CSF's secondary programme is located within the walls of a homogeneous K-12 minority language school, it will not be able to offer the same breadth of programmes as a majority secondary school would due to the small numbers of rightsholders' children. The CSF will likely experience significant attrition as age cohorts approach the secondary years.

[2882] Historical enrolment data shows that the CSF's starting cohorts in Kindergarten are about 11 children, although this includes some children of non-rightsholders. The CSF's enrolment in Grades 7 and 8 in each of 2014/15 and 2013/14, was a combined 8 students. This can be expected to grow if the CSF were to move to a new school within Nelson city limits. However, the cohorts will shrink as children reach secondary levels.

[2883] There is no precedent to assist me to determine how a new facility might affect secondary enrolment. The Court has no evidence of the CSF starting new secondary programmes in a K-12 school, except for possibly Surrey, which is not comparable given its urban setting. In all other instances in the evidence, CSF secondary programmes in homogeneous K-12 facilities started in heterogeneous secondary facilities.

[2884] I conclude that the number of children of rightsholders in Nelson who can be expected to take advantage of a Francophone secondary programme in a newly-built, homogeneous, K-12 school in Nelson is about 12 children in Grades 9 through 12. This represents about an 18% proxy participation rate to account for the significant attrition the CSF can expect in secondary grades.

D. Entitlement

[2885] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement. In this case, the entitlement analysis differs for the elementary and secondary components of the CSF's proposed Nelson school.

1. Appropriate Comparator Schools

[2886] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents. However, in some cases, where a minority language school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[2887] In this case, the CSF has drawn a very large catchment area that includes some rural communities where no École Élémentaire des Sentiers-Alpins students actually reside. The catchment area extends from Creston to the southeast, North to Kaslo, west to Slocan and south to Salmo. All of the École Élémentaire des Sentiers-Alpins families live in and around Nelson. They would not be likely to send their children to the schools in the surrounding rural communities. Nor would parents from many of the communities-- like Creston-- be likely to send their children to École Élémentaire des Sentiers-Alpins.

[2888] As a result, the appropriate group of comparator schools are those in and around Nelson. I also include in that group rural schools located within about 25 kilometres from Nelson, as the evidence reveals that a few parents living in the outskirts of Nelson have sent their children to École Élémentaire des Sentiers-Alpins in the past. This leads me to base my analysis on the following six comparator schools: Rosemont Elementary, South Nelson Elementary, Hume Elementary, Redfish Elementary, Blewett Elementary and Wildflower Elementary/Middle. I also

include Trafalgar Middle, the only middle school in Nelson, which serves children in Grades 6 through 8.

[2889] There is limited evidence about comparator secondary schools. In my view, the appropriate comparator secondary school is L.V. Rogers Secondary School, the only Secondary School in Nelson.

[2890] In its argument, the CSF paid particular attention to an elementary/secondary school in Crawford Bay: Crawford Bay Elementary/Secondary. By all accounts, it is a state-of-the-art facility with substantial community amenities. The evidence also shows that the Crawford Bay community fundraised and made a sizeable financial contribution to the project.

[2891] Crawford Bay is located 35 km from École Élémentaire des Sentiers-Alpins, which is a further 10 km outside Nelson. It is therefore 45 kilometres away from Nelson, where École Élémentaire des Sentiers-Alpins students live. Ms. Godin visits that school with the AFKO's Bibliobus. According to her, the community is isolated and can only be reached by ferry. She advised that she would never consider sending her daughter to that school because it is nearly two hours from her home.

[2892] In my view, Crawford Bay Elementary/Secondary is a rural school that was built to serve an isolated community. It is the only school in Crawford Bay. In light of that, it is not an appropriate comparator schools as it is not an option that would be considered by rightsholder parents living in Nelson.

2. Location on the Sliding Scale

[2893] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[2894] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[2895] The plaintiffs submit that it is pedagogically and financially feasible for the CSF to offer a distinct, equivalent homogeneous school within the City of Nelson based only on its current 84-student enrolment. The plaintiffs point to Crawford Bay Elementary/Secondary's nominal capacity of 150 students and 72-student enrolment in 2014/15. The CSF also points to allowances for small schools in the Ministry's Area Standards.

[2896] I have determined that if the Province were to build a homogeneous elementary/secondary school for minority language students in Nelson, 100 children in Kindergarten through Grade 8 would be likely to attend that school. The Province rarely builds schools with that capacity. Where it has, the school was built to serve an isolated and remote community; a new school was the only practical way of providing those children with an education.

[2897] By comparison, in 2014/15, the average enrolment at the six elementary (K-5) comparator schools was 142 students. Enrolment ranged from a low of 97 students (Redfish Elementary) to a high of 187 students (Hume Elementary). Redfish Elementary was the only other school with enrolment of fewer than 100 students.

[2898] Majority elementary schools in the area are built to accommodate a larger capacity. The average operating capacity at the comparator elementary schools is 168 students. The smallest school, Blewett Elementary, was built with capacity for 109 students.

[2899] Almost all SD8-Kootenay Lake students in Grades 6 through 8 from Nelson and its environs attend one middle school: Trafalgar Middle. In 2014/15, Trafalgar Middle had 386 students, and operating capacity for more than 500 students. The enrolment in Grades 6 through 8 at École Élémentaire des Sentiers-Alpins is a small fraction of that number.

[2900] Additionally, some middle school students attend Wildflower Elementary/Middle. Enrolment at that school, a Grade 1-9 programme, was 139 in 2012/13. To give a sense of the size of the middle school programme, 19 students were considered to be secondary students (Grades 8 and 9) that year. That is much closer to the middle school enrolment at École Élémentaire des Sentiers-Alpins.

[2901] The CSF's enrolment at the elementary (K-5) level is smaller than comparator school enrolment. Further, schools in the area are usually built to accommodate larger enrolments than École Élémentaire des Sentiers-Alpins can reasonably expect. However, the CSF is entitled to a measure of deference in its determination that it is appropriate to provide homogeneous education for elementary students in Nelson. When enrolment of middle schools students is included, the CSF can expect up to 100 students to attend a newly-constructed school in Nelson. There are a number of K-5 schools in the area with comparable enrolment and capacity.

[2902] Thus, I conclude that the number of children likely to attend École Élémentaire des Sentiers-Alpins in Kindergarten through Grade 8 falls at the middle to high end of the sliding scale. Rightsholders are entitled to a homogeneous facility offering a global educational experience that is substantively equivalent to those at comparator elementary schools.

[2903] However, it would not be practical or cost-effective for middle school students at École Élémentaire des Sentiers-Alpins to have a global educational experience equivalent to that available at Trafalgar Middle. As I see it, middle school students at École Élémentaire des Sentiers-Alpins should have a global

educational experience and facilities that are similar to those at Wildflower Elementary.

[2904] There is no evidence concerning the enrolment and capacity at the one secondary school in the area. I assume that enrolment and capacity are similar to or greater than that at Trafalgar Middle. As a result, as with middle school instruction, rightsholders in the area are not entitled to equivalent, homogeneous secondary instruction. In my view, 12 secondary students only just pass the threshold for warranting instruction, and fall near the bottom of the sliding scale.

3. Global Elementary School Experience

[2905] The plaintiffs say that the educational experience at École Élémentaire des Sentiers-Alpins is substandard due to the quality of a number of its facilities: its location; its entrance, office, hallways and classrooms; its gymnasium; its library; maintenance concerns; music instruction space; environmental factors; limited transportation services; and middle school amenities. I will weigh those factors together with others that are relevant to the educational experience.

a) Location and Visibility

[2906] École Élémentaire des Sentiers-Alpins is located about 10 km outside Nelson city limits. According to Mr. Allison, the school is hard to find, and when he visits the school, he frequently misses the school junction. Ms. Bellerose likewise suggested that École Élémentaire des Sentiers-Alpins lacks visibility.

[2907] The CSF arranged for a sign to be installed near École Élémentaire des Sentiers-Alpins. At the insistence of the Ministry of Transportation, it was erected parallel rather than perpendicular to the highway, making it less effective than it could be.

[2908] Ms. Bellerose advised that because École Élémentaire des Sentiers-Alpins is located outside town, she is concerned about wildlife. Students have been kept indoors during breaks following reports of cougar sightings. The school has held wildlife drills to prepare students for potential encounters.

[2909] On the other hand, Ms. Bellerose affirmed that École Élémentaire des Sentiers-Alpins has a large schoolyard, with a soccer field and ample space for children to play. The Joint Fact Finder's Report states that École Élémentaire des Sentiers-Alpins is on a 5.7 acre site with access to tennis and basketball courts. Its site is larger than every comparator elementary and elementary/middle school, which have an average site of about three acres. The site sizes range from 1.7 acres (South Nelson Elementary) to 4.9 acres (Redfish Elementary).

[2910] École Élémentaire des Sentiers-Alpins' location outside city limits makes it less useful as a meeting place and symbolic centre for the minority language community. Although the distance between Nelson and École Élémentaire des Sentiers-Alpins is short, it is less convenient to visit the school than it would be for parents to visit a school within Nelson city limits. Ms. Bellerose advised that fewer parents volunteer at the school than did when École Élémentaire des Sentiers-Alpins was previously located in Nelson proper. This detracts from the global educational experience at the school.

[2911] I am not, however, prepared to accept that the rural location is a negative factor related to the school. While some parents would find the rural location to be a negative factor, others might find it appealing. I consider this to be a neutral factor.

b) Age and FCI

[2912] École Élémentaire des Sentiers-Alpins has an FCI rating of 0.4. The six comparator schools have an average FCI score of 0.30. All of them have better FCI scores than École Élémentaire des Sentiers-Alpins. Thus, the school that the CSF occupies is in a worse state of repair than the comparator majority schools.

[2913] École Élémentaire des Sentiers-Alpins has an average age of 43 years. The average age of the comparator schools is about 64 years, ranging from a low of 26 years (Redfish Elementary) to a high of 106 years (Wildflower Elementary/Middle). The school that the CSF occupies is therefore of a comparable age to those of the majority.

c) Main Entrance, Administrative and Hallway Space

[2914] Ms. Bellerose described the main entrance, staff and administrative space at École Élémentaire des Sentiers-Alpins. According to her, the school principal and secretary have offices, and staff can access a photocopy room, which stores paper and school supplies. The infirmary is used as storage. Staff also share access to a staff room.

[2915] The plaintiffs primarily rely on parent comparison affidavits to support their claims that École Élémentaire des Sentiers-Alpins' main entrance, hallways and administrative space are deficient. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I do not find the parents' views to be credible and give them no weight.

[2916] The data in the Joint Fact Finder's Report places École Élémentaire des Sentiers-Alpins squarely in the middle when it comes to absolute administrative space, main entrance space, staff space and hallways space. École Élémentaire des Sentiers-Alpins has 44 m² of administrative space, whereas the average comparator school has 43 m². École Élémentaire des Sentiers-Alpins likewise has 32 m² for its staff room, while the average comparator school has 42 m². As for space at the main entrance, École Élémentaire des Sentiers-Alpins has 20 m² to the comparator school's average of 25 m². In all cases, there are two or three schools with more space, and two or three schools with less.

[2917] École Élémentaire des Sentiers-Alpins seems to have half the hallway space as other schools, with only 172 m² to the average of 320. However, the average is skewed high by Wildflower Elementary, which serves a number of other district roles. It has 706 m² of hallway space. Excluding Wildflower Elementary, the average hallway space is 243.4 m², ranging from 105 m² (Redfish Elementary) to 376 m² (South Nelson Elementary). Three schools have more space than École Élémentaire des Sentiers-Alpins, and two have less.

d) Classrooms

[2918] École Élémentaire des Sentiers-Alpins has eight classrooms. One is used as a library, so the CSF effectively has seven classrooms.

[2919] For the first three years École Élémentaire des Sentiers-Alpins leased A.I. Collinson Elementary, École Élémentaire des Sentiers-Alpins had only three divisions. The remaining four classrooms were used for science, art, a Strong Start programme and a lunchroom. As the CSF has added divisions, the lunch and science rooms have been converted back to regular instructional space. The two extra rooms continue to be used for art and Strong Start.

[2920] The average classroom size at École Élémentaire des Sentiers-Alpins is 76 m². This is smaller than the average classrooms size at comparator schools, which is 81 m², and ranges from 74 m² (South Nelson Elementary) to 87 m² (Redfish Elementary). Only South Nelson Elementary has smaller average classrooms than the former A.I. Collinson Elementary. Overall, though, the classrooms are not significantly smaller than the classrooms in majority schools.

[2921] The plaintiffs also suggest that the Kindergarten classroom at École Élémentaire des Sentiers-Alpins is smaller than average, at only 73 m². However, the CSF chooses to use its largest classroom- which is 89 m² - for the exclusive purpose of offering Strong Start three days each week. I infer that classroom was likely designed to be the Kindergarten classroom.

[2922] The average Kindergarten classroom size in the comparator schools is 91 m², covering a range from 114 m² (Blewett Elementary) to 70 m² (South Nelson Elementary). As some schools have two Kindergarten classrooms, there are four classrooms larger than the room designed for Kindergarten at École Élémentaire des Sentiers-Alpins, and three that are smaller.

e) Gymnasium

[2923] École Élémentaire des Sentiers-Alpins has a gymnasium, with a stage, change rooms and storage rooms. The gymnasium at École Élémentaire des

Sentiers-Alpins is 283 m², slightly larger than the comparator school average of 272 m². Those gymnasiums range from 163 m² (Rosemont Elementary and Blewett Elementary) to 382 m² (Hume Elementary). Once again, three schools have larger gymnasiums and three have smaller.

f) Library

[2924] École Élémentaire des Sentiers-Alpins does not have a purpose-built library. Its library is a converted classroom. The library measures 74 m². Only one comparator school library is smaller than that at École Élémentaire des Sentiers-Alpins: Blewett Elementary, at 69 m². Wildflower Elementary/Middle does not have a library. The largest library is at Redfish Elementary, which has 143 m² of space. The average size for a comparator school library is 103 m².

g) Environmental Factors

[2925] According to Ms. Bellerose, the HVAC system at École Élémentaire des Sentiers-Alpins is problematic. She stated that some rooms are too hot, and others too cold. Some rooms are so cold that students have taken to eating in their jackets, while the teacher one room over will work in her tank top. Ms. Bellerose explained that SD8-Kootenay Lake staff have not been able to remedy the problem. There is no credible evidence of the temperature standard at any comparator schools.

[2926] École Élémentaire des Sentiers-Alpins staff kept a register of the temperatures in various rooms from March 2013 to May 2014. The plaintiffs argue the register is admissible as a business record, suggesting that it meets the common law test for admitting a business record for the truth of its contents: it was made reasonably contemporaneously, in the ordinary course of duty, by persons having personal knowledge of the matters, who are under a duty to make the record, with no motive to misrepresent the matters recorded: *Mohamed v. Intransit BC Limited Partnership*, 2015 BCSC 1300 at para. 91.

[2927] The plaintiffs argue that the records were made by a teaching assistant under instructions from École Élémentaire des Sentiers-Alpins' vice principal.

Ms. Bellerose testified that the teaching assistant made the record contemporaneously with the observation of the temperatures. The plaintiffs also say that maintaining the records “is certainly within the ordinary course of a teaching assistant’s duties”, as it was done “to assist in securing repairs to EESA’s heating systems by SD8”.

[2928] The plaintiffs attempt to characterize the records as a transactional document for use between a landlord and tenant. They say it was not created for use in litigation, as SD8-Kootenay Lake is not a party to the litigation. The plaintiffs also suggest the defendants failed to cross-examine Ms. Bellerose about the register.

[2929] When Ms. Bellerose testified, I ruled that the temperature records were not admissible for the truth of their contents. I see no reason to interfere with that ruling. The temperature records lack the indicia of reliability. They appear to have been prepared with a view to this litigation. There is no evidence to establish that the records were provided to SD8-Kootenay Lake. Moreover, as I explained in connection with the Positioning Letters in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF has a pattern of crafting evidence with a view to positioning for this litigation, and has a history of misstating facts in that documentation. As a result, I maintain my ruling that the temperature records are not admissible for truth.

[2930] Some concerns have been identified about radon gas at the former A.I. Collinson Elementary site. Ms. Bellerose advised that SD8-Kootenay Lake performed radon testing of all of its schools, and that parents were concerned about the results. As the results of the testing are hearsay, the most that I take from these reports is that parents have concern about potential radon gas. There is no evidence about whether there are concerns about radon gas at comparator schools. Ms. Bellerose testified that SD8-Kootenay Lake took steps to increase airflow at the school, and that SD8-Kootenay Lake and the CSF were ensuring that any necessary remediation would be completed.

h) Transportation

[2931] Given the location of CSF parent homes from École Élémentaire des Sentiers-Alpins, all parents live closer to a majority school than École Élémentaire des Sentiers-Alpins.

[2932] Students are transported to École Élémentaire des Sentiers-Alpins by school bus under contract with SD8-Kootenay Lake. SD8-Kootenay Lake buses pick up students as part of their regular routes for SD8-Kootenay Lake students, then drop them at two central pick-up points from which a single bus takes them to École Élémentaire des Sentiers-Alpins. Some students cannot be accommodated by those routes, so their parents drive them to the central location.

[2933] The Joint Fact Finder's Report provides that 100% of students enrolled at École Élémentaire des Sentiers-Alpins in 2012/13 took the bus to school. At the comparator schools, the percentage of students bussed to school ranged from 0% (Rosemont Elementary) to 97% (Redfish Elementary). At two comparator schools, more than 90% of the population travels to school by bus. At two other schools, less than 10% of the population is bussed to school.

[2934] Mr. Milne's data demonstrate that the "longest ride times" and "average ride times" at the SD8-Kootenay Lake comparator schools are significantly longer than the average and longest bus ride times at École Élémentaire des Sentiers-Alpins. At École Élémentaire des Sentiers-Alpins, the longest and average bus ride time is stated to be 20 minutes. Out of the five comparator schools where children are bussed to school, the average bus ride time is 32 minutes, and the longest bus ride time is 70 minutes. The longest ride times range from 60 minutes (Blewett Elementary) to 79 minutes (Wildflower Elementary/Middle). The average bus ride times are all 30 minutes except for South Nelson Elementary, where the average bus ride time is 40 minutes.

[2935] The plaintiffs argue that the ride times at École Élémentaire des Sentiers-Alpins appear to be lower because Mr. Milne did not include bus travel times to

central pick-up points. I agree that this is the case, and that it likely makes the École Élémentaire des Sentiers-Alpins travel times appear somewhat shorter than they would otherwise be. I cannot say by how much. I note, however, that Mr. Allison was not aware of any parent complaints about transportation times in Nelson.

[2936] In any event, given the prevalence of students travelling a great distance to attend comparator schools, the evidence falls short of establishing there is any significant difference between École Élémentaire des Sentiers-Alpins and comparator schools arising out of transportation. There was no significant drop in enrolment when École Élémentaire des Sentiers-Alpins moved to A.I. Collinson Elementary. Rather, the programme saw modest growth of about 20 students that is attributable to the growth in the size of cohorts: about 5 students per year. Thus, in my view, the distance between École Élémentaire des Sentiers-Alpins and Nelson proper has not proven to be a significant deterrent to parents living within a reasonable distance from the programme enrolling their children in the minority language school.

[2937] The plaintiffs argue that travel times have prevented some Francophone parents in the area from exercising their rights under s. 24 of the *Charter*. The plaintiffs rely on the evidence of Ms. Dickie, a rightsholder parent living in Winlaw.

[2938] Ms. Dickie testified that she lived in Nelson in 2006/07. Her oldest child attended École Élémentaire des Sentiers-Alpins at Central School in its first year, and moved with the school to Gordon Sargent Elementary.

[2939] When École Élémentaire des Sentiers-Alpins moved to A.I. Collinson, Ms. Dickie decided to enrol her son in a French immersion programme in Nelson. She did not enrol him at École Élémentaire des Sentiers-Alpins because of its location, her desire for her son to have peers in his age group, and because her son would only have one more year at École Élémentaire des Sentiers-Alpins before enrolling in middle school. She gave all three factors equal weight.

[2940] Ms. Dickie did not enrol her second child at École Élémentaire des Sentiers-Alpins. When her daughter was three, Ms. Dickie and her family moved to Winlaw, in the Slokan Valley, where they live on a rural farm.

[2941] When her daughter reached school age, Ms. Dickie initially enrolled her at École Élémentaire des Sentiers-Alpins assuming that her daughter, like her son, could take the bus to a Nelson school from a nearby central pick-up point, and be transported from there to École Élémentaire des Sentiers-Alpins. Unfortunately, due to the bus pick-up times, her daughter would not make her transfer to the bus to École Élémentaire des Sentiers-Alpins. As a result, Ms. Dickie enrolled her daughter at Winlaw Elementary nearby, the school closest to her home.

[2942] Ms. Dickie advised that to drive her daughter to École Élémentaire des Sentiers-Alpins would take about two hours each day. She said her family did not consider moving back to Nelson because she and her husband were operating successful businesses in Winlaw. She conceded that they decided that their businesses were more important than a Francophone education.

[2943] Ms. Dickie's evidence shows the difficulties that arise because of the large catchment area that the CSF has drawn around École Élémentaire des Sentiers-Alpins. By all accounts, the catchment area is rural and large. Ms. Dickie's nearest majority-language school, Winlaw Elementary, is 62 km away from École Élémentaire des Sentiers-Alpins. Winlaw is a rural community at a distance from Nelson, in a community where the numbers do not warrant minority language instruction. Indeed, Winlaw Elementary is a very small school, with capacity for only 79 students. While the CSF chooses to allow children from that area to enrol at École Élémentaire des Sentiers-Alpins, it must accept that given the distance, it would be very unlikely for any parents in that area to enrol their children at École Élémentaire des Sentiers-Alpins.

[2944] In my view, any "artificial suppression" of attendance because of transportation times is really a numbers warrant issue. In many of the rural communities at a distance from Nelson, the numbers are simply too low to justify

Francophone instruction. The CSF decided that it was most cost-effective to contract bus services from SD8-Kootenay Lake, which decided it was not cost-effective to transport children from the rural communities located outside Nelson. Given those considerations of cost, the numbers do not warrant those children receiving Francophone educational facilities.

i) Music Instruction

[2945] With no dedicated music room, Ms. Bellerose advised that it is difficult to arrange music instruction at École Élémentaire des Sentiers-Alpins. Sometimes École Élémentaire des Sentiers-Alpins students are instructed on the stage in the gymnasium, but it can be difficult to schedule time between physical education courses.

[2946] Only two comparator schools have dedicated spaces for music. Hume Elementary and Wildflower Elementary teach music in multipurpose rooms. South Nelson Elementary and Blewett Elementary do not have music rooms.

j) Middle School Amenities

[2947] When École Élémentaire des Sentiers-Alpins first occupied the former A.I. Collinson Elementary, the CSF offered Kindergarten to Grade 5. The CSF agreed to parent requests to extend its programme up to Grade 8 upon moving to the new school.

[2948] École Élémentaire des Sentiers-Alpins does not have classrooms to offer a full middle-school enrichment programme. Ms. Bellerose confirmed there is no kitchen or shop class. Its only specialized space is an art classroom. Students also take a course on technology using their laptops. Mr. Allison conceded that parents were aware of the lack of middle school enrichment facilities when they requested middle school grades.

[2949] The CSF did not explain why it could not add spaces like a music room or a shop by using portables, as it did at École L'Anse-au-Sable (Kelowna). It was suggested to Mr. Allison that the CSF could use some of its AFG funding to create

specialized spaces for enrichment programmes at A.I. Collinson Elementary. While he was under cross-examination, it was pointed out to Mr. Allison that the CSF receives AFG funding on a per pupil basis, including funding for students at École Élémentaire des Sentiers-Alpins. Mr. Allison countered that he preferred to spend AFG funds maintaining buildings the CSF owns.

[2950] Trafalgar Middle has specialty classrooms for a wide range of middle-school programming including woodworking, art, foods, textiles and technology. Trafalgar Middle has operating capacity for 575 students. In 2012/13, it was operating at 73% of its operating capacity. The CSF did not adduce any evidence about attempts to provide Francophone instruction in surplus space at Trafalgar Middle, which would allow it to provide partial Francophone instruction and more enrichment opportunities.

[2951] Wildflower Elementary/Middle does not have the types of specialized spaces that Trafalgar Middle does. It even lacks a gymnasium and library. Although it is hard to tell from the data sheet, it seems to have a specialized space for a technology class.

[2952] It seems to me that, based on parent requests, the CSF has chosen to provide middle-school instruction within an elementary facility, which is a choice within its right to management and control of matters concerning language and culture. It is open to the CSF to use its AFG funds to perform leasehold improvements on École Élémentaire des Sentiers-Alpins to create more middle school instructional spaces, but it has chosen not to take that option. The CSF's choice not to take that option does not trigger an argument that the facilities are not substantively equal to local comparators.

[2953] The CSF's decisions have resulted in facilities with limited specialized instructional spaces. It is compelling that another elementary/middle school facility in the same area likewise offers limited specialized instructional spaces. In my view, the middle school facilities offered at École Élémentaire des Sentiers-Alpins are superior to those at Wildflower Elementary/Middle. Thus, a reasonable rightsholder

parent would be likely to find that the global educational middle school experience at École Élémentaire des Sentiers-Alpins is equivalent to the middle school experience at comparator elementary/middle schools in the area.

k) Other Factors

i. Francophone Experience

[2954] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I discuss in Chapter XV, Linguistic and Cultural Programming. In Nelson, there is no elementary-level French immersion, which makes École Élémentaire des Sentiers-Alpins a particularly attractive option for rightsholders.

ii. Class Sizes

[2955] Classes at École Élémentaire des Sentiers-Alpins are small. The largest class Ms. Bellerose has taught had 20 or 21 students in Kindergarten and Grade 1. In 2013/14, the largest classes had 19 students, and the smallest had 17.

[2956] École Élémentaire des Sentiers-Alpins has the smallest class sizes across all grade levels relative to comparator schools. The evidence shows that in 2014/15, École Élémentaire des Sentiers-Alpins had average class sizes of 9 students in Kindergarten, 21 students in Grades 1-3 and 17 students in Grades 4-7. At the comparator schools, average class sizes were 21 in Kindergarten, 22 in primary years and 28 in intermediate grades. No comparator schools had average class sizes as small as those at École Élémentaire des Sentiers-Alpins at any grade level.

[2957] In my view, the small class sizes at École Élémentaire des Sentiers-Alpins would make its global educational experience particularly attractive to rightsholder parents.

iii. Student to Staff Ratios

[2958] The student-to-teacher ratios for the CSF are better than they are in SD8-Kootenay Lake. SD8-Kootenay Lake has 20 students to one teacher, and about 9 special needs students to one special needs teacher. The CSF has about 15 students to one teacher, and about 4.5 special needs students to one special needs teacher. While this is a factor that would be attractive to rightsholder parents, I do not place much weight on it because it concerns the district-level totals, rather than school-level totals.

iv. Graduation Rates

[2959] The six-year completion rate in SD8-Kootenay Lake in every year since 2007/08 has ranged from about 74% to 79%. The CSF's six-year completion rate in the same period ranged from 81% to 95%. The CSF's first-time graduation rate ranged from 81% to 93% in that period, while that of SD8-Kootenay Lake ranged from 71% to 86%. In my view, a reasonable rightsholder parent would find it at least somewhat attractive that the CSF outperforms SD8-Kootenay Lake in connection with graduation rates, speaking to the quality of a CSF education.

v. Technology

[2960] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for Primary students. Computers are replaced every three years. Almost all the comparator schools have desktop computers that were retired from secondary schools, which are accessed in a centralized computer lab. Only one school has decentralized laptops, although they are not available on a one-student-to-one-laptop basis. I infer from this that technology is more integrated into the École Élémentaire des Sentiers-Alpins programme than it is into the majority elementary programmes. This is a significant advantage that reasonable rightsholder parents would find very attractive when making enrolment decisions for their children.

vi. Capacity Utilization

[2961] The capacity utilization at École Élémentaire des Sentiers-Alpins is comparable to that at the comparator schools. Because Wildflower Elementary/Middle is a shared space, the joint fact finder did not provide information about its capacity. At the other five comparator schools, the average capacity utilization in 2014/15 was 89%, ranging from a low of 73% (Redfish Elementary) to a high of 132% (Blewett Elementary). École Élémentaire des Sentiers-Alpins has a capacity utilization of 75%. Two comparator schools have about the same capacity utilization as École Élémentaire des Sentiers-Alpins, and three are more crowded.

[2962] École Élémentaire des Sentiers-Alpins also performs well based on a space per student metric. It has about 19 m² of space per student, while the comparator school average is 16 m² per student. Only one comparator school performs better than the CSF: South Nelson Elementary, which has 22 m² per student.

vii. Special Education

[2963] École Élémentaire des Sentiers-Alpins has a small classroom for special needs students and learning assistance. According to Ms. Bellerose, École Élémentaire des Sentiers-Alpins typically has one or two students with special needs each year.

[2964] École Élémentaire des Sentiers-Alpins' special education space is 45 m². On average, comparator schools (excluding Wildflower Elementary/Middle) have 69 m². Only Rosemont Elementary has less space, with 30 m². (I exclude Wildflower Elementary/Middle from the calculation because the school is used for several district services, and I cannot tell what space is used by the elementary/middle programme.)

viii. Early Childhood Programming

[2965] There is no daycare or preschool at École Élémentaire des Sentiers-Alpins. When École Élémentaire des Sentiers-Alpins was located at Gordon Sargent

Elementary, it operated a preschool and an after-school care programme. Those programmes both ended once the school moved to its current location.

[2966] Only two of six comparator schools offer a daycare and before and after school care: Rosemont Elementary and Blewett Elementary.

[2967] École Élémentaire des Sentiers-Alpins does, however, have a drop-in Strong Start programme, which operates three mornings each week in a designated classroom-- the largest classroom in the school. Ms. Bellerose advised that the Strong Start programme is used less frequently than it was when École Élémentaire des Sentiers-Alpins was at Gordon Sargent Elementary.

[2968] Three of six comparator elementary schools offer a Strong Start programme. Only one of those programmes has its own room, which is almost 20 m² smaller than the one at École Élémentaire des Sentiers-Alpins. The other two programmes operate out the school gymnasium.

[2969] Overall, I find that the CSF's early learning programmes are comparable to those at majority schools.

I) Analysis

[2970] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder parent, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[2971] The plaintiffs argue that the global educational experience at École Élémentaire des Sentiers-Alpins is not substantively equivalent to the education provided in comparator schools. The plaintiffs point to deficiencies with the classrooms (particularly the Kindergarten classroom), gymnasium, library,

administrative area, main entrance, heat control system, remote location, transportation arrangement, lack of infirmary, and overall maintenance.

[2972] The plaintiffs argue that those deficiencies are not offset by École Élémentaire des Sentiers-Alpins' small class sizes, pointing to Ms. Bellerose's concerns that small class sizes create social pressures. (I note, however, that elsewhere in her evidence, Ms. Bellerose testified to the "great year" she enjoyed her first year teaching at École Élémentaire des Sentiers-Alpins due to the small class sizes.)

[2973] In my view, there are a number of areas in which the CSF outperforms comparator elementary schools: class size and technology are chief among them, and would be very attractive to a reasonable rightsholder parent. Most importantly, the CSF offers an exceptional Francophone programme, and does not compete with any French immersion programmes at the K-5 level.

[2974] Most factors are neutral. The CSF's school building is of a comparable quality to those of the majority, and it offers similar middle school facilities to those at Wildflower Elementary/Middle. While the CSF's classrooms and administrative spaces are slightly smaller than those in majority schools, it slightly outperforms the majority on measures like capacity utilization and early childhood programming. A reasonable rightsholder parent would not find any significant difference between the quality of École Élémentaire des Sentiers-Alpins' building and majority schools.

[2975] The only truly problematic aspect of École Élémentaire des Sentiers-Alpins is its location about 10 km outside Nelson. This reduces the school's visibility and opportunities for parents to become involved in the school. It would be seen as a detriment by parents considering sending their children to École Élémentaire des Sentiers-Alpins. On the other hand, Nelson is a rural community, and many students must travel a long distance to the nearest school. As a result, I do not consider that the location and travel times are such a drawback that rightsholder parents would be significantly deterred from sending their children to École

Élémentaire des Sentiers-Alpins. Indeed, École Élémentaire des Sentiers-Alpins' enrolment has increased since it moved to the former A.I. Collinson Elementary.

[2976] Thus, in my view, a reasonable rightsholder parent would be likely to consider that the global educational experience at École Élémentaire des Sentiers-Alpins meets the same standard as the comparator schools in and around Nelson. In my view, École Élémentaire des Sentiers-Alpins, like the comparator schools, has a mix of positive and negative features. In the context of an imperfect education system like the one in British Columbia, the minority cannot expect to have the best of each type of amenity.

4. Global Secondary School Experience

[2977] The CSF believes it would be pedagogically appropriate to instruct secondary students together with elementary students in Nelson. They seek a K-12 school as a remedy, although they have not pleaded any breach of s. 23 arising out of a lack of secondary school facilities in Nelson.

[2978] There is no evidence of any current demand for a secondary programme in Nelson. As I see it, if the CSF were to offer a secondary programme, it would likely see enrolment of about 12 children spread between four grades. That number does not warrant a homogeneous secondary school; at most, it warrants heterogeneous secondary instruction.

[2979] The CSF wants to combine secondary space within its K-8 space. There are several K-12 and K-10 schools in the rural communities surrounding Nelson, specifically W.E. Graham in Kaslo, about 136 kilometres from École Élémentaire des Sentiers-Alpins; Crawford Bay Elementary/Secondary in Crawford Bay, about 35 km from École Élémentaire des Sentiers-Alpins; and W.E. Graham Community School, about 81 km away from École Élémentaire des Sentiers-Alpins.

[2980] In my view, although there is some evidence to suggest that K-12 schools are pedagogically appropriate and cost-effective in the Kootenay region, it is premature for the CSF to expect the Ministry to fund such a school for it at this

junction, particularly given that its current elementary/middle school facilities are adequate for its needs. The plaintiffs presented no evidence of actual demand for secondary instruction. There is no evidence to suggest that the CSF has sought to grow a secondary programme in a heterogeneous environment first, as it did in most communities where it operates K-12 schools. The CSF only began requesting secondary facilities from the Ministry in 2013/14.

[2981] As I see it, if the CSF wants to provide secondary instruction in Nelson, and it believes it would prove cost effective and pedagogically appropriate to offer that programme to 12 students, it may act within its jurisdiction to test demand for that programme by making arrangements with the Ministry and/or SD8-Kootenay Lake. Since the plaintiffs did not plead a breach of s. 23 arising out of a lack of secondary space, I do not consider it appropriate to determine whether the numbers are or are not receiving what they are entitled to.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[2982] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of École Élémentaire des Sentiers-Alpins and the dealings of the CSF and SD8-Kootenay Lake in connection with it.

[2983] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Nelson, I make findings that are of particular relevance to Chapter XXXV, Leases, and Chapter XXXVI, Expansion Projects and the Enrolment Driver.

1. The CSF's Capital Plan Requests

[2984] The CSF had a short-lived programme in Nelson in its earliest years. Dr. Ardanaz explained that the Nelson programme had very few students. Thinking

ahead to its future needs, in its June 1999 Capital Plan Submission for 2000/01, the CSF requested an unranked project in Nelson to acquire a site in Nelson. The programme closed shortly thereafter due to low enrolment.

[2985] École Élémentaire des Sentiers-Alpins opened in 2006/07, and, as its enrolment grew, found its home at A.I. Collinson Elementary in 2010/11. Around the same time, in its June 2010 Capital Plan Submission for 2010/11, the CSF requested a new elementary (K-7) school in Nelson as a project in its southeast BC ward. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[2986] The Ministry did not request Capital Plan Submissions for the 2011 school year. The CSF requested the same project again with the same priority in its November 2012 Capital Plan Submission for 2012/13 and its September 2013 Capital Plan Submission for 2013/14.

[2987] In support of its September 2013 Capital Plan Submission for 2013/14, the CSF submitted an In-House PIR for its proposed Nelson project. However, in the PIR, the CSF changed its request to seek the Nelson Elementary/Secondary Project. Mr. Allison attributed the change to requests from parents, but there was no evidence of parent requests. The CSF identified a single site, an undeveloped, privately-owned property near the waterfront of the Arrow Lakes in Nelson.

[2988] In the Echo Report for the CSF's September 2013 Capital Plan Submission for 2013/14, the Nelson Elementary/Secondary Project is ranked NPIR. In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in that PIR, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school.

[2989] The CSF submitted a revised In-House PIR for Nelson dated October 2014. In that PIR, the CSF indicated that it had engaged Mr. McRae to provide ten-year cohort-retention enrolment projections. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[2990] As of the conclusion of the evidence at trial in August 2015, the Province had not announced support for a capital project for the CSF in Nelson.

2. Opening École Élémentaire des Sentiers-Alpins

[2991] In its early years, the CSF operated a small programme in Nelson for only a few years before it closed. Ms. Galibois-Barss explained that the programme had only five students. When the CSF was trying to reduce its deficit in January 2000, the CSF Board of Trustees resolved to close the programme due to low enrolment.

[2992] At the request of the AFKO, in February 2008 Mr. Bonnefoy began investigating prospects for a new programme in Nelson. The CSF Board of Trustees approved a plan to open a Nelson programme for primary students a few months later, anticipating 15 students would enrol. The CSF expected cohorts to grow and to add grades annually.

[2993] Mr. Bonnefoy contacted SD8-Kootenay Lake about potential sites, and was initially told there was nothing available. Mr. Bonnefoy considered a church hall and a commercial building, but neither were appropriate for primary students.

[2994] Nelson parents suggested an independent school, known as the "International School". Mr. Bonnefoy explained that the facility was not a purpose-built school, but would have functioned as a first home for the school. The CSF arranged to rent the basement of the building while the International School used the upper floor.

[2995] The CSF organized a celebration to mark the opening of the school. However, in June 2006, the plan fell apart due to some restrictions on use of the

space. The CSF went ahead with the celebration in Nelson, but used the occasion to explain to Nelson parents that the CSF would have to find a new location.

[2996] Mr. Bonnefoy contacted SD8- Kootenay Lake again to ask for space. SD8- Kootenay Lake then offered its continuing education centre to the CSF, which was in the former Central School in Nelson. The CSF was given one large classroom on the upper floor, with a dedicated stairwell for access and egress. Other parts of the building were used for other district programmes. The school lacked a gymnasium, but had a playground and space for administrators and itinerant teachers.

[2997] École Élémentaire des Sentiers-Alpins opened in Central School in September 2006. Only 8 of the 15 students the CSF believed would attend actually registered in the programme.

[2998] École Élémentaire des Sentiers-Alpins remained at Central School for two years, at which point it outgrew the space. Mr. Bonnefoy learned that SD8-Kootenay Lake had declared the former Gordon Sargent Elementary surplus, and expressed interest in leasing that space in October 2007. SD8-Kootenay Lake agreed, and École Élémentaire des Sentiers-Alpins moved to Gordon Sargent Elementary in September 2008.

[2999] Ms. Bellerose taught at École Élémentaire des Sentiers-Alpins in 2008/09. She enthusiastically described the teaching experience as a “great first year” due to the small class sizes, and her ability to give students one-on-one attention. Since the school was centrally located, most students walked to school, allowing her to develop relationships with parents. She could easily take students on field trips.

[3000] The building had an open-concept design, so the CSF added some partitions to create two teaching spaces, early childhood education spaces and a staff room. Ms. Bellerose explained that the open concept caused some problems. It was difficult for students in the older grades to focus on academic work when students in Kindergarten were doing play work.

[3001] Like Central Elementary, the building lacked a gymnasium. However, École Élémentaire des Sentiers-Alpins' area had a small open space to one side of its room for students to play. Ms. Bellerose advised that the physical education amenities were far from ideal as there was limited room for children to run.

3. École Élémentaire des Sentiers-Alpins' move to A.I. Collinson Elementary

[3002] By 2010/11, enrolment at École Élémentaire des Sentiers-Alpins increased to 36 students. The school determined it wanted to add a third division.

[3003] In April 2010, the École Élémentaire des Sentiers-Alpins principal contacted Mr. Allison, who had become Secretary-Treasurer, and suggested École Élémentaire des Sentiers-Alpins was outgrowing its space. She encouraged Mr. Allison to visit École Élémentaire des Sentiers-Alpins to understand the situation, and look for a new site.

[3004] Mr. Allison visited both École Élémentaire des Sentiers-Alpins and the former A.I. Collinson Elementary in about April or May of 2010. After his visit, Mr. Allison contacted SD8-Nelson to determine if it was possible for the CSF to rent A.I. Collinson Elementary for its programme.

[3005] Mr. Allison's central concern with the former A.I. Collinson Elementary was that the CSF would have to start transporting students to school due to its distance from central Nelson. In early June 2010, Mr. Grittner, the CSF's transportation consultant, evaluated potential bus routes, and concluded that six to eight CSF students lived outside Nelson and would be impossible to transport no matter where the school was located.

[3006] Mr. Allison asked Mr. Grittner to work on transportation with Mr. Larry Brown, Director of Operations for SD8-Nelson. Mr. Brown confirmed that SD8-Kootenay Lake could transport École Élémentaire des Sentiers-Alpins students assuming that the CSF would agree to certain school start and end times and to use central pick-up points. Mr. Allison found those assumptions to be restrictive, but

decided to contract bus services from SD8-Kootenay Lake because it was cost-effective.

[3007] In June 2010, the CSF received some letters from parents objecting to the move. Parents stated that they preferred that the school remain within Nelson city limits, possibly by adding a portable at Gordon Sargent Elementary. Parents also suggested the CSF had not consulted with them.

[3008] A meeting was planned with parents for the summer of 2010. In advance of that meeting, Mr. Allison received a letter from parents with a list of questions about the move. Mr. Allison answered those questions in an email to be distributed to parents.

[3009] The parents asked whether moving to A.I. Collinson Elementary would have an impact on enrolment. Mr. Allison responded that it was difficult to answer the question, and pointed to the better-quality facility as a positive factor, and the distance between Nelson and the school as a negative factor.

[3010] Parents also asked Mr. Allison whether the move to A.I. Collinson would reduce the likelihood of the CSF getting a new school in town in the future. Mr. Allison indicated he could not answer, but suggested that if the CSF could “make a connection between moving outside town and the case we have made in the legal action, I believe we will decrease our chances of succeeding before the courts”. He wrote that the government could argue that the CSF and parents had “agreed to occupy a school that is equivalent to the schools in SD8, and that AI Collinson School meets this demand.”

[3011] Parents asked Mr. Allison if the CSF would consider renovating Gordon Sargent Elementary. Mr. Allison replied that the CSF could not renovate Gordon Sargent Elementary because it did not own the facility. He also averted to limited space to add portables or a gymnasium.

[3012] In connection with the former A.I. Collinson Elementary, the parents asked if it would be possible to arrange a tour for parents. Mr. Allison responded that he could look into it, but stated it was plain that the former A.I. Collinson Elementary was “far superior” to Gordon Sargent Elementary.

[3013] At that time, parents also asked whether, in light of the size of A.I. Collinson Elementary, the CSF would support an increase in grade levels up to Grade 8. Mr. Allison agreed.

[3014] The consultation meeting took place on June 28, 2010. Mr. Allison testified that he felt encouraged by the meeting, as almost all parents attended. At the meeting, Mr. Allison explained the advantages and disadvantages to moving. He confirmed that the CSF saw the move as a temporary solution, as the CSF planned to construct a new school in town when possible. He also presented the transportation options prepared by SD8-Kootenay Lake. Mr. Allison attempted to unite the community around the idea of moving to the former A.I. Collinson Elementary, and believed he was successful.

[3015] Ms. Bellerose was in favour of the move. She was excited to move to a building with “closed classrooms”, with “walls and doors” and a “great outdoor space”.

[3016] According to Mr. Allison, he eventually received unanimous consent from parents to move to A.I. Collinson. The CSF occupied the facility in the fall of 2010.

4. Leasing and Maintenance Arrangements

[3017] Since the fall of 2010, the CSF has leased the former A.I. Collinson Elementary pursuant to two consecutive three-year leases. The Ministry pays that lease.

[3018] According to Ms. Bellerose, SD8-Kootenay Lake is responsible for all maintenance on the site and building.

[3019] Ms. Bellerose complained about some maintenance concerns. There was a strong propane smell in the gymnasium, and a mould spot appeared its ceiling. There are issues with holes in the floor of a storage room and the ceiling of the photocopy room. There is a gap in a door to the exterior of the gymnasium, which lets in cold air. Some neon lights are missing their covers. Some windows do not open. These were all added to a work order to SD8-Kootenay Lake.

[3020] SD8-Kootenay Lake has fulfilled some of the requests. They repaired the water mark on the ceiling, and tore up some loose carpeting that caused a student to trip and fall. Some rooms were painted. When there are temperature concerns, SD8-Kootenay Lake maintenance staff attend to look into the problem. SD8-Kootenay Lake also took steps to improve air flow and planned full remediation work when parents and educators expressed concerns about potential (unproven before the Court) radon gas issues. Ms. Bellerose indicated that there were probably other problems that were repaired, but she had a hard time remembering what.

5. Conclusions

[3021] The CSF first requested a capital project related to École Élémentaire des Sentiers-Alpins around the same time it started this litigation and moved to the former A.I. Collinson Elementary. The CSF did not rank that project against others in order of priority. The capital funding system did not respond to the CSF's request. It was not unreasonable for the Province to refrain from funding that request given that the timing of the request corresponded with the start of the litigation, and that the CSF had just secured new space. Indeed, Mr. Allison referred to the ongoing litigation and considered how to maintain leverage in communications with Nelson parents.

[3022] On the other hand, the situation also arises out of the defendants' decision to implement a system whereby the CSF leases facilities from majority school boards. The CSF can only lease facilities that SD8-Kootenay Lake has chosen to close. Because SD8-Kootenay Lake has closed few schools in Nelson, the CSF leases space that is about 10 kilometres outside town. It would prefer not to.

[3023] Of course, SD8-Kootenay Lake has generally been amenable to requests from the CSF, offering its continuing education centre to the CSF when its plans to start a programme at the International School fell apart. They also acceded to the CSF's request to move to Gordon Sargent Elementary a few years later, and the request to lease the A.I. Collinson Elementary in about 2010. SD8-Kootenay Lake is generally responsive to maintenance issues. While maintenance on the building is not perfect, SD8-Kootenay Lake responds to the concerns of École Élémentaire des Sentiers-Alpins educators, particularly the most pressing ones. The evidence does not suggest that SD8-Kootenay Lake favours its own facilities over the ones it leases to others.

[3024] Mr. Brown also worked with the CSF to find a way for SD8-Kootenay Lake to provide transportation services for École Élémentaire des Sentiers-Alpins students. Since the CSF has chosen to rely on SD8-Kootenay Lake for transportation services, it has less flexibility concerning when it can start and end its school days. It also must use centralized pick-up points, and cannot provide a higher level of transportation services than what the majority offers. The CSF chose to take this approach because it believed it would be the most cost-effective means of providing transportation services.

[3025] With respect to the question of responsibility for any breach, the evidence shows that the CSF decided to move to the former A.I. Collinson Elementary in 2010 after weighing the distance between the city centre and the school against the positive attributes of the building. Overall, I conclude the current situation lies primarily with decisions taken by the CSF in exercise of its rights of management and control.

[3026] Notably, I do not find that the Ministry refused the CSF assistance in this instance. The CSF at no time sought assistance from the Ministry to make better arrangements for the CSF in Nelson.

F. Justification and Remedy

[3027] I conclude that rightsholders are receiving what they are entitled to in Nelson. If I had not, then it would have been open to the Ministry to justify that breach. I set out the framework for that analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to resolve the justification question.

[3028] If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Because I have done so, I do not find it necessary to address what remedy would have been appropriate to respond to the situation in Nelson.

G. Summary

[3029] I conclude that if the CSF were to construct the Nelson Elementary/Secondary Project in the City of Nelson, the number of children likely to take advantage of that programme is about 100 children in Kindergarten to Grade 8 and 12 secondary students. I find that those numbers fall at the high end of the sliding scale at the elementary level, warranting a homogeneous elementary facility that is distinct from, and equivalent to, those of the majority in connection with facilities for Grades K-5. Middle school students at École Élémentaire des Sentiers-Alpins should have a global educational experience and facilities that are similar to those at Wildflower Elementary, an elementary/middle school of a comparable size in Nelson. Secondary students are entitled to instruction, at the low end of the sliding scale.

[3030] I conclude that a reasonably prudent rightsholder parent would be likely to consider that the global educational experience for elementary and middle school students at École Élémentaire des Sentiers-Alpins meets the same standard as the comparator schools in and around Nelson. If there were a rights breach, it would have arisen out of the CSF's decisions taken in exercise of its right to management and control. While secondary students are not receiving instruction in Nelson, the

plaintiffs did not plead or argue a breach connected to a lack of secondary space, so I do not resolve whether the lack of instruction is contrary to s. 23.

XXII. ÉCOLE ÉLÉMENTAIRE ENTRE-LACS (PENTICTON)

[3031] Penticton is located in the Okanagan-Skaha area of British Columbia. There, the CSF operates École Élémentaire Entre-lacs, a homogeneous, French-language elementary/middle school serving children in Kindergarten through Grade 8. École Élémentaire Entre-lacs is housed the former Nkwala Elementary school, a facility that the CSF leases from SD67-Okanagan Skaha. In 2014/15, 151 children were enrolled in École Élémentaire Entre-lacs.

[3032] In Penticton, the CSF proposes to acquire a new site and construct a homogeneous elementary/middle (K-8) school to serve students from Penticton and surrounding areas (the “Penticton Elementary/Middle Project”). In 2014, the CSF estimated that project would cost more than \$17 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[3033] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all testified about École Élémentaire Entre-lacs. The Province’s witnesses generally did not comment on the arrangements in Penticton due to their limited involvement.

[3034] The Court also heard evidence about École Élémentaire Entre-lacs from two CSF educators. Mr. Blais was the principal at École Élémentaire Entre-lacs between 2006/07 and 2010/11, and testified about the school during his time there. He is now the principal at École L’Anse-au-Sable in Kelowna.

[3035] Ms. Fariba Daragahi is the current principal at École Élémentaire Entre-lacs, and formerly a teacher and administrator at École L’Anse-au-sable in Kelowna. In 2003, Ms. Daragahi and her family moved from Ontario to Kelowna, where Ms. Daragahi took a position teaching at École L’Anse-au-Sable. Ms. Daragahi became principal of École Élémentaire Entre-lacs after Mr. Blais in 2011/12.

[3036] The Joint Fact Finder's Report also provided evidence concerning schools in Penticton and the surrounding areas. The Fact-Finding Team relied on Ministry Data, District Data and visits to 9 of 21 schools in the region. I find this source of evidence to be highly reliable.

B. History and Context

1. The CSF's Penticton Catchment Area

[3037] Dr. Kenny explained that Penticton has links to a historic Francophone mission in Kelowna. The area also had a Francophone fur trading presence and some Francophone families in its early colonial settlements.

[3038] Today, Penticton has a small but active Francophone community. Mr. Blais advised that the Centre Culturel Francophone de l'Okanagan in Kelowna has some ties to Penticton. Penticton also has a club for Francophone senior citizens.

[3039] Dr. Kenny noted that Penticton's small Francophone community pressed for a Programme Cadre in the late 1970s. Since there was no French immersion programme in the region, many English speakers enrolled in it, leading to tension between the two linguistic groups and the eventual suspension of the Programme Cadre in 1980 or 1981. In 1996, the former Summerland and Penticton school districts merged into SD67-Okanagan Skaha, and French-speaking students from Penticton began attending Programme Cadre classes at McDonald Elementary in Summerland.

[3040] The CSF moved the Summerland programmes to Penticton. Today, École Élémentaire Entre-lacs is a homogeneous elementary/middle school serving children in Kindergarten through Grade 8. École Élémentaire Entre-lacs operates out of a school leased from SD67-Okanagan Skaha, the former Nkwala Elementary. Students in Grades 6 through 8 take exploratory courses in English at McNicoll Park Middle, next door to École Élémentaire Entre-lacs. École Élémentaire Entre-lacs also offers a Strong Start programme and a preschool.

[3041] The CSF also offers a secondary programme in a heterogeneous environment at Penticton Secondary, but that programme does not form part of the CSF's claim for a new school in Penticton.

[3042] The École Élémentaire Entre-lacs catchment area is a large one, covering the geographical area of two majority-language districts: SD67-Okanagan Skaha and SD53-Okanagan Similkameen. Thus, it technically serves students from Penticton, as well as Summerland and Naramata to the North, and Okanagan Falls, Keremeos, Oliver and Osoyoos to the south. École Élémentaire Entre-lacs' students are concentrated in Penticton, Summerland and, to a lesser extent, Okanagan Falls.

[3043] In the CSF's Penticton catchment area, SD67-Okanagan Skaha operates eleven elementary (K-5) schools and four middle schools for Grades 6 through 8. SD53-Okanagan Similkameen operates five elementary (K-7) schools for and one elementary/secondary (K-12) school. There are two elementary schools and one middle school in Summerland, two elementary schools in Okanagan Falls and seven elementary schools and three middle schools in Penticton.

[3044] French immersion in SD67-Okanagan Skaha begins in middle school at Grade 6; there is no French immersion at the elementary level.

2. Conclusions

[3045] When analyzing the Penticton claim, I will take into account École Élémentaire Entre-lacs' large catchment area, and the fact that it includes several small communities located at some distance from one another. I will also consider the historic Francophone presence in the region, and École Élémentaire Entre-lacs' historic roots in calls by parents for minority language education.

[3046] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important

institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[3047] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders's Children

[3048] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[3049] Dr. Landry estimated that in 2011 there were 229 elementary/middle school age children (age 5-14) living in the Penticton Elementary/Middle's catchment area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 259 such children living in the catchment area, a 13% increase.

[3050] I note that Dr. Landry also found 445 children of non-Francophones in the catchment area in the Knowledge Category, and 85 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in the Penticton area.

[3051] I find that a reasonable proxy for the total universe of rightsholders' children in the catchment area for the Penticton Elementary/Middle Project is about 250 elementary- and middle-school aged children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the

children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[3052] École Élémentaire Entre-lacs serves students in Kindergarten through Grade 8, and has done so consistently since 2004/05. Enrolment at École Élémentaire Entre-lacs has grown from 55 students in the 1999/00 school year, to 151 in the 2014/15 school year. In 2014/15, 108 students were enrolled in Kindergarten through Grade 5, and 43 in Grades 6 through 8. Enrolment in Grades 6 and 8 has consistently made up 25% to 30% of the school's total population.

[3053] Since École Élémentaire Entre-lacs added Grades 6 through 8 in 2004/05, the school's enrolment has increased gradually. Enrolment hovered around 85-95 students for four years, before gradually increasing in every year between 2009/10 and 2012/13. Then, the CSF saw significant enrolment increases in each of 2013/14 and 2014/15.

[3054] No children of non-rightsholders were admitted to the programme pursuant to the CSF's Expanded Admissions Policy when it was in force.

[3055] As a result, I conclude that the known elementary and middle school demand in the Penticton area is about 150 children: about 110 children at the elementary (Grades K-5) level, and about 40 children at the middle school (Grades 6-8) level.

3. The Uptake Rate

[3056] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[3057] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[3058] The plaintiffs say that the CSF seeks a new school with nominal capacity for 190 students in Kindergarten through Grade 8, and operating capacity for 181 students. The plaintiffs submit the request is reasonable because it would provide École Élémentaire Entre-lacs with eight classrooms. They point to the CSF's rapid enrolment growth, as well as the increased enrolment and retention that the CSF believes it would see if it had improved school facilities, particularly for middle school students.

[3059] The defendants urge that, based on Mr. McRae's projections, for the CSF to fill its requested school to capacity by 2023, it would require a 73% proxy participation rate, which they suggest is unreasonable. In their submission, the CSF cannot expect a significant increase above its current enrolment.

[3060] I find that there are about 150 children of rightsholders attending École Élémentaire Entre-lacs. Given the proxy universe of 250 rightsholders' children in the area, the proxy participation rate at École Élémentaire Entre-lacs is about 60%. This is a healthy participation rate that appears to leave a small amount of room for its participation rate to grow.

[3061] However, the proxy universe includes rightsholders' children living in communities at a distance from École Élémentaire Entre-lacs. Very few students from Keremeos and Oliver, and no students from Osoyoos, currently attend École Élémentaire Entre-lacs. The maps that were tendered as evidence in this case show that the schools located in those communities are 40 to 60 kilometres away

from École Élémentaire Entre-lacs, and are outside the CSF's Transportation Zone. This suggests a reduction to the anticipated participation rate.

[3062] Weighing toward a higher participation rate is the fact that École Élémentaire Entre-lacs does not compete with any French immersion programmes at the elementary level. As a result, I infer that École Élémentaire Entre-lacs likely experiences and can continue to expect a relatively high elementary school participation rate. Further, there is a small but active Francophone community in Penticton, which also weighs toward the CSF achieving a higher participation rate.

[3063] At the middle school level, though, École Élémentaire Entre-lacs competes with French immersion. Moreover, middle school students at École Élémentaire Entre-lacs currently have the benefit of being able to socialize with a larger cohort by taking options courses at a majority middle school. This likely assists the CSF to retain more students through middle school than it otherwise would. If the CSF were to construct a homogeneous elementary/middle school in Penticton, students would lose that benefit and may choose to leave École Élémentaire Entre-lacs prior to middle school to join French immersion.

[3064] I also note that due to the high rates of assimilation and low rates of transmission, and the fact that the CSF already operates a homogeneous facility in Penticton, it is unlikely that École Élémentaire Entre-lacs' current participation rate will grow significantly.

[3065] The CSF does not have experience moving from older, leased, homogeneous facilities to newly built, owned homogeneous facilities in the interior of British Columbia. The closest corollaries are École André-Piolat in North Vancouver and École Victor-Brodeur in Victoria. Given that those communities are urban centres with very different contexts, I do not find them to be helpful for drawing inferences about the situation in Penticton.

[3066] Taking into account all the surrounding circumstances, I conclude that the best estimate of the number of children in Kindergarten through Grade 8 likely to

take advantage of a Francophone programme in Penticton in a newly-constructed homogeneous school is about 175 children: about 135 at the elementary level and 40 children at the middle school level. This reflects growth from a 60% participation rate to a 70% participation rate. It also reflects absolute growth of about 25 children, or growth of about 4 children per Kindergarten through Grade 5 cohort, and steady numbers at the middle school levels. Actual growth might be a few students more at the elementary level, which would be counterbalanced by loss of some students in Grades 6 through 8.

D. Entitlement

[3067] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[3068] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents. However, in some cases, where a minority language school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[3069] Penticton is one of the claim areas that encompasses a very large catchment area: one that is so large that not all schools are realistic alternatives for rightsholder parents. The maps reveal that in 2012/13 only three households in Keremeos and Oliver sent their children to École Élémentaire Entre-lacs. Those communities are about 40 kilometres away from École Élémentaire Entre-lacs. No École Élémentaire Entre-lacs students live in Osoyoos, which is more than 60 kilometres away. While Naramata is closer (about 15 kilometres from Penticton) it is a small, rural community with only one school, and only one family from that community sends their children to École Élémentaire Entre-lacs. Thus, for the vast

majority of rightsholder parents, the schools in those communities are not the realistic alternatives that they would consider when deciding where to enrol their children.

[3070] As a result, I conclude that the appropriate comparator schools are those in Penticton, Okanagan Falls and Summerland: the schools where the vast majority of École Élémentaire Entre-lacs families live. At the elementary level, the appropriate comparator schools are: Okanagan Falls Elementary (K-7), Kaleden Elementary, Parkway Elementary, Wiltse Elementary, Carmi Elementary, Columbia Elementary, Queen's Park Elementary, Uplands Elementary, West Bench Elementary, Giant's Head Elementary and Trout Creek Elementary. At the middle school level, the appropriate comparator schools are: Okanagan Falls Elementary (K-7), Skaha Lake Middle, KVR Middle, McNicoll Park Middle and Summerland Middle.

2. Location on the Sliding Scale

[3071] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[3072] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[3073] The plaintiffs submit that it is pedagogically and financially feasible for the CSF to operate a distinct, equivalent homogeneous school in Penticton, pointing to enrolment at four comparator schools with lower enrolment than École Élémentaire

Entre-lacs' 2014/15 enrolment of 151 students: Carmi Elementary (147 students), Okanagan Falls Elementary (120 students); Kaleden Elementary (99 students) and West Bench Elementary (98 students).

[3074] All of these elementary schools serve children in Kindergarten through Grade 5. École Élémentaire Entre-lacs' anticipated enrolment in those grades is 135 children. Three of those comparator elementary schools have enrolment less than École Élémentaire Entre-lacs. This shows that it is pedagogically appropriate and cost effective to operate a homogeneous elementary school for a school of École Élémentaire Entre-lacs' size in the Penticton area.

[3075] However, the Province has not built comparator schools to serve populations that small. In Penticton, Summerland and Okanagan Falls, the average operating capacity for elementary schools is 250 children. The only elementary schools with operating capacity for less than 200 children are West Bench Elementary (154 students), Kaleden Elementary (177 students) and Parkway Elementary (199 students). All of those schools only serve children in Kindergarten through Grade 5, while École Élémentaire Entre-lacs would serve children in Kindergarten through Grade 8.

[3076] At the middle school level, schools tend to be much larger. The average operating capacity of purpose-built middle schools is 500 children, and their average enrolment is 326 students. Thus, it would not be pedagogically appropriate or cost-effective for a stand-alone middle school to be built for École Élémentaire Entre-lacs' much smaller anticipated population of 40 middle school students.

[3077] Of course, the CSF proposes to build a combined elementary/middle school. The CSF is entitled to some deference in to its opinion that model is pedagogically and financially appropriate. The evidence concerning surrounding schools also confirms that it is pedagogically appropriate to offer combined elementary/middle school instruction. This is what occurs at Okanagan Falls Elementary. That school is the sole comparator school that falls in SD53-Okanagan Similkameen, which does not use middle schools.

[3078] Given that local schools are built for and accommodate groups of children of a comparable size to École Élémentaire Entre-lacs' enrolment, I conclude that it is practical in terms of both pedagogy and cost for École Élémentaire Entre-lacs' anticipated population to be educated in a homogeneous school. However, given the small size of the École Élémentaire Entre-lacs' middle school population as compared to comparator middle schools, it is not practical in terms of cost and pedagogy for École Élémentaire Entre-lacs to offer equivalent programmes and services to those at dedicated SD67-Okanagan Skaha middle schools.

[3079] Thus, I conclude that the number of children likely to attend École Élémentaire Entre-lacs falls at the middle to high-end of the sliding scale. The numbers warrant a homogeneous facility with facilities that are equivalent to the types of elementary school facilities at majority schools. In light of the very small number of middle school students, though, École Élémentaire Entre-lacs is only entitled to proportionate access to core middle-school instructional facilities. Given their comparable sizes and grade structures, I conclude that École Élémentaire Entre-lacs should offer middle school facilities that are comparable to those offered at Summerland Middle, the comparator school with the closest operating capacity (205 children) and grade configuration (K-7) to what is proposed for École Élémentaire Entre-lacs.

3. Global Educational Experience

[3080] The plaintiffs say that École Élémentaire Entre-lacs offers a substandard global educational experience due to the quality of a number of its facilities: poor maintenance and state of repair; a lack of visibility; a poor-quality parking lot; a small school site, its administrative offices, staff rooms, classrooms, library and gymnasium; insufficient student support space; limited storage; long transportation times; and poor environmental factors. They also argue that École Élémentaire Entre-lacs ought to have its own middle-school instructional and early childhood spaces to meet its mandate. I will weigh these factors together with other factors relevant to the overall educational experience.

a) Age and FCI

[3081] Mr. Bonnefoy explained that when he first saw École Élémentaire Entre-lacs in 2004, it appeared to be an older building in need of renovations. When Mr. Allison visited it in 2008, he observed it to be one of the CSF's oldest schools. Mr. Blais confirmed the school appeared old.

[3082] There is little reliable qualitative evidence concerning the state of repair of majority comparator schools. However, as I see it, average age and FCI scores are correlated with a building's state of repair.

[3083] The FCI score of the former Nkwala Elementary is 0.51, meaning less than half of its economic life is remaining. It is therefore among the CSF leased facilities in the worst condition (with École Élémentaire des Navigateurs (Richmond, 0.59), École Collines-d'Or (Kamloops, 0.62) and the Sundance Annex (Victoria, 0.71).

[3084] The evidence shows that the average FCI at comparator elementary schools is 0.38, ranging from 0.23 (Parkway Elementary) to 0.62 (Carmi Elementary). The comparator middle schools have an average FCI score of 0.26, ranging from 0.18 (KVR Middle) to 0.29 (McNicoll Park Middle). Only Carmi Elementary, with an FCI score of 0.62 has a worse FCI score than École Élémentaire Entre-lacs. Four comparator elementary schools have an FCI score of 0.4 or worse.

[3085] The former Nkwala Elementary is also an older school. Its average age is 46 years. The average age of comparator elementary schools is 35 years, ranging from 21 years (Wiltse Elementary) to 56 years (Carmi Elementary). Comparator middle schools are an average of 25 years old, ranging from 15 years (Skaha Lake Middle, Summerland Middle) to a high of 51 years (McNicoll Park Middle). Only Carmi Elementary and McNicoll Park Middle are older than the building housing École Élémentaire Entre-lacs.

[3086] The plaintiffs also rely on an SD67-Okanagan Skaha PowerPoint document concerning the state of the former Nkwala Elementary relative to SD67-Okanagan Skaha schools. École Élémentaire Entre-lacs parents found that document on the

internet, and the CSF sent it to the Ministry. I ruled that document inadmissible for the truth of its contents, and see no reason to interfere with that ruling.

b) Location and Visibility

[3087] École Élémentaire Entre-lacs is centrally-located in the École Élémentaire Entre-lacs catchment area. Mr. Blais suggested the school is hard to find because it is in a residential neighbourhood. Ms. Daragahi confirmed Mr. Blais's observations. She advised that the road to the school is unpaved, and reaches a dead end.

[3088] Principals have taken action to improve the situation. Mr. Blais recounted that a sign was affixed to the exterior of the building. Ms. Daragahi advised that the sign has large font to make the school visible from neighbouring roads.

[3089] Further, when Mr. Blais was principal, he endeavoured to increase École Élémentaire Entre-lacs' profile. He ensured École Élémentaire Entre-lacs was publicized in City of Penticton information pamphlets, and built relationships with local Francophone organizations.

[3090] The defendants point out that the plaintiffs seek as a remedy a transfer of McNicoll Park Middle, which neighbours École Élémentaire Entre-lacs. They argue that the CSF would not seek that school if it were truly an undesirable location.

c) School Site

[3091] École Élémentaire Entre-lacs' site is about 2 acres, or about 53 metres per student based on current enrolment. The sites at comparator elementary schools range from 4 acres (Kaleden Elementary) to 10 acres (West Bench Elementary), for an average of 7 acres. When examined on a per-student basis, elementary school sites range from 57 m² per student (Giant's Head Elementary) to 429 m² per student (West Bench Elementary). Middle school sites range from 2.5 acres/32 m² per student (Summerland Middle) to 5 acres/103 m² per student (McNicoll Park Middle), for an average of 4 acres and 52 m² per student. At Okanagan Falls Elementary, the site is 5 acres, or 165 m² per student.

[3092] This suggests that École Élémentaire Entre-lacs' site is small compared to comparator schools. However, Mr. Miller confirmed that it is common for elementary schools to be built in conjunction with city-owned parks and playfields, which tends to give the school access to a larger site than the school would otherwise be entitled to. This appears to have occurred with the former Nkwala Elementary.

[3093] Not included in the size of École Élémentaire Entre-lacs' site is a large public field to the east of the building. By Mr. Bonnefoy's account, the CSF saw access to that field as a benefit when it was considering whether to lease the school. Further, École Élémentaire Entre-lacs students can use a public baseball diamond to the south of the school during lunch and recess. According to Ms. Daragahi, the school site has so many different areas that supervision is challenging.

[3094] The site has, however, caused some security concerns. McNicoll Park Middle is to the west of École Élémentaire Entre-lacs. According to Ms. Daragahi, there have been issues with the McNicoll Park Middle community crossing through the École Élémentaire Entre-lacs schoolyard to access the public field to the east. Since the park is also used by the community, on one occasion "beer tents" were set up in the public field on a school day.

d) Parking Lot

[3095] Mr. Allison explained that the École Élémentaire Entre-lacs parking lot is not paved. Mr. Bonnefoy recalled that it also has a blind corner. Mr. Blais added that the parking lot is unstructured, disheveled and disorganized, which Ms. Daragahi related to the need to carefully supervise bus drop off and pick up.

[3096] The Joint Fact Finder's Report suggests that École Élémentaire Entre-lacs is the only elementary or middle school in SD67-Okanagan Skaha (or SD53-Okanagan Similkameen) with an entirely unpaved parking lot. The plaintiffs submit that it therefore leaves a poor impression on visitors to École Élémentaire Entre-lacs.

e) Main Entrance, Administrative and Hallway Space

[3097] Until 2014/15, Mr. Allison explained, there was no office at the entrance of École Élémentaire Entre-lacs. The principal's office was located to the southeast of the school. Visitors entered onto a hallway at the northwest of the building.

[3098] Mr. Allison, Mr. Blais and Ms. Daragahi advised that the location of the administrative area prevented administrators from monitoring the entrance. Once, Ms. Daragahi found unaccounted-for visitors in the school using the washroom. A projector and some laptops were stolen on two occasions. Teachers in the rooms closest to the entrance kept their doors locked, which posed its own safety concerns.

[3099] Mr. Blais made some efforts to remedy the problem. He put a sign near the entrance directing visitors to the office. He also made a request in 2009/10 for renovations to move the administrative space to the entrance of the school.

[3100] As of 2014/15, the École Élémentaire Entre-lacs administrative space has moved to the entrance to the school. As I develop below, the CSF paid for renovations that converted the former administrative space into a classroom, and a classroom near the entrance into administrative space.

[3101] The École Élémentaire Entre-lacs staff room, by Ms. Daragahi's account, is too small to hold all the staff at École Élémentaire Entre-lacs. Staff meetings are therefore held in the school's multipurpose room.

[3102] The staff room at École Élémentaire Entre-lacs is 30 m². It is the smallest out of the comparator elementary and middle schools on an absolute basis. Elementary school staff rooms range from 35 m² (Okanagan Falls Elementary) to 65 m² (Carmi Elementary), for an average of 49 m². At the middle school level, staff rooms range from 37 m² (Skaha Lake Middle, Summerland Middle) to 85 m² (McNicoll Park Middle), for an average of 51 m².

[3103] Examining the size of space on a per student basis can be helpful, as there is likely to be a correlation between the numbers of students and staff in a school.

On that measure, École Élémentaire Entre-lacs fares slightly better, but is still below average, with 0.20 m² per student. At the elementary level, the staff rooms at comparator schools range from 0.16 m² per student (Parkway Elementary) to 0.54 m² per student (Kaleden Elementary), for an average of 0.29 m² per student. Among middle schools, staff rooms range from 0.1 m² per student (Skaha Lake Middle, KVR Middle) to 0.44 m² per student (McNicoll Park Middle), for an average of 0.19 m² per student.

[3104] Ms. Daragahi explained there is very little storage at École Élémentaire Entre-lacs. Due to a lack of gymnasium storage, mats are stacked in a corner of the gymnasium, creating a safety hazard. The stage in the gymnasium is also used for storage, but not much can be stored there because it is a hassle to remove the items from the stage. Music items are stored in a small office adjacent to the gymnasium. While the gymnasium has change rooms, they are also used to store furniture, which poses safety issues for students changing without supervision. Further, leaks from the showers have damaged some furniture stored there.

[3105] Additionally, there are storage rooms for art and science equipment, and a janitor's room.

[3106] In support of their argument concerning storage space, the plaintiffs rely on parent affidavit evidence. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I do not consider their evidence to be credible, and give it no weight.

f) Classrooms

[3107] École Élémentaire Entre-lacs has 10 classrooms. Until recently, one classroom was used for a Strong Start programme, although that programme has since moved to leased space next door at McNicoll Park Middle.

[3108] Next to the Strong Start classroom, École Élémentaire Entre-lacs has a multipurpose room that is also used as an English classroom. Part of the room is used as a lounge for students in Grade 8. Near the multipurpose room, two

classrooms are used as a middle school wing: one for a Grade 5/6 split class, and one for a Grade 7/8 split class.

[3109] Six elementary classrooms are located in the school's other wing. One classroom is used for preschool, and a second is used as a resource class for the Francisation and resource teachers. The four remaining classrooms are used for Kindergarten, a Grade 1/2 split, a Grade 2/3 split, and a Grade 3/4/5 split, respectively.

[3110] The average classroom size at École Élémentaire Entre-lacs is 72 m². The average elementary school classroom size at comparator schools is 77 m², ranging from an average size of 72 m² (Parkway Elementary, Queen's Park Elementary) to 83 m² (Wiltse Elementary). Four of eleven comparator elementary schools have an average classroom size less than 74 m².

[3111] All of the comparator schools, though, have at least one classroom larger than 75 m². The largest classrooms at École Élémentaire Entre-lacs are 74 m². At Okanagan Falls Elementary, the average classroom size is 79 m².

[3112] Comparator middle schools tend to have smaller classrooms, ranging from an average of 62 m² (Summerland Middle) to 80 m² (KVR Middle). Summerland Middle, Skaha Lake Middle and McNicoll Park Middle all have average classroom sizes less than 70 m². The average middle school classroom size is 68 m².

g) Gymnasium

[3113] According to Ms. Daragahi, the gymnasium at École Élémentaire Entre-lacs leaves little space for spectators during sporting events; players and spectators sit on the stage.

[3114] The gymnasium at École Élémentaire Entre-lacs is 327 m². The average elementary school gymnasium is 360 m². Five elementary school gymnasiums are smaller than 355 m², and all except one are smaller than 390 m². Only one comparator elementary school, West Bench Elementary, has a smaller gymnasium

than École Élémentaire Entre-lacs, at 206 m². The largest is 422 m² at Okanagan Falls Elementary, the closest comparator to École Élémentaire Entre-lacs' structure. École Élémentaire Entre-lacs' gymnasium is also marginally smaller than average on a per student basis.

[3115] Middle school gymnasiums are larger, ranging from 481 m² (Summerland Middle) to 603 m² (KVR Middle), and averaging to 541 m².

h) Library

[3116] According to Ms. Daragahi, the École Élémentaire Entre-lacs library is small, and is little more than a "storage area for books" for students in upper levels. It is, however, suitable for younger children.

[3117] The library at École Élémentaire Entre-lacs is 67 m². This is much smaller than the libraries at comparator elementary schools, which are, on average, 153 m², and range from 124 m² (Giant's Head Elementary) to 215 m² (Queen's Park Elementary). The average middle school library is even larger, ranging from 155 m² (Summerland Middle) to 260 m² (KVR Middle). At Okanagan Falls Elementary, the nearest comparator to École Élémentaire Entre-lacs, the library is 138 m².

[3118] École Élémentaire Entre-lacs' library size is also smaller than nearly every comparator elementary school when examined on a space to class size or space to enrolment basis. Only Giant's Head Elementary, which has 0.35 m² library space per total students enrolled, fares worse than École Élémentaire Entre-lacs, which has 0.44 m² of library space per total students enrolled. The lack of space is particularly problematic because École Élémentaire Entre-lacs serves students in Kindergarten to Grade 8, while comparator elementary schools serve children in Kindergarten to Grade 5.

i) Special Education

[3119] École Élémentaire Entre-lacs' infirmary was transformed into a sensory deprivation room for special needs students. As a result, Ms. Daragahi added a cot to her office to serve as an infirmary.

[3120] Ms. Daragahi also testified about three more small offices that are used by a speech therapist, special education support and a counselor, respectively. The counselor's room is also used to store the school's two television sets.

[3121] All four of these spaces are smaller than 16 m². According to the Joint Fact Finder's Report, École Élémentaire Entre-lacs has 46 m² of space for special education. Three comparator elementary schools have less space: Kaleden Elementary, West Bench Elementary and Parkway Elementary. Okanagan Falls Elementary has much more: about 229 m², the most of any elementary school. Middle schools have between 156 m² (Summerland Middle, Skaha Lake Middle) and 207 m² (KVR Middle), for an average of 210 m² of space.

[3122] However, École Élémentaire Entre-lacs also has a resource room that is used for teaching Francisation and by other resource teachers, which adds about 70 m² to its special education space. École Élémentaire Entre-lacs also has one multipurpose room. All of the middle schools have multipurpose rooms, but only five of 11 comparator elementary schools have multipurpose rooms. Wiltse Elementary has two multipurpose rooms.

[3123] In my view, when all of the CSF's additional classrooms are taken together with its special education offices, it has ample space for special education.

j) Environmental Factors

[3124] Ms. Daragahi explained that the classrooms at one end of the École Élémentaire Entre-lacs building are very hot in the spring and fall. This problem was being remedied at the time of trial. As I develop below, the CSF and SD67-Okanagan Skaha have embarked on a three-year project to install new heating and cooling units, which will provide air conditioning to most of the school.

[3125] Mr. Blais, there were sometimes parties in the schoolyard after hours, and windows at École Élémentaire Entre-lacs were broken. Further, Ms. Daragahi reported that the school sign was destroyed by vandals. SD67-Okanagan Skaha refused to install lights to prevent vandalism.

[3126] To prevent the vandalism, metal grates were installed over the windows. According to Mr. Blais and Ms. Daragahi, this exacerbated problems with temperature control because the windows were unable to be opened.

[3127] Noise is also a problem. Both Ms. Daragahi and Mr. Blais reported that the school's furnaces can be disruptively loud. This, too, will likely be partly remedied by the upgrades to the HVAC system. Nevertheless, according to Mr. Blais, there is a problematic echo at the school, which is unrelated to the HVAC issues.

k) Transportation

[3128] Mr. Allison explained that École Élémentaire Entre-lacs provides transportation for students living within a Transportation Zone that extends north to Summerland and South to Okanagan Falls. It excludes students living in Keremeos, Oliver and Osoyoos, so the CSF compensates three families for driving their children to pick-up points in Okanagan Falls.

[3129] Ms. Daragahi commented that, due to long transportation times, some younger are tired when they arrive at school. Many students report skipping breakfast, so the school offers a breakfast snack programme.

[3130] Seventy-one percent of École Élémentaire Entre-lacs students travel to school by bus. At comparator elementary schools, somewhere between 0% of students (Queen's Park Elementary, Carmi Elementary) and 42% of students (Okanagan Falls Elementary) take the bus to school, for an average of 16%. For middle schools, somewhere between 0% (KVR Middle) and 36% (McNicoll Park Middle) of children are bussed to school, for an average of 23%.

[3131] The maximum ride time at École Élémentaire Entre-lacs is 75 minutes; the average bus ride time is 69 minutes. This reflects the very fact that the CSF offers transportation services from a number of smaller communities surrounding Penticton. Among those elementary schools where students are bussed to school, the maximum ride times range from 35 minutes (Trout Creek Elementary) to 60 minutes at six of nine schools. At both elementary and middle schools, the

average longest bus ride time is 55 minutes. The average bus ride times at comparator elementary schools is 17 minutes, ranging from a low of five minutes (Wiltse Elementary, Parkway Elementary) to a high of 35 minutes (Okanagan Falls Elementary).

[3132] At Okanagan Falls Elementary, 42% of children are bussed to school, with longest bus ride times of 48 minutes and longest bus ride times of 35 minutes.

I) Middle School Programming

[3133] According to Mr. Bonnefoy, Nkwala Elementary is a purpose-built elementary school, and therefore does not provide specialty classrooms for middle school or secondary enrichment courses. The school likewise does not have a music room, nor does it have a science lab for experiments. SD67-Okanagan-Skaha refused the CSF's request to install a portable to use as a music room.

[3134] To compensate, Ms. Daragahi advised that students in Grades 6, 7 and 8 attend McNicoll Park Middle for one hour each day to take Home Economics, Drama, Music, Band and Carpentry. In 2014/15, 43 students in Grades 6 through 8 took courses at McNicoll Park Middle.

[3135] According to Ms. Daragahi, McNicoll Park Middle educators instruct École Élémentaire Entre-lacs' students in English. She explained that students in upper grades have tendency to speak more English than their peers, and have sometimes skipped classes at McNicoll Park Middle unbeknownst to École Élémentaire Entre-lacs administration.

[3136] All of the comparator middle schools have specialized spaces that École Élémentaire Entre-lacs does not. They have spaces for music, drama, technology, woodworking, cooking, business education and science labs. However, given their much larger enrolment, École Élémentaire Entre-lacs cannot expect to have the same, homogeneous facilities for that type of instruction.

[3137] Okanagan Falls Elementary, the closest comparator to École Élémentaire Entre-lacs, does not have the same types of amenities as a purpose-built middle school does. Its only specialty classroom is a music room.

[3138] École Élémentaire Entre-lacs' administrators have tried provide an enriched programme for middle school students. Students in Grade 8 have access to a part of the multipurpose room set aside as a Grade 8 lounge. When Mr. Blais arrived at École Élémentaire Entre-lacs in 2006, he facilitated École Élémentaire Entre-lacs' participation in SD67-Okanagan Skaha sports leagues. The school developed a logo and T-Shirts to contribute to a sense of community and school pride.

[3139] The defendants take the position that the numbers in the Penticton region do not warrant middle school instruction. As of 2014/15, there were 43 students enrolled in Grades 6 through 8. In 2013/14, there were 36 students. Prior to that, between 2007/08 and 2012/13, there were 23 to 28 students in those grades in any given year.

m) Early Childhood Programming

[3140] École Élémentaire Entre-lacs has a preschool and a Strong Start programme. Ms. Daragahi explained that these services are “feeders” for the Kindergarten programme, and in that sense, are the “engines” of the school. The programmes are well attended. Thirty-three students are enrolled in the preschool, in groups of 10 students per day. The Strong Start programme is also popular, with 60 children enrolled, and about 20 children and their parents attending on any given day.

[3141] Mr. Blais explained that École Élémentaire Entre-lacs' early learning programmes cement École Élémentaire Entre-lacs as a hub for Francophones from infancy through their senior years. Mr. Blais also observed that more Francophones began congregating in the area by moving their homes close to the school.

[3142] Ms. Daragahi planned to add another division to École Élémentaire Entre-lacs in 2014/15. Mr. Allison explained that the CSF now leases a room at McNicoll

Park Middle, and houses the Strong Start programme there so it can accommodate an extra division.

[3143] Early childhood programmes are very common at comparator elementary schools. Only Parkway Elementary and West Bench Elementary do not have some sort of early childhood services located on site. Three schools offer daycare only; five offer Strong Start and daycare; and one school offers preschool and daycare. École Élémentaire Entre-lacs is the only school to offer both preschool and Strong Start.

[3144] École Élémentaire Entre-lacs also offers a before- and after-school care programme. This is also common at the comparator elementary schools. Only Parkway Elementary and Uplands Elementary do not offer before or after school care.

n) Other Factors

i. Francophone Experience

[3145] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I describe in Chapter XV, Linguistic and Cultural Programming. In Penticton, there is no elementary-level French immersion, which makes École Élémentaire Entre-lacs a particularly attractive option for rightsholders.

[3146] When Ms. Daragahi meets with parents, she points out several advantages to an education at École Élémentaire Entre-lacs. She shares with them the school's value for preserving Francophone heritage. She also presses the personalized attention that students receive at École Élémentaire Entre-lacs, and the Francophone community that the family will become a part of.

[3147] Ms. Daragahi gave evidence about the quality of education at École Élémentaire Entre-lacs. It is her opinion that teachers at École Élémentaire Entre-lacs do extra work, more than their counterparts at majority-language schools, to

meet educational requirements for their students. She also advised that she can tell from report cards that students are performing well, and sees that students are proud of their Francophone education.

[3148] Mr. Blais started traditions to enhance the Francophone culture at École Élémentaire Entre-lacs. The school held a welcoming BBQ and a school dance in December. On graduation, students in Grade 8 create a group banner and share a special lunch cooked by students in Grade 7 and the APÉ.

[3149] Altogether, these endeavours create a strong Francophone school community at École Élémentaire Entre-lacs.

ii. Class Sizes

[3150] Class sizes at École Élémentaire Entre-lacs are comparable to those at comparator elementary and middle schools. École Élémentaire Entre-lacs' Kindergarten classes have an average of 20 children, just higher than the comparator school average of 19 students. École Élémentaire Entre-lacs' class sizes are also higher than average for Grades 1-3, averaging to 22 students compared to the comparator school average of 20 students. École Élémentaire Entre-lacs' Grade 4-7 class size is 21 students, smaller than the comparator school average of about 25 students. École Élémentaire Entre-lacs' class sizes are also slightly lower for Grade 8 students, with 21 students as compared to the majority average of 23 students.

iii. Student to Staff Ratios

[3151] The CSF's student to teacher ratio is better than that of SD67-Okanagan Skaha, where all but one comparator school is located. SD67-Okanagan Skaha has 18 students to every teacher; the CSF has 15 students to each teacher. The CSF also outperforms SD67-Okanagan Skaha on student to special needs teachers, with four special needs students to special needs teachers, in comparison to SD67-Okanagan Skaha's eight such students to teachers.

iv. Graduation Rates

[3152] There is almost no difference between the first-time graduation rate of SD67-Okanagan Skaha (87%) and the CSF (88%). However, examining the six-year completion rate, the CSF's graduation rate is 95%, more than 10% higher than that of SD67-Okanagan Skaha (84%).

v. Technology

[3153] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for Primary students. The laptops are decentralized and integrated into the classroom, and are replaced every three years. All of the comparator elementary and middle schools have centralized desktop computers in labs where the fixed computers are shared by all the students in the school. I take from this that technology is better integrated into the École Élémentaire Entre-lacs curriculum, and there is greater availability of computers for CSF students than students in comparator schools.

vi. Capacity Utilization

[3154] École Élémentaire Entre-lacs has 14 m² per student based on its 2014/15 enrolment. The average comparator school has 15 m² per student, ranging from a low of 9 m² (Giant's Head Elementary) to a high of 24 m² (Kaleden Elementary). Six of eleven elementary schools have less than 14 m² per student. Middle schools have an average of 18 m² per student, ranging from a low of 13 m² per student (KVR Middle) to a high of 29 m² per student (McNicoll Park Middle).

[3155] École Élémentaire Entre-lacs' operating capacity is 182 children. Based on 2014/15 enrolment, it was operating at 83% of its capacity.

[3156] The average capacity utilization at comparator elementary schools is 80%, ranging from a low of 56% (Kaleden Elementary) to a high of 125% (Parkway Elementary). Middle school capacity utilization tends to be lower, ranging from a low

of 40% (McNicoll Park Middle) to a high of 84% (KVR Middle), and averaging to 65%.

o) Analysis

[3157] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[3158] The plaintiffs submit that, taking all the evidence together, École Élémentaire Entre-lacs has many deficiencies that do not exist in SD67-Okanagan Skaha schools.

[3159] The vast majority of children of rightsholders in the École Élémentaire Entre-lacs catchment area live closer to a majority school than to École Élémentaire Entre-lacs. This results in long transportation times: an average of 69 minutes. Of course, many of the students travelling that distance to school are commuting from one community to another. It is appropriate for minority students to have longer transportation times than are tolerated for the majority as it allows them to access larger facilities. Regardless, the long travel times and the distance between home and school are something that a reasonable rightsholder parent would find unattractive about an education at École Élémentaire Entre-lacs.

[3160] A reasonable rightsholder parent might also weigh the facility quality of École Élémentaire Entre-lacs against that of majority schools. The former Nkwala Elementary, which houses École Élémentaire Entre-lacs, is in a poor state of repair relative to comparator schools. It has the second-worst FCI score out of all the comparator schools. Only two schools are older than École Élémentaire Entre-lacs.

Its parking lot is unpaved and unattractive (although this is something that the CSF could fix using its AFG).

[3161] Parents would also be concerned that the classrooms at École Élémentaire Entre-lacs are smaller than average. This is particularly problematic because École Élémentaire Entre-lacs uses split class arrangements at all levels. This creates a greater need for space to work with subsets of students in groups.

[3162] École Élémentaire Entre-lacs' library is less than half the size of the average comparator elementary schools. This is particularly problematic because École Élémentaire Entre-lacs serves children in Grades 6 through 8, which majority elementary schools do not. École Élémentaire Entre-lacs therefore needs more library space to provide greater resources for middle school programming. École Élémentaire Entre-lacs also has a smaller than the average elementary school gymnasium, which is problematic because École Élémentaire Entre-lacs serves older students than do the local comparator schools.

[3163] Of lesser importance, a reasonably prudent rightsholder parent would find it unappealing that École Élémentaire Entre-lacs' staff room is smaller than all the comparator schools

[3164] Some problems with École Élémentaire Entre-lacs have been remedied, or are not significant concerns. While École Élémentaire Entre-lacs lacked visibility at one time, that problem has been remedied with signage. The principals also worked hard to improve École Élémentaire Entre-lacs' presence in the community. Further, prior to 2014/15, a reasonable rightsholder parent might have found it strange that the École Élémentaire Entre-lacs administrative offices were nowhere to be found upon entering the building. That has been changed by way of renovations to the building. While there were problems with the temperature control in the building, those issues are being resolved.

[3165] Still other factors would be attractive to a rightsholder parent. Chief among them, École Élémentaire Entre-lacs provides a first-class Francophone education,

with much personalized attention. It has a strong Francophone identity and culture due to the hard work of educators like Ms. Daragahi and Mr. Blais.

[3166] Moreover, a reasonable rightsholder parent would find that the integration of technology into the classroom at École Élémentaire Entre-lacs far surpasses that at the comparator schools, contributing to the overall educational experience. A reasonable rightsholder parent would also appreciate the CSF's small class sizes in comparison to SD67-Okanagan Skaha at the intermediate and middle school levels, and that the CSF has better student to teacher ratios than does SD67-Okanagan Skaha.

[3167] Although the École Élémentaire Entre-lacs site appears to be small based on the information in the Joint Fact Finder's Report, in reality the school has access to several large playfields adjacent to the building. A reasonable rightsholder parent would see those playfields and rightfully assume that the school had access to them. The large playfields would be seen as a benefit by a reasonable rightsholder parent, just as the CSF saw them.

[3168] I find based on the CSF's proposal that it acquire McNicoll Park Middle, which is adjacent to École Élémentaire Entre-lacs, that the school is also in a good location for a CSF school. It is central to the catchment area. Mr. Blais testified that some Francophones have moved to be closer to the school.

[3169] Of lesser importance, a rightsholder parent would find it attractive that École Élémentaire Entre-lacs has ample extra space for learning assistance and a multipurpose room. A parent might also find it attractive that the CSF has nearly a 10% better six-year completion rate than does SD67-Okanagan Skaha.

[3170] With connection to middle school programming, I note that Okanagan Falls Elementary has a much larger gymnasium than does École Élémentaire Entre-lacs, and has an art room, which École Élémentaire Entre-lacs does not have. However, middle school students at École Élémentaire Entre-lacs are able to take exploratory courses next door at McNicoll Park Middle. While it would be better if those courses

were taught in French, École Élémentaire Entre-lacs middle school students are able to receive core Francophone instruction in a homogeneous facility while experiencing a greater range of exposure to specialty classrooms than it would if École Élémentaire Entre-lacs had facilities equivalent to those at Okanagan Falls Elementary. Given the very small number of children likely to participate in a middle school programme in Penticton, I find that the CSF has access to appropriate specialty middle school classrooms given concerns of pedagogy and cost.

[3171] Balancing these factors against one another, I conclude that the global elementary school educational experience at École Élémentaire Entre-lacs is not equivalent to that offered in majority schools. The negative aspects of the facility -- long transportation times, a poor state of repair, poor age and appearance, and small classrooms, library and gymnasium-- are not outweighed by its positive aspects-- its excellent Francophone programming, its highly advanced technology programme and its attractive playfields. While middle school students have proportionate access to appropriate facilities for exploratory options, in my view, the global educational experience is still inferior given the deficiencies at École Élémentaire Entre-lacs.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[3172] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of École Élémentaire Entre-lacs and the dealings of the CSF and SD67-Okanagan Skaha in connection with it.

[3173] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Penticton, I make findings that are of particular relevance to Chapter XXXV, Leases, and Chapter XXXVI, Expansion Projects and the Enrolment Driver.

1. The CSF's Capital Plan Requests

[3174] Around the time the CSF took jurisdiction in the Okanagan Skaha region, in its June 1999 Capital Plan Submission for 2000/01, the CSF requested a new elementary/secondary school in the Okanagan/Skaha area ("Okanagan/Skaha Elementary/Secondary Project"). The CSF did not prioritize that project against others, and asked for funding in the third year of the plan.

[3175] After that, the CSF did not make requests related to the Okanagan/Skaha region until its September 2002 Capital Plan Submission for 2003/04, when it sought the Okanagan/Skaha Elementary/Secondary Project as its eighth-highest ranked project. The CSF requested the same project as its sixth-highest project in its October 2003 Capital Plan Submission for 2004/05.

[3176] When the CSF began leasing Nkwala Elementary in about 2004, its capital requests for the Okanagan/Skaha region also changed. Beginning with its October 2004 Capital Plan Submission for 2005/06, the CSF's eighth-highest priority request was to acquire an asset from SD67-Okanagan Skaha in the Penticton Area (the "Penticton Acquisition Project") to serve as an elementary/secondary school. The CSF continued to request the Penticton Acquisition Project, either to serve as an elementary/secondary or an elementary/middle school, in each of its subsequent capital plan requests until the start of the litigation: the Penticton Acquisition Project was the CSF's thirteenth-highest priority project in its November 2006 Revised Capital Plan Submission for 2007/08; and its seventeenth and lowest-ranked project in its October 2007 Capital Plan Submission for 2008/09.

[3177] With the CSF's May 2009 Capital Plan Submission for 2009/10, it moved to ward-based capital planning. That year, the CSF requested the Penticton Acquisition Project as its third and lowest-ranked project in the southern British-Columbia ward. The CSF asked for funding starting in the fifth year of the provincial capital plan because the CSF anticipated some leasehold improvements would ameliorate Nkwala Elementary, and because "the working relationship with SD 67 is strong".

[3178] The CSF sought the Penticton Acquisition Project again in its June 2010 Capital Plan Submission for 2010/11. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[3179] The Ministry did not request Capital Plan Submissions in the 2010/11 school year, for the 2011/12 budget year. In the CSF's November 2012 Capital Plan Submission for 2012/13, the CSF requested the Penticton Acquisition Project again, with the form of prioritization as it used in 2010.

[3180] The CSF's request for Penticton changed with its September 2013 Capital Plan Submission for 2013/14. At that point, the CSF requested a new site and school for the Penticton Elementary/Middle Project. The CSF asked for the school to have capacity for 145 students. Like every other capital project request that year, it was one of the CSF's number 1 priorities.

[3181] In support of its 2013 Capital Plan Submission, the CSF provided the Ministry with a November 2013 In-House PIR for the Penticton Elementary/Middle Project. In that PIR, the CSF identified two sites that the CSF could potentially acquire.

[3182] After submitting its 2013 In-House PIR, the CSF heard from Ms. Bonnie Roller-Routley, Secretary-Treasurer of SD67-Okanagan-Skaha, that the SD67-Okanagan Skaha Board of Trustees was considering closing McNicoll Park Middle, next door to École Élémentaire Entre-lacs.

[3183] On August 27, 2014, Mr. Allison sent Assistant Deputy Minister Fayad a Positioning Letter informing the Ministry about the opportunity. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the CSF gave the Ministry that information, not that any of the

contents of the letter are true. Assistant Deputy Minister Fayad asked Mr. Allison to keep the Ministry informed of any further discussions and developments.

[3184] In the Echo Report for the 2013/14 Capital Plan Submission, the Penticton Elementary/Middle Project was ranked NPIR. In his feedback to Mr. Allison, Mr. Cavelti expressed concern with the CSF's enrolment projections as stated in that PIR, as the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend the new school.

[3185] The CSF submitted a revised In-House PIR for the Penticton Elementary/Middle Project in October 2014. Because enrolment at École Élémentaire Entre-lacs had increased in the previous two years by more than 20 students, the CSF increased the requested school capacity to 190 students. In that PIR, the CSF indicated that it had engaged Mr. McRae to provide 10-year cohort-retention enrolment projections. Those projections, which the CSF provided under separate cover, extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[3186] The CSF also updated its site options. It included another private site, and referred to the potential acquisition of McNicoll Park Middle. The CSF indicated that if McNicoll Park Middle were to be closed, the CSF would be interested in acquiring the site and renovating the old school or building a new school on that site.

[3187] As of the conclusion of the evidence at trial in August 2015, the Province had not supported a new capital project for the CSF in Penticton.

2. The CSF's Early Tenure in SD67-Okanagan Skaha

[3188] Before the FEA and CSF were created, SD67-Okanagan Skaha offered Programme Cadres at Macdonald Elementary (Kindergarten to Grade 5), Trout Creek Elementary (Grades 6 through 8) and Summerland Secondary (Grades 9 through 12). All the programmes were in heterogeneous facilities in Summerland.

[3189] Dr. Ardanaz explained that the CSF consolidated its elementary and middle school programmes into a single school, which was located in a heterogeneous environment. The CSF Board of Trustees discussed opening a single elementary/secondary programme to house all the CSF students together. The CSF also pursued some sites around that time. Dr. Ardanaz recalled visiting one potential school building, but it was still an active school and was never made available to the CSF.

[3190] After the small consolidation, the idea of opening a homogeneous school appears to have been less of a priority until about 2004, when the CSF began making capital requests for the area again.

1. The CSF's lease of Nkwala Elementary

[3191] In January 2004 Dr. Ardanaz wrote to Mr. Frank Regehr, then the Secretary-Treasurer for SD67-Okanagan Skaha, seeking a purchase or a long-term lease of a facility for the CSF. This led to the negotiation of the CSF's lease of the former Nkwala Elementary as a stand-alone school for the 2004/05 school year. The CSF consolidated its Summerland programmes at that location. The programme at Summerland Secondary transitioned to Penticton Secondary.

[3192] The first lease of Nkwala Elementary by the CSF was negotiated for August 2004 to June 2009 by Mr. Peter Boyle, acting Secretary-Treasurer for the CSF (the "First Nkwala Lease"). Pursuant to that lease, SD67-Okanagan-Skaha charged the CSF an aggregate rental rate of \$1,327,500.

[3193] The CSF now operates École Élémentaire Entre-lacs in the former Nkwala Elementary facility under a second three-year rental agreement (the "Second Nkwala Lease"). The CSF pays to SD67-Okanagan-Skaha \$222,000 per year. The lease was set to expire in 2016.

[3194] Additionally, the CSF entered into supplementary one-year agreements with SD67-Okanagan Skaha for middle school and secondary school courses at McNicoll Park Middle and Penticton Secondary. In 2013/14, SD67-Okanagan Skaha charged

the CSF \$309,402 for those services; \$22,918.56 of that amount was attributable to “school services”, and the rest to instruction of students.

[3195] The Ministry pays the lease costs independently of the CSF’s Operating Block grants, excluding administrative portions of the lease.

[3196] Pursuant to the First Nkwala Lease, SD67-Okanagan Skaha was responsible for maintenance associated with Nkwala Elementary, including cleaning, grounds maintenance, HVAC servicing, electrical, non-energy utilities, fuel and electricity.

[3197] Now, the CSF enters into annual contracts for SD67-Okanagan-Skaha to maintain École Élémentaire Entre-lacs. Pursuant to the most recent agreement, the CSF pays \$60,000 per year for basic maintenance. The CSF also pays utilities, administrative fees, and for custodial supplies, as well as tradesman time and materials. The CSF pays those fees using its operating budget.

[3198] Mr. Blais described some issues with maintenance at École Élémentaire Entre-lacs when he was principal. He explained that the carpets were unclean because students ate lunch in carpeted areas. However, SD67-Okanagan Skaha only cleaned the carpets once per year. The toilets were often plugged, and required maintenance. He recalled that there were sometimes long delays for maintenance to the building.

[3199] Ms. Daragahi testified that when maintenance is needed, she submits work orders to SD67-Okanagan Skaha through an electronic system. Sometimes she follows up with a phone call. She has encountered many issues with delayed maintenance to the building. On one occasion, Ms. Daragahi requested a lock for a gate on the property after two students wandered away without supervision. To her, the issue was “super urgent”. However, she did not receive a padlock for 27 days. There was also an issue with a black widow spider’s nest on the property, which went unresolved for 215 days. On another occasion, Ms. Daragahi asked to have some shelves replaced because of mice excrement. She was quoted a price of

\$2,300 to replace the shelves and a sink. Due to the cost, she declined the repair and devised a system so the teacher would not use that area.

[3200] The CSF also purchased new water fountains for the school in February 2014. By the time Ms. Daragahi testified in June 2014, the water fountains had not been installed, despite follow up phone calls and repeated work orders.

[3201] On another occasion, Ms. Daragahi sought installation of an external storage locker to store emergency preparedness kits. Later, she asked to have those kits moved near the entrance of the school, to accord with CSF policy. SD67-Okanagan Skaha refused those requests, citing its own policy, which differs from the CSF's.

[3202] Ms. Daragahi has also had challenges with the building's fire dispatch system. In April 2014, Ms. Daragahi contacted the fire dispatch to schedule a fire drill. She learned that École Élémentaire Entre-lacs' enrolment with the dispatch service had been cancelled. Ms. Daragahi reported the problem to SD67-Okanagan Skaha, and was told that the district had migrated to a different dispatch service and that the problem would be fixed. When Ms. Daragahi tried to run a fire drill again sometime later, it became clear to her that the problem had not been resolved.

[3203] Mr. Allison suggested that repairs would be faster if the CSF had its own facility and was itself responsible for maintenance. According to Ms. Daragahi, The CSF cannot seek quotes from or contract with other maintenance suppliers. SD67-Okanagan Skaha refused a request to increase the cost of the lease in exchange for the CSF assuming responsibility for maintenance.

[3204] The evidence shows several attempts by the CSF to undertake leasehold improvements of the former Nkwala Elementary.

[3205] In about 2009, the CSF and SD67-Okanagan Skaha discussed adding middle and secondary school spaces to the building. The CSF developed a plan whereby it would pay \$900,000 for the renovations and amortize the cost over the

course of the lease. Ultimately, the plan did not go forward. I note that this was around the same time as the Ministry spread one year's AFG funding over two years.

[3206] In 2008, Mr. Bonnefoy began working with SD67-Okanagan Skaha on upgrades to the HVAC system at École Élémentaire Entre-lacs to take advantage of a Ministry partial funding programme. However, the CSF wanted to secure a new long-term lease before committing to co-funding the renovations with SD67-Okanagan-Skaha. The CSF and SD67-Okanagan-Skaha sought an exemption from the accounting rule that revenues from leases of more than five years flow into a school district's capital rather than operating budgets. Mr. Bonnefoy could not recall whether he followed up with Mr. Owen at the Ministry to determine whether such an exemption would be allowed. In any event, the Ministry did not provide AFG funding in 2009/10, and the project did not go forward at that time.

[3207] When Ms. Daragahi gave evidence in June 2014, the HVAC programme was going forward in three phases. Air conditioners had been installed in the warmest rooms, and the systems in other rooms would be updated in a block-by-block basis. SD67-Okanagan Skaha and the CSF are sharing the cost of the renovations. The CSF is paying its share using its AFG.

[3208] There have been other renovations to Nkwala Elementary in Mr. Allison's time as Secretary-Treasurer, at the CSF's expense. In January 2010, after receiving some complaints from parents, Mr. Allison arranged for the CSF to fund several upgrades: updates to the hot water and sinks in six classrooms; replacement of some toilets; replacement of carpet with linoleum; painting in five classrooms; and a reorganization of the bus loading zone.

[3209] Ms. Daragahi confirmed that the CSF also funded a renovation to convert a classroom near the entrance of the Nkwala Elementary Building into an office for security reasons. She first contemplated the reorganization in April 2011. It took three years before the CSF committed to funding the renovations.

[3210] In its argument, the plaintiffs take the position that the CSF's efforts have had a "marginal" impact on the Nkwala Elementary Site's FCI score, moving if from a score of 0.58 in 2010 to 0.51 in 2015. The plaintiffs complain that SD67-Okanagan Skaha will retain the benefit of the improved building when the CSF's use of the facility ends. The plaintiffs also take the position that the building has a number of other deficiencies that have yet to be addressed.

3. Conclusions

[3211] The relationship between SD67-Okanagan Skaha and the CSF is mixed. In some ways, the relationship is a strong one. The districts have been able to work together to co-fund and complete leasehold improvements to the former Nkwala Elementary building. The two boards are co-operating to complete necessary improvements to the layout of the building and the HVAC system. Further, SD67-Okanagan Skaha gave the CSF notice of its planning for McNicoll Park Middle. Not all districts have been as forthcoming.

[3212] On the other hand, there are some problems with the day-to-day implementation of the maintenance agreements between the CSF and SD67-Okanagan Skaha. École Élémentaire Entre-lacs administrators face long delays before routine maintenance is performed.

[3213] The lease costs charged by SD67-Okanagan Skaha are also very high. The CSF points out that from 2004/05 to 2014/15, the Province paid \$2,444,469 to SD67-Okanagan Skaha for the CSF's leased programmes in Penticton. This concern is allayed to an extent because the Ministry pays the cost of the lease. The decision to fund CSF space through leases is one that falls within the Province's right to determine the structure and parameters of the education system (so long as those decisions do not interfere with the CSF's right to management and control and ensure that rightsholders receive adequate facilities where the numbers so warrant). However, the arrangement shows how some school boards profit from their dealings with the CSF.

[3214] The CSF has a long history of requesting projects in the Penticton area. The CSF has consistently requested projects there since about 2002. Over the course of 13 years, the Province's capital funding system has not responded to that request. On the other hand, when the CSF sequentially prioritized its project requests, the Penticton projects were typically given a low priority ranking. Further, enrolment at École Élémentaire Entre-lacs only surpassed 100 students in 2009/10, and only accelerated quickly beginning in 2013/14. The nature of the requests have changed over time, too: from a site and new elementary school, to the acquisition of an old SD67-Okanagan Skaha school, to requests for a new site and school for an elementary/middle school. From the Ministry's perspective, the equivocation coupled with the low priority and low enrolment might have made it challenging to fund the project.

[3215] As I explain in more detail in Chapter XXXVI, Expansion Projects and the Enrolment Driver, in about 2005 the Minister passed over the CSF's proposed project in Penticton. The Minister supported two CSF projects that year (in Comox and Campbell River). The Minister also supported several SD36-Surrey and SD75-Mission projects ahead of the CSF's proposed Penticton project because SD36-Surrey was able to contribute some Local or Restricted Capital Reserve to those projects. It did so even though the proposed Penticton project had a better Space Rank Score than the proposed majority school projects. Thus, in that instance, the fact that the CSF had to compete with majority school boards that were able to bring more Local or Restricted Capital Reserve to the table materially contributed to the current situation in Penticton.

[3216] Thereafter, the Ministry did not fund any Expansion Projects between 2005 and 2011. In my view, given that the CSF continued to request projects in that period, and that the Penticton project was so close to being approved in 2005, the lack of funds for Expansion Projects between 2005 and 2011 also materially contributed to the current situation.

F. Justification

[3217] I conclude that a reasonable rightsholder parent would conclude that the global educational experience at École Élémentaire Entre-lacs is substandard. That breach is caused by two aspects of the Province’s funding regime: the policy by which the CSF’s capital project proposals are compared against project approvals by majority boards (who have greater ability to contribute Local and Restricted Capital to projects), and the lack of capital funding for Expansion Projects between 2005 and 2011. The remaining question is whether the breach is justified.

[3218] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs’ claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the “fair and rational allocation of public funds”. It is my view that the particular infringing measure that weighs the CSF’s proposed Expansion Projects against those requested by the majority is likewise intended to further the fair and rational allocation of public funds, as was the lack of Expansion Projects during a period of declining enrolment.

[3219] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I am satisfied there is a rational connection between the fair and rational allocation of public funds and a system that compares the CSF’s needs to that of the majority. By weighing the CSF’s needs against other needs for space across the Province, the Province seeks to ensure that all districts are treated equitably and that funds are spent where they are most needed. I also see a rational connection between fairly and rationally expending public funds and not building any new spaces for students between 2005 and 2011. Given that the Province had constructed tens of thousands of new spaces for students between the 1990s and 2005, it was rational to decide not to devote further public funds to that purpose when enrolment across the Province was declining.

[3220] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[3221] The extent to which the measure minimally impairs the plaintiffs' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. I find that the fact that the CSF's project requests were weighed against those of SD36-Surrey and SD75-Mission deprived rightsholders in Penticton of a new site for a school in 2005. The Minister was dealing with limited public funds, and was allocating them between districts to achieve the public good of education. As I have noted, it is entitled to some deference in how it went about doing so. At that time, enrolment at École Élémentaire Entre-lacs was only about 80 students, and students had access to a homogeneous school. The Minister paid that lease. The CSF was being provided with AFG funding that it could have put toward tenant improvements at École Élémentaire Entre-lacs. The Minister approved funding for CSF expansion in Comox and Campbell River, with the CSF's agreement. Given those circumstances and the deference owed to the government, at that time the comparison between the CSF's needs and that of the majority impaired the s. 23 rights of Penticton rightsholders as little as possible while still allocating limited public funds.

[3222] Then, a lack of further funding for Expansion Projects deprived rightsholders of a new school between 2005 and 2011. In my view, the failure to support any Expansion Projects for the CSF in that period, to the detriment of the position of rightsholders in Penticton, was not minimally impairing. The Province essentially implemented a blanket prohibition of Expansion Projects. It did not devote any funds to remedying the CSF's position or need for Expansion Projects in Penticton or elsewhere. In those circumstances, it is entitled to less deference. In my view, the

Ministry could have achieved its goal of fairly and rationally allocating limited public funds while still funding CSF Expansion Projects in some limited way. The Minister was not carefully weighing which capital projects ought to go forward and which should not. The Province simply did not fund any new Expansion Projects, at the expense of its constitutional obligations. Here, the Province fails the s. 1 justification test at the minimal impairment stage.

[3223] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[3224] With reference to the situation in Penticton, the salutary effects of weighing the CSF's proposed Penticton project against those of the majority include that the Ministry was able to move forward with three projects for SD36-Surrey and SD75-Mission. Doing so allowed it to create more absolute spaces for students, because SD36-Surrey and SD75-Mission could contribute some Local and Restricted Capital Reserve to those projects. During the Expansion Project freeze between 2005 and 2011 the salutary effects are primarily cost savings-- the savings the Ministry was able to generate by not funding the CSF's project requests for Penticton. The CSF's proposed project is currently estimated to cost about \$17 million (not including site acquisition). Due to rampant construction cost escalation since 2009, the cost savings in 2005 would have been less than that.

[3225] The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to

the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[3226] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[3227] The deleterious effects, at the local level, concern the inferior educational experience afforded to the minority. In Penticton, CSF students are educated in facilities that are inferior to majority schools: They endure long transportation times, which are compounded by the school's poor state of repair, its age, and its lack of curb appeal. Its classrooms are small, as is its library and gymnasium. These deficiencies are not outweighed by the excellent Francophone programming, its highly advanced technology programme and its attractive playfields. That likely deters some parents from enrolling their children at the minority school.

[3228] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at

most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[3229] As a result, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. This is particularly so given my conclusion that, even with the best possible facilities, only about 25 more students would be likely to attend École Élémentaire Entre-lacs.

[3230] Weighing those effects together, I find that the deleterious effects outweigh the salutary effects. The cost savings to the Province of remedying the situation does not justify the deleterious effects on the global educational experience for rightsholders. While the system as a whole has resulted in generally fair outcomes for the CSF, the CSF is at the bottom of the range. Those benefits do not outweigh the low cost of remedying the situation and the poor global educational experience afforded to rightsholders' children in Penticton. I therefore conclude that the Province has failed to show proportionate effects.

G. Remedy

[3231] The plaintiffs submit that an appropriate and just remedy is to construct a new K-8 school for the CSF in Penticton. The plaintiffs point to the sites identified in the CSF's recent In-House PIRs, as well as the potential for the CSF to acquire McNicoll Park Middle. As McNicoll Park Middle remains an operating school, they seek an order requiring the Minister to order SD67-Okanagan Skaha to close and transfer McNicoll Park Middle to the CSF. They also stress the importance of granting the remedies without delay.

[3232] I address my approach to remedies in Chapter X, Remedies. There, I explain that I do not consider that the Minister has the power to order the transfer of McNicoll Park Middle to the CSF as the plaintiffs suggest that it does.

[3233] As I outline in Chapter X, Remedies, the most appropriate and just remedy for the plaintiffs' Community Claims will typically be a declaration of the positive

rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches. With reference to Penticton, the Ministry could remedy the situation in a number of ways. It could fund the transfer of McNicoll Park Middle to the CSF (if it becomes available), then fund renovations to the school. Or it could fund a full replacement. Or, it could fund a transfer of and renovations and replacements to Nkwala Elementary.

[3234] In the circumstances, I find that an appropriate remedy is to issue declarations. I declare that:

- a) Rightsholders under section 23 of the *Charter* living in the catchment area of École Élémentaire Entre-lacs are entitled to have their elementary/middle school age children (age 5-14) receive minority language education in homogeneous facilities with space for 175 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools in Penticton, Summerland and Okanagan Falls, and proportionate to the educational experience in comparator middle schools.
- b) The school facility presently housing École Élémentaire Entre-lacs does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools and proportionate to the experience in comparator middle schools.

[3235] The CSF and the Ministry will need to work together to ensure that the needs of Penticton rightsholders are met. As I describe in Chapter XLIII, Duty to Assist the CSF and the *Education Mediation Regulation*, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[3236] Further, given that this and other *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the

majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[3237] The plaintiffs also argue that *Charter* damages ought to be granted concerning the breach in Penticton. I describe my approach to *Charter* damages in Chapter X, Remedies. There, I explain that in many instances where the government is acting in good faith pursuant to an unconstitutional law or policy, countervailing factors concerning the "public good" will tend to negate the plaintiffs' claims for *Charter* damages. This ensures that government actors will continue to enforce laws without fear of retribution if they are later found to be invalid.

[3238] In this instance, I am satisfied that the Minister was always acting in good faith in connection when implementing its capital funding system in connection with the CSF's needs in Penticton. The CSF did not seek the Minister's assistance dealing with its relationship with SD67-Okanagan Skaha except in connection with the transfer of McNicoll Park Middle. There are many competing needs for capital projects in the Province. Awarding damages in this instance could have a chilling effect by leading Government to allocate a disproportionate amount of funding to the CSF out of fear of retribution.

H. Summary

[3239] I conclude that the best estimate of the number of children in Kindergarten through Grade 8 likely to take advantage of a programme in Penticton in the best possible circumstances is about 175 children: about 135 at the elementary level and 40 at the middle school level. I find that the school falls in the middle- to high-end of the sliding scale. The numbers warrant a homogeneous facility that can offer a global educational experience that is equivalent to that offered at majority elementary schools. In light of the very small number of middle school students,

though, École Élémentaire Entre-lacs is only entitled to proportionate access to core middle-school instructional facilities.

[3240] I find that the numbers in Penticton at the elementary and middle school level are not receiving what they are entitled to because the global educational experience is not proportionate or equivalent to what is offered at the majority at comparator schools. Two aspects of the Ministry's laws and policies materially contributed to those breaches: The policy that compared the CSF's proposed Penticton project to projects proposed by majority school boards with greater resources in 2005 and the lack of any new funding for Expansion Projects between 2005 and 2011.

[3241] In my view, the defendants have not shown that the breach is justified: the decision not to fund any Expansion Projects between 2005 and 2011 was not reasonably tailored to the objective of ensuring the fair and rational allocation of public funds while still meeting the Province's constitutional obligations. Further, the deleterious and salutary effects of the measures are not proportionate.

[3242] I find that declarations are the most appropriate remedy. However, the Province will also be required to prepare a separate Capital Envelope to respond to this and other CSF needs across the Province.

XXIII. ÉCOLE ÉLÉMENTAIRE LES NAVIGATEURS (RICHMOND)

[3243] Richmond is located in the Lower Mainland region of British Columbia. There, the CSF operates École Élémentaire des Navigateurs, a homogeneous French-language Kindergarten to Grade 7 school. École Élémentaire des Navigateurs operates out of the former Alexander Kilgour Elementary ("Kilgour Elementary"), which it leases from SD38-Richmond. In 2014/15, the school's enrolment was 127 students.

[3244] In Richmond, the CSF proposes to build an owned, newly-built homogeneous elementary/secondary (K-12) school to serve children from Richmond and a part of New Westminster (the "Richmond Elementary/Secondary Project"). In

2014, the CSF estimated the project would cost more than \$22 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[3245] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all described their experiences with École Élémentaire des Navigateurs. Mr. Stewart and Mr. Palmer and to a lesser extent Mr. Miller, also testified about their dealings with the CSF and SD38-Richmond concerning École Élémentaire des Navigateurs.

[3246] The Court also heard from Mr. Gosselin, a long-time teacher and administrator for the CSF. Upon moving to Vancouver in the 1980s or 1990s, Mr. Gosselin worked for SD39-Vancouver as a teacher-on-call for French immersion classes and the Programmes Cadres at École Élémentaire Anne-Hébert and Kitsilano Secondary. In 1990, he was hired by SD36-Surrey to teach Grade 3 at its Programme Cadre. Later, he transferred to the CSF and taught and served as an administrator at École Élémentaire Rose-des-Vents (Vancouver (West)), École Élémentaire Anne-Hébert (Vancouver (East)) and École Élémentaire des Navigateurs, where he is the current principal.

[3247] I found Mr. Gosselin to be a forthright witness. When he was given the opportunity, he was frank that he was in favour of the CSF acquiring Kilgour Elementary even though that might not have helped the CSF's case. I found him to be an honest and reliable witness.

[3248] The Joint Fact Finder's Report also describes École Élémentaire des Navigateurs and comparator schools. The Fact-Finding Team consulted Ministry and District Data, and engaged an architect to convert floorplans to provide areas for rooms and doorways. A member of the Fact-Finding Team visited 10 comparator schools with a custodial supervisor from SD38-Richmond. Mr. Milne visited École Élémentaire des Navigateurs with the school principal. I find this to be very helpful and reliable evidence.

B. History and Context

1. The CSF's Richmond Catchment Area

[3249] Dr. Kenny explained that French speakers formed part of the earliest settlements in Richmond. Opportunities for education in French were limited, but parents could send their children to an independent French Catholic school in Vancouver.

[3250] The Court heard limited evidence concerning Francophone community organizations in the Richmond area.

[3251] SD38-Richmond began considering French immersion options in 1978. Enrolment in those programmes grew to 700 students by 1982. At the same time, the Programme Cadre had only five students, although that number grew to 25 for the 1985/86 school year. Some parents from Richmond sent their children to École Élémentaire Anne-Hébert in Vancouver.

[3252] The CSF opened École Élémentaire des Navigateurs to provide a local option for Richmond rightsholders in about 2001. Today, it operates as a homogeneous Kindergarten to Grade 7, French-language elementary school. It also offers a French-language daycare and a before-and-after school care programme. There is no Strong Start or preschool programme.

[3253] On graduation from École Élémentaire des Navigateurs students may choose to attend École Secondaire Jules-Verne in Vancouver. École Élémentaire des Navigateurs does not offer any specialized amenities for secondary instruction, like science labs or shop classes.

[3254] École Élémentaire des Navigateurs operates in a school leased from SD38-Richmond, Kilgour Elementary. The school is centrally-located in the catchment area in a residential neighbourhood.

[3255] The catchment area for École Élémentaire des Navigateurs consists of the entire territory of SD38-Richmond and a small portion of the territory of SD40-New

Westminster. SD38-Richmond operates 38 elementary schools and 10 secondary schools. It offers French immersion at nine elementary and two secondary schools. SD40-New Westminster operates one elementary school and one secondary school in the École Élémentaire des Navigateurs catchment area.

2. Conclusions

[3256] When analyzing the Richmond claim, I take into account the catchment area's urban make-up, and the large number of schools with which École Élémentaire des Navigateurs competes, including French immersion schools. I also consider that minority language education did not take hold in Richmond until the CSF was created; its Programme Cadre was unsuccessful, and French immersion has typically proven much more popular in the area.

[3257] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[3258] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[3259] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use that number as a proxy for the total number of

rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[3260] Dr. Landry estimated that in 2011 there were 287 elementary-age children (age 5-13) living in the Richmond Elementary/Secondary Project's catchment area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 303 elementary-age children of Mother-Tongue Rightsholders in the catchment area, a slight increase of about 5%.

[3261] I note that Dr. Landry also found 1,792 elementary-age children of non-Francophones in the catchment area in the Knowledge Category, and 354 in the Regular Home Use Category. I do not find those numbers to be a reliable proxy for the number of children Education or Sibling Rightsholders in Richmond.

[3262] Dr. Landry and Mr. McRae also estimated the number of children eligible to attend a Francophone secondary programme. Based on Dr. Landry's data, in 2011 there were 122 secondary-age children (age 14-17) in the catchment area who had a Mother-Tongue Rightsholder parent. Mr. McRae forecasted that number would decline to 102 children by 2023. I do not find Dr. Landry's counts of 1,395 secondary-age children in the Knowledge Category or 200 in the Regular Home Use Category to be helpful evidence.

[3263] I find that a reasonable proxy for the total universe of rightsholders' children in the Richmond Elementary/Secondary Project's catchment area into the reasonably foreseeable future is about 300 elementary-age children and 100 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[3264] École Élémentaire des Navigateurs serves students in Kindergarten through Grade 7. The evidence shows that enrolment at École Élémentaire des Navigateurs

has grown from 10 students in Kindergarten and Grade 1 in its first year (2001/02) to 127 students in Kindergarten to Grade 7 in 2014/15.

[3265] The grade configurations have changed over time, with the École Élémentaire des Navigateurs gradually adding grades until the school offered a K-6 programme in 2007/08. The school added Grade 7 in 2014/15. Between 2007/08 and 2011/12, when École Élémentaire des Navigateurs operated as a K-6 school, enrolment was consistently between 90 and 110 students. Enrolment has grown by about 27 students since École Élémentaire des Navigateurs began offering Grade 7 in 2012/13. Current known demand is 127 children. Three children of non-rightsholders were admitted to École Élémentaire des Navigateurs pursuant to its Expanded Admissions Policy when it was in place.

[3266] Some École Élémentaire des Navigateurs students choose to attend a Francophone secondary programme in Vancouver, École Secondaire Jules-Verne. Twenty-three École Secondaire Jules-Verne students live in the catchment area for the proposed Richmond Elementary/Secondary Project.

3. The Uptake Rate

[3267] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[3268] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's

historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[3269] The plaintiffs say that the CSF seeks a new school with nominal capacity for 340 students, or operating capacity for 323 students: capacity for 248 Kindergarten and elementary students, and 75 secondary students. The plaintiffs say a school of that size is appropriate because it would allow École Élémentaire des Navigateurs space for two Kindergarten divisions, nine elementary divisions and three secondary divisions. They point to École Élémentaire des Navigateurs' history of enrolment growth, and the increased enrolment it believes it would see if it had improved facilities, particularly for secondary students. They suggest that École Élémentaire des Navigateurs offers a substandard global educational experience, depressing enrolment.

[3270] The defendants suggest that the CSF's request is unreasonable. They note that the current proxy participation rate at the elementary level is around 40%, and that the CSF would require a proxy participation rate of about 85% to fill its proposed school.

[3271] Currently, 127 elementary-age children attend École Élémentaire des Navigateurs. Given the proxy universe of 200 elementary-age children, École Élémentaire des Navigateurs' proxy participation rate is 42%. This is a relatively healthy participation rate, particularly because École Élémentaire des Navigateurs is located in an urban area, where it competes with many neighbourhood and French immersion schools. Those schools are typically closer to rightsholders' homes than is École Élémentaire des Navigateurs.

[3272] As I develop below, I do not find that École Élémentaire des Navigateurs offers substandard facilities, or that it the facilities deter rightsholder parents from choosing a minority language education. Further, history shows that French immersion tends to be more popular in Richmond than minority language education.

So, while there is room for the proxy participation rate to grow, given the competition in the area coupled with the high rate of assimilation and low rate of transmission of the French language, the growth at the elementary level is unlikely to be substantial.

[3273] The CSF has built two elementary/secondary schools in the Lower Mainland: École Gabrielle-Roy (Surrey) and École André-Piolat (North Vancouver).

[3274] École Gabrielle-Roy initially operated out of leased space in SD36-Surrey. For at least the most recent years prior to the construction of the new school, those facilities were heterogeneous. Between the time the new school facility opened in 2002/03 and 2014/15, enrolment at the elementary (K-7) level grew from 280 children to 373 children: an increase of about 33%.

[3275] Dr. Castonguay, using Dr. Landry's methodology, counted 843 elementary-age children (age 5-12) with a Mother-Tongue Rightsholder parent living in the École Gabrielle-Roy catchment area. Assuming the universe remained constant, the participation rate grew from 33% to 44% after the move to a new, homogeneous facility: an increase of 11%.

[3276] The assumption that the universe in Surrey remained constant is far from certain. Surrey is the fastest growing school district in the province, and among the fastest growing districts in North America, by Mr. Miller's account. Thus, I assume that the total universe of children has been growing since 2002/03. The effect is that the starting participation rate was somewhat higher, and that the growth of the participation rate was of a lesser magnitude than these numbers suggest.

[3277] École André-Piolat (North Vancouver) began as an owned, homogeneous school and was replaced as a Building Condition Project. It re-opened in 2004 with the intent that it would quickly grow to serve children in all grade levels. Since then, enrolment at the elementary levels (K-7) has increased from 140 children in the school's first year to 355 children in 2014/15. Thirteen children of non-rightsholders were admitted pursuant to the CSF's Expanded Admissions Policy, so enrolment growth was about 144%.

[3278] Dr. Castonguay, using Dr. Landry's methodology, calculated the number of elementary-age (age 5-12) children with Mother Tongue rightsholder parents living in North Vancouver. He found that there were 562 such children in the catchment area in 2011. Assuming that the universe remained constant, the proxy participation rate at the K-7 level grew from 25% in 2004/05 to 61% in 2014/15: an increase of 36%.

[3279] The experiences in Surrey and North Vancouver are not perfect corollaries. Both those communities have much larger populations of Mother-Tongue Rightsholders than exist in Richmond. They also both also opened new schools with smaller participation rates than École Élémentaire des Navigateurs has now. Nevertheless, the experience at those two schools shows that in an urban setting, the participation rate for elementary students will tend to grow when it moves into a newly built elementary/secondary school.

[3280] Taking into account all the surrounding circumstances, including the experiences in North Vancouver and Surrey, I consider that the CSF can reasonably expect about 165 elementary students to attend a newly-built homogeneous elementary/secondary school in Richmond. This represents a participation rate of 55%: slightly higher than the one in Surrey and lower than the one in North Vancouver. It envisions the participation rate growing by about 12%.

[3281] I find that known demand for a secondary programme in Richmond is 23 students, representing 23% of the proxy universe of rightsholders' children. This is a relatively low participation rate, leaving some room for growth. There is no doubt that if École Élémentaire des Navigateurs offered a secondary programme in Richmond, the participation rate would be higher than it is now. The fact that the nearest secondary school is located in Vancouver rather than Richmond is a disincentive to the choice of a minority language secondary education.

[3282] On the other hand, by serving a larger population, École Secondaire Jules-Verne is able to offer a dedicated secondary programme. École Élémentaire des Navigateurs would not be able to offer the same complement of secondary programming if it were operating as a K-12 school. I also consider that École

Élémentaire des Navigateurs will experience some attrition as students approach secondary levels, and will always struggle due to competition with the greater breadth of programming available at majority secondary schools.

[3283] The Surrey and North Vancouver parallels are hard to apply to Richmond. In Surrey, there was no secondary option prior to the start of the new homogeneous school facility. As such, it is of marginal relevance. In North Vancouver, the secondary programme moved from a heterogeneous environment to École André-Piolat, then failed due to low enrolment. There are no instances in the evidence of a homogeneous minority language secondary programme opening to provide a closer option for students and parents in the community where they reside.

[3284] In my view, given current existing demand and the benefit of moving the secondary programme to Richmond, the CSF can reasonably anticipate about 40 students to attend a homogeneous secondary programme in Richmond. This represents a 40% participation rate, and growth of about 17%.

D. Entitlement

[3285] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement. The entitlement analysis differs for the elementary and secondary components of the CSF's proposed Richmond school.

1. Appropriate Comparator Schools

[3286] Because of the local focus of the analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[3287] In this case, the appropriate comparator schools are all those in SD38-Richmond and those in SD40-New Westminster that overlap with the École Élémentaire des Navigateurs catchment area. The maps show that rightsholder families are distributed throughout that area. Thus, those schools are the local

alternatives that parents would consider when making enrolment decisions for their children.

2. Location on the Sliding Scale

[3288] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[3289] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[3290] The plaintiffs submit that it is pedagogically and financially feasible for the CSF to offer a distinct, homogeneous school equivalent to majority schools based only on École Élémentaire des Navigateurs' current 127-student enrolment. They note that SD38-Richmond operated one school with a 2014/15 enrolment lower than École Élémentaire des Navigateurs', and 7 schools with fewer than 175 students.

[3291] I have determined that if the Province were to build a homogeneous elementary/secondary school for minority language students in Richmond, about 165 children in Kindergarten to Grade 8 would be likely to attend that school.

[3292] The Joint Fact Finder's Report describes about 40 SD38-Richmond and SD40-New Westminster elementary schools. Of those he described, seven have enrolment ranging from 29 students (Sea Island Elementary, a K-3 school) to 166 students (Donald E. McKay Elementary, Thomas Kidd Elementary, both K-7 schools). The average enrolment in 2014/15 was 299 students. This shows that it is

pedagogically appropriate and cost-effective to operate a homogeneous elementary school in Richmond for a school of École Élémentaire des Navigateurs' anticipated size.

[3293] Generally, though, the Province does not build schools in Richmond to have such a small operating capacity at the elementary level. The only school with a similar operating capacity is Sea Island Elementary, which is a K-3 school. The smallest operating capacity for a K-7 school is 181 students (Quilchena Elementary, Jessie Wowk Elementary). The average operating capacity at comparator schools is 347 students. Less than a quarter of the schools in the sample were built with operating capacity for 250 or fewer students.

[3294] Overall, though, given the similarities in size between SD38-Richmond K-7 schools and École Élémentaire des Navigateurs, and given that it may be appropriate for the minority to offer different types of facilities than the majority, I find that the numbers at the elementary level in Richmond fall at the highest extremity of the sliding scale, warranting distinct, equivalent facilities that offer a global educational experience equivalent to what is offered at majority comparator schools.

[3295] The situation is different at the secondary level, where I anticipate that only about 40 children would be likely to participate in a CSF programme. There is no evidence of any purpose-built elementary/secondary schools in the Richmond area. The CSF is entitled to some deference to its assessment that an elementary/secondary school is pedagogically appropriate in SD38-Richmond. However, in the urban context, this must be weighed with the cost efficiencies and pedagogical benefit that would accrue from secondary students attending a larger school, which serves a larger population, with more amenities.

[3296] Overall, given that about 40 children would be likely to attend a CSF secondary programme in Richmond, I conclude that the numbers warrant minority language secondary instruction and access to core facilities proportionate to what is available in majority secondary schools.

3. Global Elementary/Middle School Experience

[3297] The plaintiffs argue that the elementary educational experience at École Élémentaire des Navigateurs is substandard for a number of reasons: the attractiveness of its exterior appearance and visibility; maintenance problems; a small school site; a small administrative area; unattractive classrooms; a lack of student support space; a small library; environmental factors; long travel times; and a lack of middle school and early childhood spaces. I will weigh those factors together with other factors relevant to the educational experience.

a) Facility Condition

[3298] Mr. Gosselin advised that exterior of École Élémentaire des Navigateurs is covered in sheet metal siding. It has an asphalt entrance. Mr. Gosselin described the interior of the building as appearing “old”, with low, water-damaged ceilings.

[3299] The only qualitative comparative evidence concerning the appearance of the facility comes from rightsholder parents. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I assign those views no weight. As a proxy, I look to the age and FCI scores for the comparator schools, which tend to be correlated with a school’s state of repair.

[3300] Mr. Frith calculated École Élémentaire des Navigateurs’ average age to be 43 years. The average age of the sample comparator schools is 34 years, ranging from 62 years old (Sea Island Elementary) to 2 years old (Samuel Brighthouse Elementary). About half the schools are more than 35 years old. Twelve of forty schools are the same age or older than École Élémentaire des Navigateurs.

[3301] École Élémentaire des Navigateurs’ FCI score is 0.59. The average FCI score at the comparator schools is 0.37. Sample comparator FCI scores range from a best score of 0 (Samuel Brighthouse Elementary) to a worst score of 0.72 (James Whiteside Elementary). Only four comparator schools have a worse FCI score than does École Élémentaire des Navigateurs, placing École Élémentaire des Navigateurs near the bottom 10% of schools in terms of facility condition.

b) Appearance and Visibility

[3302] École Élémentaire des Navigateurs is located in a residential neighbourhood. Mr. Bonnefoy stated that it is “oddly located” and difficult to find.

[3303] This contradicts the evidence of Mr. Allison, who stated that École Élémentaire des Navigateurs is well located. When he began working as Mr. Bonnefoy’s assistant in 2007, he enrolled his children at École Élémentaire des Navigateurs. Mr. Gosselin stated that he is in favour of the CSF acquiring its current facility in part because he thinks it is in a good location. I prefer the evidence of Mr. Gosselin in this instance.

[3304] Mr. Bonnefoy explained that throughout his tenure with the CSF, the signage on the École Élémentaire des Navigateurs building identified the school as Alexander Kilgour Elementary. The CSF asked to remove that sign. While that did not happen, the CSF was allowed to add its own, second sign to the exterior of the building.

[3305] The plaintiffs argue that the signage on the building serves as a constant reminder that École Élémentaire des Navigateurs is located in a leased facility, which has an impact on the pride that rightsholder parents feel in the school.

c) School Site

[3306] Several CSF educators and administrators commented that École Élémentaire des Navigateurs’ site is one of its positive attributes. Dr. Ardanaz stated that students have access to a large playfield. Mr. Allison commented favourably on École Élémentaire des Navigateurs’ site and large grassy field.

[3307] According to Mr. Gosselin, the site includes a play structure, a covered foyer with CSF-constructed garden plots, and a large field with soccer goal posts and a baseball diamond. However, from time to time, sometimes for up to a month, École Élémentaire des Navigateurs shares the field with migrating geese. This is not an uncommon problem in Greater Vancouver. Mr. Gosselin found it “beautiful” until the

geese were chased by Kindergarten students, and École Élémentaire des Navigateurs had to deal with goose excrement.

[3308] Several parents of École Élémentaire des Navigateurs students, including Ms. Straus, Ms. Valerie Allen, Ms. Shinkarik and Ms. Belinda Plourde, testified that the École Élémentaire des Navigateurs play structure is outdated, unattractive, and too small to be used by many students. Mr. Stewart's evidence was that in 2011, the CSF received a \$50,000 grant to purchase and install playground equipment at Navigateurs. The parents recounted that the APÉ decided not to use the money to purchase and install playground equipment as it would be too costly to invest in a play structure and move it to a new school if one were built.

[3309] The Joint Fact Finder's Report indicates that École Élémentaire des Navigateurs is on a five-acre site. The average site size at sample comparator schools is seven acres, and range from 1.5 acres (Robert J. Tait Elementary) to 25.9 acres (John G. Diefenbaker Elementary). Twelve comparator schools have smaller sites than École Élémentaire des Navigateurs, and twenty-eight have larger.

[3310] When examining site size in comparison to enrolment, though, École Élémentaire des Navigateurs has more than 165 m² per student enrolled in 2014/15, while the comparator school average is 111 m² per student. Only five schools have a bigger site per student than does École Élémentaire des Navigateurs. The evidence does not suggest, and the plaintiffs do not argue, that École Élémentaire des Navigateurs requires a larger site per student to achieve substantive equivalence with the majority.

d) Main Entrance and Administrative Space

[3311] Dr. Ardanaz observed that École Élémentaire des Navigateurs has a large staff room, principal's office and administrative area.

[3312] The Joint Fact Finder reported that the École Élémentaire des Navigateurs administrative space is about 39 m². The average comparator school has 60 m² of administrative space, ranging from a low of 36 m² (Thomas Kidd Elementary) to a

high of 146 m² (Kathleen McNeely Elementary). Only Thomas Kidd Elementary has less absolute space than does École Élémentaire des Navigateurs. Only two other schools have less than 40 m² of administrative space.

[3313] When examining administrative space on a per-student basis using 2014/15 enrolment, École Élémentaire des Navigateurs is one of only nine schools with more than 0.3 m² per student.

[3314] École Élémentaire des Navigateurs' main entrance is 18 m². The average main entrance at the comparator schools is 43 m², ranging from a low of 12 m² (W.D. Ferris Elementary) to a high of 169 m² (Henry Anderson Elementary). Only six of forty schools have less absolute space for their main entrance than does École Élémentaire des Navigateurs.

[3315] On a per student basis, École Élémentaire des Navigateurs has less main entrance space per student than does the average comparator school. École Élémentaire des Navigateurs has only 0.14 m² per 2014/15 student as compared to 0.17 m² per 2014/15 student at the average comparator schools. However, the average is skewed high by Sea Island Elementary, which has a much larger main entrance per student than all other schools. Indeed, more than half of the comparator schools have less space per student for their main entrance than does École Élémentaire des Navigateurs.

e) Classrooms

[3316] The plaintiffs argue that École Élémentaire des Navigateurs' classrooms are unattractive, citing the descriptions by parents who visited comparator schools. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I do not find those descriptions credible and give them no weight.

[3317] The average size of École Élémentaire des Navigateurs' classrooms is 80 m². The comparator school classrooms range from an average of 71.5 m² (Lord Byng Elementary) to 101.5 m² (Quilchena Elementary), for a total average of 81 m².

Fourteen of forty comparator elementary schools have smaller average classrooms than does École Élémentaire des Navigateurs.

f) Special Education

[3318] École Élémentaire des Navigateurs has 11 classrooms, but not all of them are used for divisions. One classroom is used as a multipurpose room to teach art, English, and for aides to work with students with learning disabilities. Another is used for before- and after-school care. There are also a number of small offices for special instruction. A room adjacent to the library is used as a sensory deprivation room for a student with special needs. Other small offices are used to serve students with special needs, and for Francisation.

[3319] According to the Joint Fact Finder's Report, École Élémentaire des Navigateurs has 121 m² of special education space. On average, comparator schools in the Joint Fact Finder's sample have 154 m² of special education space, ranging from having no space (Maple Lane Elementary, Sea Island Elementary) to 446 m² (James Gilmore Elementary). École Élémentaire des Navigateurs has more space than 14 of 40 schools.

[3320] Examining the same information on a per student basis, École Élémentaire des Navigateurs has 0.95 m² of special education space per student, more than the comparator school average of 0.6 m² of special education space per student. Only four comparator schools have more special education space than does École Élémentaire des Navigateurs when that is examined on a per student basis.

[3321] Of course, the Joint Fact Finder's Report count of École Élémentaire des Navigateurs' special education space seems to not take into account the multipurpose room or the classroom used for before- and after-school care (which presumably is not otherwise in use during the school day). Thus École Élémentaire des Navigateurs likely has even more special education space than the Joint Fact Finder's Report suggests.

g) Library

[3322] École Élémentaire des Navigateurs has a purpose-built library, with space designated for a computer and printer, as well as a reference area for teachers.

[3323] École Élémentaire des Navigateurs' library is 98 m². The Joint Fact Finder's data shows that the average library size at his sample of comparator schools is 150 m², ranging from 83.5 m² (Donald E. McKay Elementary) to 240 m² (Queen Elizabeth Elementary). École Élémentaire des Navigateurs is one of only three schools with less than 100 m² for its library.

[3324] École Élémentaire des Navigateurs does have greater than average library space per student, though, with 0.77 m² per student; the majority average is only 0.54 m² per student. It has more library space per student than 31 of the 39 sample comparator schools for which the Join Fact Finder collected data.

h) Environmental Factors

[3325] Mr. Gosselin testified that the heating and ventilation at École Élémentaire des Navigateurs were uneven; one classroom can be warm while another is cold. He also testified that the windows are poorly insulated, and do a poor job of blocking out outdoor sounds, causing distraction for students. There is no credible evidence concerning temperature and noise at comparator schools.

i) Transportation

[3326] The CSF transports students to École Élémentaire des Navigateurs using five buses. In 2014/15, 75% of École Élémentaire des Navigateurs students travelled to school by bus. None of the students attending any of the majority schools took the bus to school. In 2012/13, the Joint Fact Finder found, the average bus ride time for École Élémentaire des Navigateurs students was 46 minutes, and the longest ride time was 60 minutes.

j) Middle School Instructional Space

[3327] Starting with the 2012/13 school year, École Élémentaire des Navigateurs adopted a K-7 grade configuration that mirrors that of SD38-Richmond. Prior to that, École Élémentaire des Navigateurs students graduated to École Secondaire Jules-Verne after Grade 6.

[3328] Mr. Allison explained that the CSF Board of Trustees chose to add Grade 7 to École Élémentaire des Navigateurs based on a survey of École Élémentaire des Navigateurs parents. Mr. Allison was not in favour of the idea because École Élémentaire des Navigateurs does not have specialty rooms like science labs and a music room for Grade 7 students. He also thought that graduating students to École Secondaire Jules-Verne after Grade 6, one year before SD38-Richmond elementary students graduate to secondary school, assisted the CSF to retain students into the secondary years.

[3329] As Mr. Allison suggested, École Élémentaire des Navigateurs does not have specialized classrooms for middle school instruction, like a purpose-built music room, science lab, theatre or large gymnasium. Neither do the SD38-Richmond comparator elementary schools. Out of all those schools, about 20% have a specialty music or band room. Three schools have an art room, one of which doubles as a science room. One school has a media room.

[3330] The only comparator school to offer specialty classrooms for drama, home economics, music, science, sewing or woodworking is Queensborough Middle, a purpose-built middle school with operating capacity for 375 students in Grades 5-8 in SD40-New Westminster.

k) Early Childhood Education

[3331] Two surplus classrooms at École Élémentaire des Navigateurs are used for a French language daycare called Les Moussaillons. The daycare serves about 22 children between ages three and five. Les Moussaillons pays no fee to École Élémentaire des Navigateurs for use of the rooms. Mr. Gosselin's evidence was that

the daycare is useful for assisting students to learn French before they begin Kindergarten. École Élémentaire des Navigateurs also offers before- and after-school care, but no preschool or Strong Start programme.

[3332] Early childhood programmes also take place at slightly more than half of the majority schools. Ten of the schools in the Joint Fact Finder's Report offer daycare only; five offer preschool only; two offer daycare and preschool; one offers Strong Start; three offer Strong Start and one of daycare or preschool; and two schools offer all three programmes. The remaining 17 schools do not offer any early childhood programming.

I) Other Factors

i. Francophone Experience

[3333] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I describe in Chapter XV, Linguistic and Cultural Programming. Of course, since École Élémentaire des Navigateurs competes with French immersion at the elementary level, this factor might not be enough to persuade parents to enrol their children at École Élémentaire des Navigateurs. Further, confusing signage hurts the school's prominence in the community.

ii. Class Sizes

[3334] École Élémentaire des Navigateurs' class sizes are marginally lower than or comparable to the class sizes in SD38-Richmond, where all but two of the comparator schools are located. École Élémentaire des Navigateurs' average Kindergarten class is larger than the SD38-Richmond average, with 20 students as compared to SD38-Richmond's 18 children. École Élémentaire des Navigateurs primary classes, though have 19 students, which is marginally lower than SD38-Richmond's average of 20 students. In intermediate grades, École Élémentaire des

Navigateurs' classes have a greater pedagogical advantage, with 24 students in comparison to the majority's 27.

iii. Student to Staff Ratios

[3335] The CSF's student to teacher ratio is 15 students to one teacher. This is better than the student-to-teacher ratios for SD38-Richmond (17 students) and SD40-New Westminster (18 students).

[3336] The CSF also outperforms both districts on the special needs student-to-special needs teacher ratio, with four special needs students to each special needs teacher. SD38-Richmond has six such students to such teachers, while SD40-New Westminster has 10 special needs students to teachers.

iv. Graduation Rates

[3337] The CSF's six-year completion rate is 95%. SD38-Richmond's is 89%, and SD40-New Westminster's is 92%. Turning to first-time graduation rate, the CSF has an 88% graduation rate, while SD38-Richmond has a 76% rate, and SD40-New Westminster has an 82% rate. Overall, I find these differences to be marginal, except for the difference between the SD38-Richmond first-time graduation rate and that of the CSF.

v. Technology

[3338] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students. The laptops are decentralized and integrated into the classroom, and are replaced every three years.

[3339] At all the comparator schools, computers are desktop computers located in computer labs. Most schools have only enough desktop computers for a single class. A few have an additional desktop computer in each classroom. Three schools have a set of twelve to fifteen tablets for the entire school.

[3340] I take from this that the technology programme at École Élémentaire des Navigateurs is more advanced than the programmes at comparator schools, and better integrated into the classroom learning environment.

vi. Capacity Utilization

[3341] École Élémentaire des Navigateurs has more space per student than almost all comparator schools. The average comparator school has 14 m² per student. École Élémentaire des Navigateurs has 18 m² per student. Only six comparator schools have more space per student in square metres than École Élémentaire des Navigateurs.

[3342] École Élémentaire des Navigateurs is also operating at below the average operating capacity. École Élémentaire des Navigateurs is operating at 55% of its operating capacity. The average comparator school is operating at 86% of its capacity, ranging from 17% (Sea Island Elementary, a primary school) to 164% (Archibald Blair Elementary). Only three schools operate at a lower capacity than does École Élémentaire des Navigateurs: Sea Island Elementary, R.M. Grauer Elementary and R.C. Tamley Elementary. All the remaining schools are operating at 60% or greater capacity. Eleven are operating at more than 100% capacity.

[3343] The plaintiffs submit that there is no unused classroom space at École Élémentaire des Navigateurs. They note that while there are eleven classrooms and six divisions, the four vacant rooms are used as a multipurpose room, for Francisation, and three for preschool and before- and after-school care. While I acknowledge that the CSF offers enhanced services in its surplus space, that only serves to illustrate how the CSF benefits from its low level of crowding and surplus capacity.

vii. Gymnasium

[3344] École Élémentaire des Navigateurs has an average-sized gymnasium. École Élémentaire des Navigateurs' gymnasium is 369 m². The average comparator

school gymnasium is 376 m². Twenty-one gymnasiums are smaller than École Élémentaire des Navigateurs', while eighteen are larger.

m) Analysis

[3345] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[3346] There is no doubt that most rightsholder parents in the École Élémentaire des Navigateurs catchment area live closer to a majority school than to a minority school. None of the comparator schools offers transportation services. About 75% of École Élémentaire des Navigateurs students travel to school by bus. The transportation times are relatively long. The average bus ride time is 46 minutes, and the longest is 60 minutes. The long transportation times are something that a reasonable rightsholder parent is likely to find to be an unappealing.

[3347] This is despite the fact that École Élémentaire des Navigateurs is generally well-located. I favour the views of Mr. Gosselin over those of Mr. Bonnefoy on that issue.

[3348] A reasonable rightsholder parent would find some other aspects of École Élémentaire des Navigateurs unappealing. École Élémentaire des Navigateurs is in the bottom 10% of schools with regard to FCI score, which suggests it is not in a particularly good state of repair compared to majority schools.

[3349] Of less importance to the global educational experience and a rightsholder parent's views would be the fact that École Élémentaire des Navigateurs has one of the smallest libraries, and some of the smallest absolute administrative space and main entrance space as compared to comparator schools. Given that École

Élémentaire des Navigateurs performs well when those measures are examined on a per student basis, a parent might not find them to weigh heavily against the overall educational experience for their children. Indeed, I did not take from Mr. Gosselin's evidence that those spaces were undersized for the CSF's needs, as some other educators reported about their amenities.

[3350] Most factors are neutral. École Élémentaire des Navigateurs is of an average age compared to majority schools. It has average-sized classrooms and an average-sized gymnasium. It has an average amount of absolute special education space. It offers early childhood programming, as do about half of the comparator elementary schools. Neither École Élémentaire des Navigateurs nor the comparator schools offer specialty classrooms for middle school instruction.

[3351] Parents would also find some benefits to enrolling their children at École Élémentaire des Navigateurs, such as the Francophone education that the school provides. Parents would also find that École Élémentaire des Navigateurs has a competitive advantage over comparator schools when it comes to class sizes at the primary and intermediate levels. Adding to the global educational experience is the fact that École Élémentaire des Navigateurs offers an advanced technology programme, with computers fully integrated into the educational environment in a way that does not exist in the comparator schools. Furthermore, École Élémentaire des Navigateurs has a lower level of crowding than majority schools when examined on either a space per student or a capacity utilization basis.

[3352] Moreover, the CSF has a better student-to-teacher ratio than comparator districts, and a better special needs student-to-teacher ratio. Parents would also find the site to be attractive, as did many educators and administrators.

[3353] Overall, I find that the global educational experience afforded to elementary school students at École Élémentaire des Navigateurs is equivalent to the educational experience at comparator elementary schools. The only real area where the educational experience is unequivocally problematic is transportation times. This is to be expected. As Mr. Justice Willcock discussed in *Association des*

Parents- BCSC, sometimes it will be appropriate for minority students to tolerate longer transportation times so they can avail themselves of the benefits of attending a larger school.

[3354] As I discuss in Chapter XIV, Transportation, the CSF receives adequate transportation funding pursuant to the Student Location Factor, and is likely generating a transportation surplus. Mr. Grittner was of the view that travel times in the Lower Mainland and the Fraser Valley have been reduced to the greatest extent possible, and very few students on each trip endure disproportionate travel times. As a result, I do not find that transportation times are a significant disadvantage, or that they are undue in light of the low number of Francophones in the area, and their geographic dispersion.

4. Global Secondary School Experience

[3355] The plaintiffs seek an elementary/secondary school in Richmond. Currently, secondary students from Richmond attend École Secondaire Jules-Verne in Vancouver. As I explain in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), École Secondaire Jules-Verne was purpose built with the intent that it would serve children from Richmond, although the CSF's long-term planning envisioned creating a secondary programme in Richmond at some point in the future.

[3356] École Secondaire Jules-Verne was built near a Skytrain station to facilitate transportation of students from Richmond using public transportation. The CSF pays for the transit passes. Mr. Allison's evidence is that it takes about 45 minutes to travel to and from his home near École Élémentaire des Navigateurs to École Secondaire Jules-Verne by public transit.

[3357] Since École Élémentaire des Navigateurs began offering Grade 7 at École Élémentaire des Navigateurs, it has more problems retaining École Élémentaire des Navigateurs students when they graduate to secondary school. Mr. Allison observed that when his son had graduated from École Élémentaire des Navigateurs

after Grade 6, six of ten students in his cohort attended École Secondaire Jules-Verne. When his daughter transferred to École Secondaire Jules-Verne after Grade 7, only two of ten students in her cohort attended École Secondaire Jules-Verne for Grade 8. Mr. Gosselin testified that in 2013/14, there were ten students in Grade 7; only four of ten were expected to attend École Secondaire Jules-Verne.

[3358] A reasonable rightsholder parent making enrolment decisions for a secondary student would likely find the distance between Richmond and École Secondaire Jules-Verne to be a negative factor when making enrolment decisions for their children. There is no doubt that if École Élémentaire des Navigateurs offered a secondary programme with appropriate secondary facilities, it would likely retain more students through the secondary years than it currently does.

[3359] I note, however, that even in the best of circumstances only about 40 secondary students would be likely to attend a secondary programme in Richmond in a newly-built, homogeneous elementary/secondary school. Those numbers are only entitled to instruction and proportionate access to facilities.

[3360] Thus, the CSF could choose to accommodate secondary students in Richmond in a different way. It could offer a partial, heterogeneous secondary programme at a Richmond secondary school. It could also choose to add some core secondary facilities to the École Élémentaire des Navigateurs site using portables, as it did in Kelowna. Given the low number of children likely to participate in such a programme, this would meet the entitlement standard by providing minority language secondary instruction with access to core secondary specialty facilities.

[3361] Instead, the CSF chose to accommodate secondary-age children from Richmond at École Secondaire Jules-Verne. École Secondaire Jules-Verne is a modern, new, purpose-built secondary school. It offers a full range of secondary programming, in a fully homogeneous Francophone environment. It provides secondary students from Richmond with more than simply instruction and proportionate access to secondary specialty facilities: it provides them with a homogeneous secondary school, albeit one outside the community in which they

reside. It is fully within the CSF's right of management and control to make such a decision.

[3362] Given the relatively low number of secondary students that could be expected to attend a CSF combined elementary/secondary programme in Richmond in the best possible circumstances, I find that the secondary numbers are receiving proportionate amenities in light of the number of children likely to take advantage of the programme. Since elementary students currently have equivalent facilities to those of the majority, it is not practical to expect the Province to pay for a new elementary/secondary school to accommodate forty secondary students.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[3363] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of École Élémentaire des Navigateurs and the dealings of the CSF, the Ministry and SD38-Richmond in connection with it.

[3364] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Richmond, I make findings that are of particular relevance to Chapter XXXV, Leases, Chapter XXXVI, Expansion Projects and the Enrolment Driver, and Chapter XXXVIII, Site and School Acquisition Projects.

1. The CSF's Capital Plan Requests

[3365] École Élémentaire des Navigateurs began in leased space in a wing of Diefenbaker Elementary in about 2001, before moving to Kilgour Elementary for the start of the 2004/05 school year.

[3366] The CSF began requesting the Richmond Elementary/Secondary Project beginning with its October 2004 Capital Plan Submission for 2005/06, and continued

requesting it through its October 2007 Capital Plan Submission for 2008/09. The project was typically the CSF's lowest-priority project. Mr. Bonnefoy explained that the CSF held Kilgour Elementary pursuant to five-year leases, which gave it some security of tenure. It was the CSF's ninth-ranked project in its October 2004 Capital Plan Submission for 2005/06 and its October 2005 Capital Plan Submission for 2006/07; the fourteenth-ranked project in the CSF's November 2006 Revised Capital Plan Submission for 2007/08; and the seventeenth-ranked project in the October 2007 Capital Plan Submission for 2008/09.

[3367] As I develop below, through the fall of 2007, there were ongoing discussions about the CSF's possible acquisition of Kilgour Elementary from SD38-Richmond. At the request of Ministry staff, in early February 2008, the CSF revised its October 2007 Capital Plan Submission for 2008/09 and made the Richmond Elementary/Secondary Project its highest priority.

[3368] In its May 2009 Capital Plan Submission for 2009/10, the CSF moved to ward-based capital planning. The CSF changed its capital project request for Richmond from the Richmond Elementary/Secondary Project, to a request to acquire a K-6 school from SD38-Richmond. That was the CSF's third-highest ranked project in the Greater Vancouver ward, after projects for École Élémentaire Rose-des-Vents (Vancouver (West)) and École Élémentaire Anne-Hébert (Vancouver (East)). The CSF requested funding starting in the second year of the capital plan because one year remained on the CSF's lease.

[3369] The CSF returned to its request for the Richmond Elementary/Secondary Project with its June 2010 Capital Plan Submission for 2010/11, seeking a school with Nominal Capacity for 340 children. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[3370] The CSF did not submit a capital plan in 2011, as none was requested. In its November 2012 Capital Plan Submission for 2012/13 and September 2013 Capital Plan Submission for 2013/14, the CSF continued to request the Richmond Elementary/Secondary Project, with the same form of prioritization as it used in 2010.

[3371] The CSF submitted an In-House PIR in support of its capital request for Richmond, which is dated November 2013. In that PIR, the CSF identified two privately-owned sites that it wanted to acquire for the Richmond Elementary/Secondary Project, and did not refer to Kilgour Elementary.

[3372] Mr. Cavelti provided the CSF with feedback on its In-House PIRs in January 2014. He explained that the Ministry ranked the Richmond Elementary/Secondary Project as NPIR. He expressed concern with the CSF's enrolment projections as stated in that PIR, as the CSF focused on the number of potentially-eligible students rather than the number of students that would actually attend a new school. Additionally, Mr. Cavelti asked the CSF to address how reconfiguration would impact enrolment at École Secondaire Jules-Verne, and asked if the CSF had considered acquiring Kilgour Elementary.

[3373] In his response to Mr. Cavelti's feedback, Mr. Allison pressed the CSF's position that any impact on École Secondaire Jules-Verne enrolment would be minimal. Mr. Allison also explained that the CSF did not believe Kilgour Elementary would become available. He agreed to update the In-House PIR to confirm the CSF's continued interest in that school.

[3374] The CSF submitted a revised In-House PIR to the Ministry in October 2014. This PIR identifies Kilgour Elementary as a site that the CSF wants to acquire, and on which it wants to construct a new school. The CSF also indicated that it had engaged Mr. McRae to provide 10-year cohort-retention enrolment projections, which the CSF provided by way of a separate email. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[3375] As of the conclusion of the evidence at trial in August 2015, the Province had not announced support for any capital projects for the CSF in Richmond.

2. The CSF's Early Tenure in SD38-Richmond

[3376] According to Dr. Ardanaz, when the FEA was created, Francophone students from Richmond attended École Élémentaire Anne-Hébert (Vancouver (East)). Parents first requested a school in Richmond in 1998 or 1999. The CSF Board of Trustees resolved to investigate space for a new school before agreeing to open a programme.

[3377] Dr. Ardanaz met with SD38-Richmond administrators in late 1999 to discuss surplus schools. Dr. Ardanaz and Mr. Ken Morris, Secretary-Treasurer for SD38-Richmond, could not reach agreement. According to Dr. Ardanaz, Mr. Morris insisted that SD38-Richmond was not interested in transferring title to its school buildings, and preferred to lease property to the CSF.

[3378] In October 2000, the CSF Board of Trustees resolved to open a programme in Richmond. After meeting with Richmond parents, Dr. Ardanaz wrote to Mr. Morris and officially requested two classrooms for a K-1 programme in a French immersion school with access to the staff room, gymnasium and the library. SD38-Richmond offered classrooms at Diefenbaker Elementary, which was not a French immersion school.

[3379] École Élémentaire des Navigateurs opened at Diefenbaker Elementary in 2001/02 and offered Kindergarten and Grade 1. The CSF had two classrooms in the same wing of the building, with its own entrance. Dr. Ardanaz found the school and community to be very welcoming.

[3380] Enrolment at École Élémentaire des Navigateurs grew, and the CSF pressed Mr. Morris about surplus facilities. Eventually, SD38-Richmond staff informed CSF staff that Kilgour Elementary would become available, and invited the CSF to make an offer. In June 2003, the CSF offered \$200,000 per annum to lease the school commencing on August 1, 2003, for a period of five years less one day,

subject to approval by the Minister. Dr. Ardanaz explained that the Minister approved the lease.

[3381] However, the CSF was not able to lease the school in time for the start of the 2003/04 school year. After escalating the matter to the SD38-Richmond Superintendent, the two districts reached agreement. École Élémentaire des Navigateurs moved to Kilgour Elementary for the start of the 2004/05 school year.

[3382] The CSF's first lease of Kilgour Elementary was set for a term of five years less one day, allowing SD38-Richmond to collect that revenue as operating rather than Restricted Capital revenue. The CSF was charged annual rent of \$225,000. The Ministry paid for the CSF's lease of space.

[3383] Kilgour Elementary was larger than the CSF needed. Mr. Bonnefoy explained that the CSF used four rooms as educational space. The remaining space was used by the CSF Information Technology department and as a base for itinerant teachers.

3. Leasing and Maintenance Arrangements with SD38-Richmond

[3384] Mr. Bonnefoy accepted that the CSF's lease requires the CSF to maintain Kilgour Elementary in first-class condition. However, in Mr. Bonnefoy's view, the building was not in first-class condition when the CSF began occupying it. Mr. Bonnefoy observed that the school was in poor repair. It appeared dirty, had broken windows, required repair to the roof tiles, had carpets on the wall, and was full of old furniture. Dr. Ardanaz confirmed that the school had been used as storage prior to the CSF's occupancy, but that SD38-Richmond cleared the stored items out of the building. An issue also arose about the hot water not being turned on before École Élémentaire des Navigateurs moved into the school.

[3385] Mr. Bonnefoy's evidence was that the equipment provided by SD38-Richmond was substandard. In 2006, Mr. Bonnefoy requested an equipment

allowance from the Minister, who allowed École Élémentaire des Navigateurs \$92,000 for equipment.

[3386] Pursuant to the lease, SD38-Richmond staff performs all maintenance. The CSF pays for the maintenance portions of the lease from its operating budget. According to Mr. Bonnefoy, during his time with the CSF, maintenance on Kilgour Elementary was not always performed as rapidly as the CSF would have liked.

[3387] Mr. Gosselin is responsible for making work orders of SD38-Richmond. He recalled some work orders that went unaddressed, such as requests for new blinds. Other requests were completed: His request for carpets to be changed was met with carpets being washed more frequently. SD38-Richmond has completed other work orders. SD38-Richmond sent an exterminator to deal with a problem with mice on one occasion. SD38-Richmond also responded “immediately” to an urgent request related to a broken water pipe.

[3388] According to Mr. Gosselin, the security card system has caused challenges for some staff who want to work in the building after hours. Further, there is no public address system in the building, only telephones to the classrooms. This posed a problem when École Élémentaire des Navigateurs tried to institute its lock-down procedure. Mr. Gosselin requested a public address system from the CSF. Mr. Gosselin has also asked for some other safety concerns to be addressed, such as new locks for the doors, and new curtains for the classrooms. Mr. Gosselin stated that he is waiting for the CSF to fulfill those requests. It is not clear whether he meant to refer to SD38-Richmond, not the CSF.

[3389] Mr. Gosselin advised SD38-Richmond provides École Élémentaire des Navigateurs with janitorial services. Mr. Gosselin sometimes receives complaints about the quality of the janitorial work. He request for more cleaning services was refused.

[3390] Mr. Gosselin finds the lease's maintenance requirements onerous. He feels limited from doing even minor work on the building, such as hanging the annual school picture on the wall.

4. Attempt to acquire Kilgour Elementary in 2007/08

[3391] The CSF's tenancy at Kilgour Elementary was unremarkable until about September 14, 2007, when the Minister issued a new ministerial order concerning the disposal of lands or improvements (the "2007 Disposal Order"). I make findings about the 2007 Disposal Order and its impact on the CSF's operations in Richmond here, and consider them in Chapter XXXVIII, Site and School Acquisition Projects, in connection with the plaintiffs' claim that the CSF is disadvantaged by the school disposal process.

[3392] Prior to 2007, the Minister allowed school boards to dispose of surplus properties following community consultation; school boards did not need ministerial approval.

[3393] Mr. Miller advised that in 2007, the Minister began working with the Ministry of Labour and Citizens' Services on a project to ensure that school building assets were retained in the public sector for public use. The discussions envisioned a programme with two components: the creation of an inventory of surplus or closed schools that might be available for an alternative government use ("Asset Inventory Programme"), and a systematic matching of surplus school district assets with public agencies interested in acquiring them ("Asset Matching Programme").

[3394] The Asset Matching Programme endeavoured to match surplus properties with an alternative use by a different public agency. If the Asset Matching Programme found a match, the school district owner would be compensated for transferring the property to the government agency. While the Minister hoped to compensate districts with credits toward a Capital Planning Cycle, it was unclear how the Ministry would issue a capital credit without budgeting for it in advance.

[3395] The 2007 Disposal Order implemented the Asset Matching Programme. It did so by making the Ministry of Labour and Citizens' Services, Accommodations and Real Estate Services division ("ARES") responsible for reviewing the property and government demand. The 2007 Disposal Order provided that school boards would receive fair market value for any transfers in the form of a capital credit.

[3396] Mr. Bonnefoy was hopeful that the 2007 Disposal Order could help the CSF to acquire properties. He met with ARES officials to share the CSF's planned projects and site needs. ARES staff compiled a list of the CSF's needs, which does not refer to the Richmond Elementary/Secondary Project, the CSF's lowest-priority project at the time.

[3397] The Asset Matching Programme began in mid-September 2007. School boards were given until October 5, 2007, to identify surplus properties to ARES for matching. ARES would notify school boards of any matches by November 30, 2007. Mr. Stewart agreed that this seemed like a short timeline for a new process.

[3398] In late September 2007, Mr. Morris proposed to Mr. Bonnefoy that the 2007 Disposal Order might provide "a mutually beneficial opportunity" for the CSF to acquire Kilgour Elementary.

[3399] Mr. Stewart agreed that Mr. Morris seemed to be attempting to use the Asset Matching Programme to SD38-Richmond's advantage. This involved soliciting interest in Kilgour Elementary by the CSF. By then declaring it surplus and allowing it to enter to matching programme, he could effectively force the Ministry to fund a fair market value sale of the property. Since Kilgour was a locally-owned school, all the proceeds would flow to SD38-Richmond's Local Capital Reserve. Nevertheless, Mr. Stewart agreed that the Ministry saw Kilgour Elementary as the best option for the CSF in Richmond.

[3400] Mr. Bonnefoy wrote to Mr. Jim Alkins, the Director of Capital Management at the Ministry, and told him of Mr. Morris's message and of the CSF's potential interest in acquiring Kilgour Elementary, subject to some renovations. The Ministry

evaluated the proposal, noting that a Richmond project was not a high priority for the CSF, and that the CSF was interested in other high-priority projects. This, Mr. Stewart confirmed, was typical in Ministry capital planning.

[3401] SD38-Richmond moved forward, too. In November 2007, Ms. Linda McPhail, Chairperson of SD38-Richmond, wrote to Ms. Bourgeois, Chairperson for the CSF, and advised that SD38-Richmond planned to sell Kilgour Elementary. As a result, the CSF's lease would terminate effective June 30, 2009. Later in November 2007, Mr. Bonnefoy encountered an SD38-Richmond press release stating that Kilgour Elementary would be placed for sale pursuant to the 2007 Disposal Order. Mr. Bonnefoy explained that although the letter and press release caused some alarm for École Élémentaire des Navigateurs parents, He was not concerned because it seemed the school would be sold to the CSF.

[3402] Mr. Allison was one of the parents who felt some alarm. He explained that his wife saw a newspaper article that stated Kilgour Elementary would be sold. Mr. Allison grew concerned, too, as his two children attended Kilgour Elementary and he had purchased his home due to its proximity to the school. After investigating, to allay parent fears, Mr. Allison and Ms. Carole Casey, then the principal at École Élémentaire des Navigateurs, sent a letter to reassure parents that the CSF planned to acquire Kilgour Elementary.

[3403] Mr. Stewart explained that from the Ministry's perspective, SD38-Richmond's tactics escalated the urgency of the acquisition. The acquisition was expected to cost about \$15 million. Ministry staff looked at contingency reserves and savings from capital projects to see if it could find enough for the transfer, but it proved challenging to find such a large sum without prior planning. Mr. Stewart advised that the Minister was hesitant to offer a capital credit for a future capital plan because it would fetter government project approvals in future years. Due to the short timeline for the Asset Matching Programme that year, Mr. Stewart's view was that the Ministry could not fund the project at that time.

[3404] That said, Mr. Stewart conceded that the Province had previously compensated districts for transfers to the CSF by approving lower-priority projects that would not otherwise have been funded. He also confirmed that SD38-Richmond had some priority projects under consideration at the time. But he stated that without capital funding, the Ministry was unable to take that approach.

[3405] On November 21, 2007, Mr. Alkins confirmed to ARES staff that the Minister could not commit to funding the CSF's acquisition of Kilgour Elementary by the November 30, 2007, deadline. He suggested the Minister would make a final decision based on cash flow in the coming months.

[3406] On December 4, 2007, Mr. Morris advised Mr. Bonnefoy that ARES had failed to match Kilgour Elementary with an alternate government use. He suggested SD38-Richmond would move forward with a sale privately by consulting with the City of Richmond, as envisioned in the 2007 Disposal Order. Mr. Morris also copied Mr. Bonnefoy on a letter to ARES expressing surprise and disappointment that the Ministry and ARES had matched Kilgour Elementary with École Élémentaire des Navigateurs.

[3407] Frustrated, Mr. Bonnefoy wrote to Mr. Alkins and expressed concern that SD38-Richmond was using the CSF as a pawn. He urged that it was inappropriate that school boards could dispose of schools without considering the CSF's needs. Mr. Stewart agreed that Mr. Morris and SD38-Richmond were making the issue political and, in Mr. Stewart's view, behaving improperly.

[3408] Mr. Stewart directed Mr. Alkins to respond to Mr. Bonnefoy. Mr. Alkins assured Mr. Bonnefoy that the Ministry would review the 2007 Disposal Order and make changes as appropriate. Mr. Alkins also wrote that the Ministry was continuing to pursue the acquisition of Kilgour Elementary for the CSF. Mr. Stewart confirmed this was so: the Ministry included the project in its Consolidated Capital Plan submission to Treasury Board. Mr. Stewart confirmed that the Ministry recognized the need for CSF ownership due to what had become a difficult relationship between SD38-Richmond and the CSF.

[3409] Mr. Alkins also wrote to Mr. Morris. He asked that SD38-Richmond delay consulting with the City of Richmond and other activities associated with disposal pending a final funding decision from the Minister. SD38-Richmond acceded to the request, and did not dispose of Kilgour Elementary. However, Mr. Stewart could not recall Mr. Morris ever providing any reassurance that he would stand down on the issue.

[3410] The CSF sent another follow up letter on January 25, 2008, this time from Ms. Bourgeois to Minister Bond. Ms. Bourgeois requested an amendment to the 2007 Disposal Order to require districts to consider other educational uses prior to disposing of property.

[3411] Minister Bond responded to Ms. Bourgeois's letter on March 5, 2008. She wrote that ARES would coordinate the CSF's most recent Capital Plan Submission with available properties reported from other districts. She also expressed that staffs from the CSF, ARES and other districts must also work to ensure that needs and opportunities are matched. She suggested that a coordinated submission requesting transfer of title to a property should minimize other conflicts in the matching process.

[3412] Mr. Stewart revealed that about this time, the Ministry was beginning to understand that its capital budget might be affected by a change in the economic climate. Nevertheless, with the Minister's encouragement, the CSF continued actively pursuing the acquisition of Kilgour Elementary.

[3413] In early February 2008, the CSF revised its October 2007 Capital Plan Submission for 2008/09. The CSF moved the Richmond Elementary/Secondary Project from its seventeenth-ranked priority to its highest-priority project. Mr. Bonnefoy and Mr. Stewart agreed that the Ministry asked the CSF to consider making that change.

[3414] The CSF also undertook some feasibility work, which suggested that seismic renovations to Kilgour elementary would cost about \$9,302,065, while a replacement would cost \$7,744,246. Mr. Bonnefoy shared the study with Mr. Alkins.

[3415] ARES likewise continued working toward the acquisition by conducting an appraisal of Kilgour Elementary. The property's appraised value was \$8,575,000 when used as a school, or \$11,815,000 if it would be redeveloped.

[3416] Despite this work, by the spring of 2008, discussions fell away. Mr. Bonnefoy explained that he was last involved in a discussion about the acquisition of Kilgour Elementary in May 2008. SD38-Richmond was to provide documentation to the Ministry supporting its request to receive all of the proceeds as Local Capital. Mr. Stewart confirmed that the Ministry received that documentation.

[3417] Mr. Stewart could not recall any formal decision ever being made in connection with the sale of Kilgour Elementary to the CSF. The Ministry's budget became very tight in the spring of 2008, which Mr. Stewart conceded was linked to the lack of a concrete decision concerning Kilgour Elementary.

5. The South McLennan Properties

[3418] According to Mr. Bonnefoy, the 2007 Disposal Order was eventually amended. The amended disposal order (the "2008 Disposal Order") removed reference to the Asset Matching Programme and ARES. Instead, it required ministerial approval to dispose of assets, except when disposing of assets to the CSF or independent schools.

[3419] Further, by the end of December 2008, the Ministry and the CSF were in discussions about new ways of responding to the CSF's capital needs. The Ministry was looking at recommending a Capital Envelope specific to the CSF to allow it to respond to opportunities as they arose. I discuss this in detail in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[3420] A new opportunity in Richmond arose around the same time. On December 10, 2008, Mr. Morris advised Mr. Bonnefoy that SD38-Richmond had two properties for sale. The first was a collection of residential properties in the Official Community Plan re-designation process (the “South McLennan Properties”). SD38-Richmond estimated their value to be between \$7 million to \$10 million. The former site of Steveston Secondary was also available, with an estimated value of between \$25 million to \$30 million.

[3421] Mr. Bonnefoy sent Mr. Morris’s letter to the Ministry, expressing concern that the CSF not miss out on the opportunities. Mr. Stewart did not share Mr. Bonnefoy’s concern because SD38-Richmond had not applied for approval to dispose of either of the sites.

[3422] Ministry staff responded to Mr. Bonnefoy with some encouragement. It was suggested that once the CSF completed its long-range facility plan, the Ministry would do its best to provide the CSF with a longer-term Capital Envelope to address its unique facility needs. Ministry staff encouraged Mr. Bonnefoy to investigate the properties and include them in the long-range facility plan if they were suitable.

[3423] Mr. Bonnefoy visited the South McLennan Properties with Mr. Allison and Mr. Cavelti. Both Mr. Allison and Mr. Bonnefoy explained that the properties had family homes on them. Mr. Bonnefoy saw potential to work with the City of Richmond to develop an elementary school and a park on the lands. According to Mr. Bonnefoy, SD38-Richmond staff suggested they would halt the rezoning process if the CSF committed to acquiring the properties.

[3424] Ministry, CSF and SD38-Richmond staffs discussed the idea in the spring of 2009. SD38-Richmond proposed that the Ministry fund the acquisition of the South McLennan lands by the CSF for \$2 million, which would flow into SD38-Richmond’s Local Capital Reserve account. The proposal also envisioned the Ministry supporting one of SD38-Richmond’s capital projects. The CSF would then re-zone the land for the construction of a new elementary school. In the interim, SD38-Richmond would agree to a four-year extension of the existing lease of Kilgour

Elementary. Shortly thereafter, the Chairperson of SD38-Richmond wrote to Minister Bond, indicating that the Board of Education for SD38-Richmond had resolved to support the proposal.

[3425] Mr. Allison was sufficiently confident that the proposal would go forward that he allowed the École Élémentaire des Navigateurs principal to share the information with École Élémentaire des Navigateurs parents. SD38-Richmond and the CSF began negotiating the lease extension.

[3426] Mr. Stewart did not share Mr. Allison's view. Mr. Stewart recalled considerable discussion about the proposal, because it involved not just a site acquisition, but funding for a project for SD38-Richmond. At this point in his evidence, he averted to challenging economic circumstances due to the ongoing world economic crisis. The Minister was not particularly hopeful Treasury Board would devote new funds to capital projects. He advised that Ministry staff considered that the CSF had sufficient room to accommodate its enrolment in leased space at Kilgour Elementary. Since the CSF's need was not immediate, the Ministry decided not to support the CSF's acquisition of the South McLennan Properties. To his recollection, the proposal did not go forward in part because of the Province's financial limitations at that time.

[3427] Meanwhile, the CSF's lease of Kilgour Elementary approached its end. Since the project had not gone forward, the CSF and SD38-Richmond did not negotiate the proposed four-year lease of Kilgour Elementary. Instead, SD38-Richmond agreed to extend the lease of Kilgour Elementary for one year on the existing terms so the parties could continue to discussions.

6. The Lease Funding Suspension in 2009/10

[3428] In August 2009, the Ministry announced that it would not fund CSF leases for 2009/10 (the "Lease Funding Suspension"). I make findings about the Lease Funding Suspension's impact on the CSF's operations in Richmond here, and consider the impact again in Chapter XXXV, Leases, in connection with the plaintiffs'

claim that the CSF was hurt by the Lease Funding Suspension and ought not be required to lease properties.

[3429] In Brief, the Lease Funding Suspension required school boards to provide the CSF with space for no charge that year. The CSF would pay the operating and maintenance portions of leases, but the Ministry did not fund the CSF's lease of space. While most school boards accepted the decision, SD38-Richmond took exception, pointing to its recent good-faith extension of CSF's lease for one year.

[3430] Shortly after the announcement, Mr. Bonnefoy saw a newspaper article that reported SD38-Richmond officials were seeking legal advice about whether it was bound to allow the CSF to lease Kilgour Elementary without payment. Mr. Bonnefoy confronted Mr. Morris about the article, telling him that SD38-Richmond was being intimidating and causing anxiety for the École Élémentaire des Navigateurs community.

[3431] On November 6, 2009, Mr. Morris wrote to Mr. Bonnefoy insisting on the terms of the lease for 2009/10, arguing that the CSF's obligations were not conditional on Ministry funding. The letter also threatened that SD38-Richmond might end the CSF's lease after June 30, 2010 and use Kilgour Elementary for full-day Kindergarten. Mr. Bonnefoy did not believe that SD38-Richmond actually needed space for full-day Kindergarten. It seemed to him that the threat was a response to the Lease Funding Suspension.

[3432] Mr. Stewart handled the situation on behalf of the Ministry. Like Mr. Bonnefoy, he did not believe that SD38-Richmond would evict the École Élémentaire des Navigateurs. The Ministry was providing school districts with modular structures to accommodate full-day Kindergarten, making the threat appear to be an idle one. He also recalled that SD38-Richmond had previously decided Kilgour Elementary was not required for educational purposes into the future. It was his view that SD38-Richmond was "playing politics".

[3433] Mr. Stewart asserted that he would have done everything in the Minister's power to prevent SD38-Richmond from evicting École Élémentaire des Navigateurs. He was prepared to recommend that the Minister reduce SD38-Richmond's operating funding grant by an amount equal to the lease payments so that SD38-Richmond would see no financial gain from insisting on payment. Mr. Stewart confirmed, however, that he never communicated this to the CSF. He never put it in writing because he was not in any position to make such a commitment.

[3434] Nevertheless, Mr. Stewart advised that he intervened in the dispute between SD38-Richmond and the CSF. In January 2010, he called SD38-Richmond senior staff, in what he referred to as a "cease and desist" phone call. He did not recall ever documenting the call in writing.

[3435] Mr. Allison became Secretary-Treasurer of the CSF at the start of 2010. He continued to push the Ministry to fund the Richmond lease, fearing eviction from Kilgour Elementary. He also pressed the Ministry to restore lease funding. In January 2010, Mr. Stewart assured Mr. Allison that the Ministry would do its best to restore funding for the 2010/11 school year, and possibly 2009/10 lease funding if any excess funds were available at the end of the fiscal year.

[3436] Shortly thereafter, in early 2010, Mr. Allison learned that Mr. Morris had left his position as Secretary-Treasurer for SD38-Richmond.

[3437] In March 2010, Mr. Miller confirmed to Mr. Allison that the Ministry had set aside funds for the CSF's 2010/11 leases. Mr. Allison twice requested a more formal letter to satisfy requests from SD38-Richmond. On receipt of Mr. Allison's request, Mr. Stewart both telephoned and wrote to the Associate Superintendent of SD38-Richmond to confirm that CSF leases would be funded. He did not copy Mr. Allison. Mr. Stewart was satisfied that his response was sufficient, particularly because the Ministry staff had informed all districts that the Ministry would fund the leases in a conference call related to the annual Capital Plan Instructions.

[3438] Since he did not hear from Mr. Stewart immediately, Mr. Allison escalated the matter, asking for assistance from other senior Ministry staff. He asked Ministry staff again at the BCASBO conference in May 2010, and followed up his request with an email. Mr. Stewart did not send any further follow up to SD38-Richmond officials because he thought that the conversation and email he had had with SD38-Richmond senior staff ought to have been sufficient.

[3439] Mr. Stewart's evidence was that the Ministry operated behind the scenes, discussing ways of resolving the dispute between the two districts. Mr. Stewart conceded that he considered suggesting to SD38-Richmond and Mr. Allison that they engage a third party - in this case, ARES staff - to help resolve the issue. He does not appear to have done so; instead, the Ministry engaged in its own review of CSF leases, which is discussed in more detail in Chapter XXXV, Leases.

[3440] To summarize my findings in Chapter XXXV, Leases, through the spring of 2010, the Ministry engaged in a review of CSF leases with Shared Services BC Staff worked toward a standard-form lease contract, including standard lease rates, for districts to use with the CSF. Mr. Stewart informed SD38-Richmond staff that this work was underway. He did not tell the CSF. The work proceeded slower than expected.

[3441] In June 2010, Mr. Mark De Mello, the new Secretary-Treasurer of SD38-Richmond, asked for a call with Mr. Stewart concerning the lease with the CSF. Mr. John Woycheshin, Capital Branch staff, confirmed to Mr. DeMello that the Province would fund the CSF's lease of Kilgour Elementary for 2010/11. He also advised that the Ministry was in the process of gauging the market value for CSF leases, but the work was not moving quickly.

[3442] Despite this, in negotiations with the CSF, SD38-Richmond took the position that the Ministry had not confirmed lease funding for 2010/11. At Mr. DeMello's suggestion, the CSF invoked an overholding clause on the 2009/10 lease in June 2010. They agreed to another overholding period for July through December 2010.

Throughout, SD38-Richmond maintained it was not clear whether the Ministry would fund the leases.

[3443] In November 2010, Mr. De Mello advised the Ministry that the SD38-Richmond Board of Trustees was growing “antsy” about the overholding approvals. Mr. De Mello suggested that the two districts enter into a Memorandum of Understanding extending the ongoing lease until the end of the 2010/11 school year. Mr. Woycheshin approved that arrangement on the understanding that the two districts could review the arrangement in June 2011 in light of any development of a standardized lease format.

[3444] As I explain in Chapter XXXV, Leases, the Ministry and Shared Services BC never arrived at a standard form lease or lease rates. SD38-Richmond eventually sent Mr. Allison a lease renewal for 2011/12, with a rent increase of \$15,000. Mr. Allison forwarded that to Mr. Cavelti, seeking confirmation that the Ministry would support that increase. According to Mr. Allison, he did not receive a response, and in any event, renewed the lease for 2011/12.

[3445] After the 2011/12 lease drew to a close, Mr. Allison obtained a further one-year renewal of the lease of Kilgour Elementary for 2012/13, and then a two-year renewal for 2013/14 and 2014/15.

[3446] The CSF did not invoke the *Education Mediation Regulation* with respect to the Lease Funding Suspension and SD38-Richmond’s position on it. Mr. Bonnefoy was concerned that approach would “add fuel to the fire” and be “counterproductive”. He also stated his opinion that since SD38-Richmond was trying to enforce the terms of a lease signed in good faith, he did not see a role for the *Education Mediation Regulation*.

7. Steveston Secondary

[3447] With the Lease Funding Suspension behind him, Mr. Allison began focusing on a new site and school in Richmond once more. The CSF developed an interest in acquiring the former Steveston Secondary and building a new school and a school

board office on it. Mr. Allison described the site as a large, 13-acre site adjacent to another secondary school. It is located near No. 2 Road, a main artery in Richmond, which Mr. Allison believed would be convenient for transporting students.

[3448] In early 2011, after a request by the CSF for a meeting, CSF senior staff met with two city counsellors from the City of Richmond where they discussed the CSF's aspirations for Steveston Secondary. The CSF also raised the idea with SD38-Richmond staff, who offered up Kilgour Elementary instead.

[3449] On March 14, 2011, Mr. Raymond Ouimet, President of the CSF, requested a meeting with Ministry officials to secure funding to complete a PIR for the acquisition of Steveston Secondary. Mr. Stewart advised that Ministry staff did not see the request as an urgent one because the CSF had adequate space at Kilgour Elementary. Further, Steveston Secondary seemed to be a large, costly site. The Ministry continued to believe Kilgour Elementary was the best option for the CSF in Richmond.

[3450] Minister Abbott responded some months later. He suggested that the Richmond Elementary/Secondary Project was the CSF's seventh-highest priority, and new administrative offices were its twenty-fifth-highest priority. Minister Abbott encouraged CSF staff to continue working with Ministry staff to ensure the CSF's capital plan correctly reflected the CSF's priorities.

[3451] Minister Abbott's statement did not reflect the fact that the CSF had ceased sequentially prioritizing its capital projects. Mr. Stewart acknowledged that Ministry staff were aware at the time that the seventh-priority ranking likely did not reflect the CSF's actual priorities. As I see it, Minister Abbott's statement reveals the tension that was forming between the Ministry and the CSF because of the CSF's decision not to abide by the Capital Plan Instructions.

[3452] In the fall of 2011, the Ministry received a Capital Envelope from Treasury Board: its first Capital Envelope for Expansion Projects since about 2005. As part of the announcement, the Minister supported a project for CSF in Vancouver (West):

the Southeast False Creek Project, which I discuss in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)). The Minister did not support the Richmond Elementary/Secondary Project, either for the Steveston Secondary Site, the South McLennan Properties, or Kilgour Elementary, despite many years of work toward the acquisition of a site in that area. Mr. Stewart conceded that for the CSF, more than other districts, there was a tension between prioritizing immediately realizable projects, like the one in Richmond, and projects with the greatest need but less tangible prospects, like those in Vancouver (West).

[3453] Mr. Stewart advised that SD38-Richmond eventually sought ministerial approval to dispose of Steveston Secondary. By that point, Government had instituted a programme called RAEG: the Release of Assets for Economic Generation. That programme was designed to generate Government revenue through the disposal of surplus assets. I discuss it in detail in Chapter XXXVIII, Site and School Acquisition Projects.

[3454] According to Mr. Stewart, Ministry staff confirmed SD38-Richmond had complied with its consultation duties, and reviewed the application in light of the RAEG programme. Ministry staff also took into account the CSF's needs. In light of the high price of the property, its distance outside the centre of the community, and SD38-Richmond's assurances that Kilgour Elementary would be available to the CSF in the long term, the Ministry did not consider Steveston Secondary to be appropriate for the CSF.

[3455] Ministry staff forwarded SD38-Richmond's application to the Minister, who approved it in about April 2013. In June 2013, Mr. DeMello and Ms. Donna Sargeant, Chairperson of SD38-Richmond, showed Mr. Allison the letter from Minister Don McRae approving the disposal of Steveston Secondary.

[3456] Mr. Allison came to accept that there was no longer an opportunity for the CSF to acquire Steveston Secondary; Mr. Stewart agreed.

[3457] Mr. Allison sent Mr. Stewart a Positioning Letter on July 25, 2013. He asked the Province to immediately purchase a part of Steveston Secondary for the Richmond Elementary/Secondary Project and for the construction of a new school board office. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I only take from this letter the fact that the request was made.

[3458] In the course of his July 25, 2013, Positioning Letter, Mr. Allison wrote that Steveston Secondary presented a “cost-effective” solution to the CSF’s needs in Richmond. While under cross-examination, he conceded that the cost of acquiring Steveston Secondary exceeded the cost of acquiring Kilgour Elementary. However, he maintained that Kilgour Elementary was not available at that time. This contradicts his evidence that SD38-Richmond had offered Kilgour Elementary a few months prior.

[3459] In response, Mr. Stewart confirmed that SD38-Richmond had received approval to dispose of Steveston Secondary to a private developer after complying with the requirements of the 2008 Disposal Order. He also averted to the CSF’s failure to provide a PIR for the Richmond Elementary/Secondary Project, which was a prerequisite to a project approval.

[3460] Mr. Palmer confirmed that SD38-Richmond sold Steveston Secondary at a price of around \$40 million. Since the property was acquired locally, all of those funds went into SD38-Richmond’s Local Capital Reserve account. Mr. Palmer confirmed that gave SD38-Richmond considerable freedom over how it spends the proceeds.

8. Attempt to Acquire Kilgour Elementary in 2014

[3461] In July 2014, Mr. De Mello called Mr. Allison and offered to sell Kilgour Elementary to the CSF. Mr. Allison explained that the call from Mr. De Mello was unexpected and appreciated. He thought that the site would prove large enough to accommodate the Richmond Elementary/Secondary Project.

[3462] With the offer on the table, in September 2014, Mr. Allison sent a Positioning Letter to Assistant Deputy Minister Fayad, notifying her of the opportunity and asking for immediate funding to acquire Kilgour Elementary, conduct a facility condition study and appraisal, and construct a new elementary/secondary school. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[3463] In her October 2014 response, Assistant Deputy Minister Fayad stated there was no capital funding for the CSF to acquire Kilgour Elementary at that time. She encouraged Mr. Allison to continue working with SD38-Richmond, potentially toward a long-term lease of the facility.

9. Conclusions

[3464] The evidence reveals that SD38-Richmond profits from its leasing arrangements with the CSF. From 2004/05 to 2014/15, the Ministry paid SD38-Richmond \$2,310,000 in supplementary operating funds in consideration of the CSF's use of SD38-Richmond facilities.

[3465] There is some evidence to support that the leasing arrangement between SD38-Richmond and the CSF has been problematic, particularly when Mr. Morris was Secretary-Treasurer.

[3466] In 2007 and 2008, SD38-Richmond attempted to use the Asset Matching Programme and its relationship with the CSF to extract a market-value sale of Kilgour Elementary from the Province. Later, in 2008, SD38-Richmond proposed an arrangement for the sale of the South McLennan Properties that would have allowed it to both profit from both the sale of the property and receive a capital approval. SD38-Richmond was clearly acting in its own interest in an attempt to take advantage of Ministry processes and the CSF for its own financial benefit.

[3467] SD38-Richmond has also been willing to use underhanded tactics. During the disputes concerning the Asset Matching Programme and the Lease Funding Suspension, SD38-Richmond was quick to turn to the media to put political pressure

on the Ministry and the CSF. With both, they also threatened to evict the CSF from Kilgour Elementary. Although it was unlikely SD38-Richmond would have done so, it caused anxiety for École Élémentaire des Navigateurs families.

[3468] I also infer that SD38-Richmond was not candid with the CSF in connection with the renewal of the CSF's lease of Kilgour Elementary following the Lease Funding Suspension. When SD38-Richmond and the CSF invoked the overholding clause in 2010/11, SD38-Richmond officials repeatedly cited the Ministry's failure to confirm that it would fund the lease. However, the evidence establishes that the Ministry told SD38-Richmond that it was working toward a standard lease and rates, and SD38-Richmond was waiting for the results of that lease review. Neither the Ministry nor SD38-Richmond told the CSF the real reason SD38-Richmond was refraining from signing a new lease. This was a stretch of the truth that caused the CSF to fear the security of its tenure even though there was never any serious doubt that the CSF would have access to Kilgour indefinitely.

[3469] Indeed, I find that the CSF has never faced any serious risk of being evicted from Kilgour Elementary. From 2007 until 2014, SD38-Richmond made many assertions that the CSF could acquire Kilgour Elementary outright. Given SD38-Richmond's history of using pressure tactics to achieve its own ends, I infer that SD38-Richmond would not have gone through with its threats to evict École Élémentaire des Navigateurs.

[3470] The situation in Richmond therefore presents a unique situation for the CSF. The CSF has an opportunity to acquire Kilgour Elementary. However, it has less need to do so because there is no threat to its tenure. So long as that tenure remains, the building is suitable and the Ministry funds the lease, the CSF's Richmond projects are not as pressing as others.

[3471] I also find that all parties have agreed on several occasions that the best long-term option for the CSF in Richmond involves Kilgour Elementary. The site is a large one. Mr. Allison's own evidence is that the school is in a good location, on a site with a large playfield, which is large enough for an elementary/secondary

school. The Ministry generally supports that option for the CSF. SD38-Richmond is willing to sell.

[3472] I am satisfied that given that Kilgour Elementary is appropriate for the CSF, the Ministry was justified in rejecting the CSF's requests to acquire the South McLennan Properties and Steveston Secondary. It was justified refusing the request to acquire the South McLennan Properties in 2008 because there was no serious threat that the CSF would lose its lease, and the parties had been negotiating for the CSF to acquire Kilgour Elementary just a few months earlier.

[3473] The Ministry was likewise justified in rejecting the proposal for the CSF to acquire Steveston Secondary. The cost of acquiring Steveston Secondary would have been about \$40 million before considering the cost of construction of a new school. In 2008, the cost of acquiring Kilgour Elementary was estimated to be about \$8.5 million. Given the cost and that SD38-Richmond assured the Ministry that the CSF would have access to Kilgour in the long term, the Ministry was correct to reject the CSF's proposal.

[3474] I conclude, however, that the Ministry missed an opportunity to effect a transfer of Kilgour Elementary to the CSF in connection with the approval of the disposal of Steveston Secondary. There are several examples in the evidence of the Ministry tying project approvals to transfers of assets to the CSF. The Ministry took this approach when making the earliest transfers of assets to the CSF. It also used that approach to accomplish the transfer of École Élémentaire Anne-Hébert (Vancouver (East)) to the CSF from SD39-Vancouver. The Ministry does not appear to have considered making the disposal of Steveston Secondary contingent on the transfer of Kilgour Elementary to the CSF.

[3475] The question then arises why the CSF has yet to acquire Kilgour Elementary. The primary reason is that the Province chose not to devote new public funds to Expansion Projects for any districts, including the CSF, between 2005 and 2011. The Minister was prepared to support the acquisition in 2008 pursuant to the Asset Matching Programme. The Ministry has continued to notionally support the

idea since then. However, since there was no new funding for Expansion Projects between 2005 and 2011, there is desperate need for Expansion Projects in other CSF catchment areas and growing school districts. Given that the lease of Kilgour Elementary is secure, the Ministry has chosen to fund other Expansion Projects-- including other CSF projects-- using its limited funds for expansion because it considers there is greater need for those projects.

[3476] I therefore conclude that the primary cause of the CSF's current circumstances in Richmond is the lack of new funding for Expansion Projects between 2005 and 2011.

F. Justification and Remedy

[3477] I conclude that a reasonable rightsholder parent would find that the global educational experience offered to elementary students in Richmond is equivalent to the global educational experience at comparator elementary schools. Secondary students likewise have a global educational experience that is proportionate to the small number of students that would enrol in a secondary programme. If I had found otherwise, then it would have been open to the Ministry to justify its failure to fund Expansion Projects between 2005 and 2011. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed the justification question. Since I set out the framework for crafting remedies in Chapter X, Remedies, I do not find it necessary to address what remedy would have been appropriate to respond to the circumstances in Richmond.

G. Summary

[3478] I conclude that if the CSF were to construct the Richmond Elementary/Secondary Project, the CSF could reasonably expect about 165 elementary students and 40 secondary students to ultimately attend that programme. I find that at the elementary level, the numbers fall at the high end of the sliding scale, warranting distinct facilities in the community where the

rightsholder live that offer a global educational experience equivalent to what is available to the majority. The number of secondary students falls at the low end of the sliding scale, warranting minority language secondary instruction and access to core facilities proportionate to what the majority receives.

[3479] Overall, I find that the global educational experience afforded to elementary school students at École Élémentaire des Navigateurs is equivalent to the educational experience at comparator elementary schools. Given the relatively low number of secondary students that could be expected to attend a CSF combined elementary/secondary programme in Richmond, I find that Richmond secondary school students are receiving an appropriate educational experience that is proportionate to the small number of secondary students likely to take advantage of the programme.

[3480] While there have been numerous opportunities for the CSF to acquire École Élémentaire des Navigateurs outright from SD38-Richmond, those proposals have not moved forward because the Ministry chosen not to devote any new funds to Expansion Projects between 2005 and 2011.

XXIV. ÉCOLE ÉLÉMENTAIRE ROSE-DES-VENTS (VANCOUVER (WEST))

[3481] Vancouver is located in the Lower Mainland region of British Columbia. In Vancouver (West), the CSF operates École Élémentaire Rose-des-Vents, a homogeneous, French-language elementary school serving children in Kindergarten to Grade 6. Since around 2004, it has operated in an elementary school building adjacent to British Columbia's only stand-alone, homogeneous, French-language secondary school, École Secondaire Jules-Verne. The two schools are located on a site known as the "Oakridge Site" near Cambie Street and 37th Avenue in Vancouver. In 2014/15, 352 students were enrolled at École Élémentaire Rose-des-Vents.

[3482] The CSF proposes to divide the École Élémentaire Rose-des-Vents catchment area, and build two new elementary schools on the west side of

Vancouver. One new school would serve children in Kindergarten to Grade 6 living west of Main Street and East of Granville Street (the “Central Vancouver Elementary Project”). The other would serve children in Kindergarten to Grade 6 living west of Granville Street (the “West-Side Vancouver Elementary Project”). In 2014, the CSF estimated that each of those schools would cost more than \$15 million, excluding the cost of acquiring a site and preparing it for construction. The CSF plans to use École Élémentaire Rose-des-Vents as swing space while its new projects are built, then convert it to expansion space for École Secondaire Jules-Verne.

[3483] The claim concerning École Élémentaire Rose-des-Vents is unique because the Province has recognized that the CSF needs a new school in Vancouver (West). The Ministry announced support for a new CSF school on the West Side of Vancouver in 2011. That project has not moved forward because the parties have been unable to identify and acquire a site for that school.

[3484] Additionally, in *Association des Parents - BCSC*, Mr. Justice Willcock declared that rightsholders living in Vancouver (West), “are not being provided the minority language educational facilities guaranteed to them by s. 23 of the [*Charter*]” (at para. 160). That declaration was upheld by the Supreme Court of Canada in *Association des Parents- SCC*. However, because the hearing of the Petition was staged, several issues remain to be decided: responsibility, justification and remedies.

[3485] At this point, the two proceedings are being heard and decided together. The evidence in the action stands as evidence in the Petition for the purposes of deciding responsibility and justification. The evidence in the Petition does not, however, stand as evidence in the action.

[3486] As a result of the confluence of these factors, the remaining decisions in this case are those concerning responsibility, justification and remedies. An additional question concerns whether the numbers warrant more than Mr. Justice Willcock decided was warranted in *Association des Parents- BCSC*.

A. Evidence

[3487] The Court heard considerable evidence about École Élémentaire Rose-des-Vents. Dr. Ardanaz, Mr. Bonnefoy, Mr. Allison, Mr. Miller, Mr. Palmer and Mr. Stewart all testified about the history of the CSF's search for space and acquisition in Vancouver (West).

[3488] The court also heard evidence about École Élémentaire Rose-des-Vents from two CSF educators. Mr. Gosselin, the current principal at École Élémentaire des Navigateurs (Richmond), testified about his experience teaching at École Élémentaire Rose-des-Vents in the 1990s and 2000s.

[3489] Ms. Chagnon is the current principal at École Élémentaire Rose-des-Vents. Ms. Chagnon moved to Victoria and began teaching at École Victor-Brodeur in about 1990. Beginning in 1996, she spent several years working on student support services and the implementation of the CSF. She then worked as an administrator at École des Pionniers (Port Coquitlam) and École Au-cœur-de-l'île (Comox), before becoming the current principal of École Élémentaire Rose-des-Vents.

[3490] The Joint Fact Finder's Report also reported on École Élémentaire Rose-des-Vents and comparator schools, which is of limited relevance given that a rights breach has already been confirmed in Vancouver (West).

B. History and Context

1. The École Élémentaire Rose-des-Vents Catchment Area

[3491] According to Dr. Kenny, the Lower Mainland has long been the central hub of BC's Francophone community. Vancouver was predominantly settled by Anglophones with the arrival of the Canadian Pacific Railway in 1886. However, early Vancouver was multicultural and included Francophones, most of whom worked in industry or Catholic religious orders.

[3492] Dr. Kenny explained that there were limited opportunities for French-language education in the early 20th century. Two Anglophone schools offered

French as a second language as a course offering. Religious schools also offered some French-language education. SD39-Vancouver launched a Programme Cadre in about 1980, which grew rapidly and developed into École Élémentaire Anne-Hébert, Vancouver's first homogeneous Francophone school, in Vancouver (East). The Programme Cadre expanded to a heterogeneous secondary school at Kitsilano Secondary in 1985. École Élémentaire Rose-des-Vents began as an annex to École Élémentaire Anne-Hébert in the late 1990s.

[3493] Today, École Élémentaire Rose-des-Vents operates as a homogeneous minority language elementary (K-6) school serving children living in Vancouver, west of Main Street. It shares a site-- and indeed, a building-- with École Secondaire Jules-Verne, a homogeneous secondary school that serves children in Grades 7 to 12 residing in Vancouver, Richmond, and western Burnaby and New Westminster. Due to overcrowding, École Élémentaire Rose-des-Vents uses several rooms at École Secondaire Jules-Verne, portable and modular classrooms and an exterior, portable gymnasium. École Élémentaire Rose-des-Vents has a French-language preschool and daycare on its site, as well as before- and after-school care.

[3494] The École Élémentaire Rose-des-Vents' catchment area overlaps with that portion of SD39-Vancouver that falls west of Main Street in Vancouver (the "Current École Élémentaire Rose-des-Vents Catchment Area"). In the Current École Élémentaire Rose-des-Vents Catchment Area, SD39-Vancouver operates 36 elementary schools. At least nine of them offer French immersion.

2. Conclusions

[3495] When analyzing the Vancouver (West) claim, I will take into account the school's urban setting, and the large number of schools in the catchment area, including many French immersion schools. Thus, École Élémentaire Rose-des-Vents competes with many SD39-Vancouver neighbourhood and French immersion schools that are closer to the homes of CSF students. I will also take into account the long history of homogeneous Francophone education in Vancouver generally.

[3496] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[3497] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between known demand and the total universe of rightsholders' children.

[3498] In *Association des Parents- BCSC*, Mr. Justice Willcock concluded that about 500 children are likely to attend minority language elementary school in Vancouver (West) (at para. 127). In this case, the plaintiffs seek both the Central Vancouver Elementary Project and the West-Side Vancouver Project for a total operating capacity for 812 students.

[3499] In my view, whether the numbers warrant more than what Mr. Justice Willcock decided is at issue in this matter. The defendants do not suggest the issue is *res judicata*. The evidence in the trial is different from that in the Petition. While the evidence in the action forms part of the evidence in the Petition, the evidence in the Petition does not form part of the evidence in this action. I also note that circumstances have changed since Mr. Justice Willcock's 2012 ruling, particularly with respect to the level of crowding at École Élémentaire Rose-des-Vents. Thus, in my view, the question of what number of students is likely to take advantage of the new school or schools should be determined in this case.

1. Association des Parents- BCSC

[3500] In *Association des Parents- BCSC*, Mr. Justice Willcock addressed the numbers warrant question with reference to enrolment at École Élémentaire Rose-des-Vents and evidence from Dr. Landry. Using Dr. Landry's evidence, he concluded there were at least 710 children of rightsholders in the area, but likely no more than 1,000 (at para. 41). He considered that the enrolment pattern at École Élémentaire Rose-des-Vents showed growth from 21 students in 1997 to 344 students in 2011, while enrolment at École Secondaire Jules-Verne grew from 161 in 2008/09 to 244 in 2011/12, which would have an impact on the space available to École Élémentaire Rose-des-Vents (at para. 42). He also concluded that some rightsholders had been discouraged from enrolling their children at École Élémentaire Rose-des-Vents as a result of the state of its facilities and long bus ride times, and that new facilities would attract and retain new students.

[3501] Mr. Justice Willcock observed that enrolment at École Élémentaire Rose-des-Vents was projected to grow to 360 students by 2012/13 (at para. 43). He concluded there would be more than 370 students enrolled at École Élémentaire Rose-des-Vents if it were not for its current facilities, and that the numbers warranted elementary facilities capable of accommodating approximately 500 students (at para. 127).

2. The Universe of Rightsholders' Children

[3502] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[3503] The evidence concerning the universe of eligible students is broken down by catchment area for the CSF's proposed new schools.

[3504] With connection to the Central Vancouver Elementary Project's catchment area, Dr. Landry estimated that in 2011 there were 285 elementary-age children

(age 5-12) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 392 such children living in the catchment area, growth by about 40%.

[3505] With reference to the West-Side Vancouver Elementary Project's catchment area, Dr. Landry counted 312 elementary-age children (age 5-12) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area. Mr. McRae forecasted that number would grow to 319 by 2023, which is stable.

[3506] I note that Dr. Landry also counted 815 elementary-age children of non-Francophones in the Knowledge Category and 215 in the Regular Home Use Category in the Central Vancouver Project's catchment area. He also found 1,410 children in the Knowledge Category and 330 in the Regular Home Use Category in the West-Side Vancouver Elementary Project's catchment area. I do not find those numbers to be a reliable proxy for the number of children Education or Sibling Rightsholders in the Vancouver (West) area.

[3507] I find that a reasonable proxy for the universe of rightsholders' children in the Current École Élémentaire Rose-des-Vents Catchment Area is about 700 elementary-age children: 390 in the catchment area for the Central Vancouver Project and 310 in the catchment area for the West-Side Vancouver Elementary Project. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

3. Known Demand

[3508] École Élémentaire Rose-des-Vents began as a primary school. By 2004/05, it served children in Kindergarten through Grade 7. It became a K-6 school beginning in 2008/09. The evidence shows that enrolment at École Élémentaire Rose-des-Vents (elementary portion only) has grown from 21 students in the 1997/98 school year, to 352 students in the 2014/15 school year.

[3509] Enrolment at École Élémentaire Rose-des-Vents was consistently around 300 students between 2007/08 and 2009/10. It plateaued between 330 and 350 students after 2010/11. Of course, the facility has exceeded its operating capacity for 249 elementary students since 2006/07. As Mr. Justice Willcock concluded, that level of overcrowding in addition to long travel times likely resulted in many parents choosing not to enrol their children at École Élémentaire Rose-des-Vents, and might have contributed to the plateau.

[3510] The plaintiffs also provided evidence dividing current enrolment between its two new catchment areas. That evidence suggests that 209 École Élémentaire Rose-des-Vents students live in the catchment area for the Central Vancouver Elementary Project and 128 live in the catchment area for the West-Side Vancouver Elementary Project.

[3511] Unfortunately, there appear to be some problems with the catchment-area enrolment evidence for the Lower Mainland. The total number of students in the two new catchment areas (337 students total) is 15 students fewer than the total enrolment at École Élémentaire Rose-des-Vents (352 students). Similarly, there appear to be about 12 students missing from the Port Coquitlam and Burnaby catchment areas, and a further 25 students missing from the students that live in the proposed new catchment areas for Vancouver (East). Overall, the catchment-area divided enrolment falls 52 students short of the CSF's actual 2014/15 enrolment in its Lower Mainland schools.

[3512] It is impossible to know in what catchment area the omitted students reside because all the proposed new catchment areas border one another. Some of the missing École Élémentaire Rose-des-Vents students could reside in the two new Vancouver (East) catchment areas, which border the proposed catchment area for the Central Vancouver Elementary Project. As a result, I deal with the discrepancy by equally apportioning the 52 students between catchment areas by adding nine students to the known demand for each proposed programme. This overstates

enrolment across the six catchment areas by two students total, but appears to be the most fair way of dealing with the problem.

[3513] As a result, I conclude that the known demand for elementary (K-6) education in the catchment area for the Central Vancouver Elementary Project is 218 students. Known demand in the catchment area for the West-Side Vancouver Elementary Project is 137 students.

4. The Uptake Rate

[3514] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[3515] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[3516] The plaintiffs say that the CSF wants to build two schools, each with nominal capacity for 435 students or operating capacity for 406 students. They say that would give the CSF space in each proposed catchment area for at least eighteen elementary divisions. They say that since École Élémentaire Rose-des-Vents has operated above its capacity since 2005/06, enrolment will increase once it is no longer suppressed by overcrowding, facility condition and transportation times.

[3517] The defendants say that the plaintiffs' requested capacity far exceeds the order made by Mr. Justice Willcock. They say that between École Élémentaire

Rose-des-Vents (200-student capacity) and the already-approved new school (406-student operating capacity) the CSF will have space for at least 600 students, more than the 500-student capacity that Mr. Justice Willcock held the CSF to be entitled to.

[3518] The defendants also note the participation rates that would be required to fill the CSF's proposed schools. They suggest that to fill the proposed new schools by 2023, the CSF would need to achieve a 136% proxy participation rate in the catchment area for the West-Side Vancouver Elementary Project and 111% in the catchment area for the Central Vancouver Elementary Project.

[3519] I agree that the capacity that the CSF seeks far exceeds what Mr. Justice Willcock ordered. The requested capacities would also require the CSF to achieve an exceptionally high proxy participation rate by 2023, more than 100% in each catchment area. In an urban setting like Vancouver where the CSF competes with neighbourhood majority schools, the CSF cannot expect to achieve that level of participation. As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their projection of more than 800 children is not realistic.

[3520] I address the potential enrolment for the Central Vancouver Elementary Project and the West-Side Vancouver Elementary Project separately.

[3521] École Élémentaire Rose-des-Vents is located in the catchment area for the Central Vancouver Elementary Project. About 218 students at that school live in that catchment area. Given the proxy universe of 390 eligible children, the CSF's current proxy participation rate is about 56%, which is moderate. The CSF plans to replace the school on a new site.

[3522] École Élémentaire Rose-des-Vents is overcrowded, which might deter parents from enrolling their children at that school. However, for most parents in this catchment area, the transportation times to École Élémentaire Rose-des-Vents are not unmanageable. Constructing a new school to replace École Élémentaire Rose-

des-Vents on a different site in the same catchment area would be unlikely to improve travel times for many students or provide a closer option for parents. I also consider that enrolment seems to have plateaued. Additionally, many parents living in the catchment area for the Central Vancouver Elementary Project have access to neighbourhood schools and French immersion programmes closer to their homes, which will exert a negative influence on the participation rate for the Proposed Central Vancouver Elementary Project. Thus, in my view, if the Central Vancouver Elementary Project went forward, enrolment would not see substantial growth.

[3523] There are no examples of the CSF replacing an owned, homogeneous elementary school in an urban setting, as the CSF seems to propose to do in Vancouver. In North Vancouver and Surrey, the CSF replaced schools and added a secondary component, which influenced their ability to attract and retain elementary students. The Central Vancouver Elementary Project would move École Élémentaire Rose-des-Vents students further away from the secondary programme.

[3524] The closest parallel is Victoria, where an elementary/secondary school was replaced on the same site without adding new grade levels. École Victor-Brodeur re-opened in January 2007, with 272 students in Kindergarten through Grade 7. In 2014/15, it had 531 children enrolled in those grades. Its elementary enrolment grew by 259 children, or 95% in those years.

[3525] Dr. Landry found that in 2011, there were 1,075 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder parent living in the Greater Victoria region. Assuming the universe remained constant, École Victor-Brodeur's participation rate grew from 25% of elementary-age children in 2006/07 to 49% of elementary-age children in 2014/15. This represents growth in the participation rate by about 24%.

[3526] There are a number of reasons to believe that the CSF will not see the same magnitude of increases to its enrolment as the CSF achieved at École Victor-Brodeur. For one, the CSF envisions moving locations, and this will almost certainly lead to a temporary drop in enrolment. Further, École Victor-Brodeur appears to

have been reconstructed when it had a lower elementary participation rate than the CSF has in the catchment area for the Central Vancouver Elementary Project. Victoria also has a particularly cohesive Francophone community, and the presence of a military base.

[3527] Taking into account all the circumstances, including the experience in Victoria, I consider that the CSF could reasonably expect about 270 students to attend the Central Vancouver Elementary Project as a new school on a new site. This reflects about a 70% proxy participation rate, and growth in the participation rate by about 15%.

[3528] With reference to the West-Side Vancouver Elementary Project, 137 students from that catchment area currently attend École Élémentaire Rose-des-Vents. Given the proxy universe of 310 eligible children, the CSF's current proxy participation rate is about 44%. Rightsholder parents from that area have access to neighbourhood schools and French immersion programmes closer to their homes. They must also transport their children to school by bus, and their children experience long transportation times. Thus, the lack of a CSF school in the area likely deters some parents from sending their children to École Élémentaire Rose-des-Vents, as Mr. Justice Willcock concluded in *Association des Parents-BCSC*. However, this is not as pronounced as it is in communities like Burnaby and Victoria, for example, because there is still a school within the municipality where the parents live.

[3529] The CSF has divided its Vancouver catchment areas once before. École Élémentaire Rose-des-Vents itself began as an annex to École Élémentaire Anne-Hébert. It opened in 1997/98 in temporary space with 21 students in Kindergarten to Grade 2. Its enrolment grew to 352 students in Kindergarten to Grade 6 in 2014/15. In the first ten years of the programme, enrolment grew from 21 students to 303 students. Enrolment at École Élémentaire Anne-Hébert in that period remained relatively stable.

[3530] Dr. Landry's evidence provides that in 2011 there were about 600 elementary-age children of Mother-Tongue Rightsholders across the Current École Élémentaire Rose-des-Vents Catchment Area. Assuming that the universe of eligible children remained constant over time, the participation rate at École Élémentaire Rose-des-Vents grew to about 50% in the first 10 years of the programme, and to about 60% in 18 years.

[3531] The creation of École Élémentaire Rose-des-Vents is instructive. It shows that even when the CSF starts a new school to divide a catchment area, the programme tends to grow gradually, adding grades and growing cohorts over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. This is also what the CSF did when it started a new programme in Richmond, and what the CSF proposed to do when it first considered opening a programme in Burnaby: it would begin with a few grades and progressively add more. Thus, the number of children will warrant different facilities and amenities as the West-Side Vancouver Elementary Project grows.

[3532] I also consider that École Élémentaire Rose-des-Vents has achieved a 56% proxy participation rate of children living in the Central Vancouver Catchment Area. It has done so without a new facility, and when facing serious overcrowding, but without the same problems caused by transportation times. In Victoria, with a new facility, École Victor-Brodeur was able to achieve a 65% proxy participation rate of nearby elementary students in the eight years following construction of a new facility, which reflects growth by about 25%. As explained above, the CSF is likely to achieve a lesser magnitude of growth in Vancouver (West) than the CSF achieved at École Victor-Brodeur.

[3533] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect 25 to 45 students to attend the West-Side Vancouver Elementary Project in its first three or so years. In a newly-built, homogeneous facility, enrolment could reach up to 220 students, or about a 70% proxy participation rate, in its first 10 or so years.

[3534] Based on my independent analysis, the numbers appear to warrant space for approximately 220 students in the catchment area for the West-Side Vancouver Elementary Project, and approximately 270 students in the catchment area for the Central Vancouver Elementary Project. This validates Mr. Justice Willcock's conclusion that the numbers warrant space for about 500 students in the Current École Élémentaire Rose-des-Vents Catchment Area.

D. Entitlement

[3535] After determining the number of children, the question becomes what the number is entitled to on the sliding scale.

[3536] Mr. Willcock found, the Supreme Court of Canada confirmed, and the defendants admit that the number of rightsholders' children in Vancouver (West) falls at the high end of the sliding scale, warranting distinct homogeneous facilities that offer a global educational experience equivalent to that offered in majority schools.

[3537] The defendants advise that they do not ask the Court to revisit Mr. Justice Willcock's declarations, as affirmed by the Supreme Court of Canada. They concede that they are bound by the declaration.

[3538] In *Association des Parents- BCSC*, Mr. Justice Willcock concluded that rightsholders living west of Main Street in Vancouver were not being afforded the minority language educational facilities guaranteed to them by the *Charter* (at paras. 158, 160):

I find that the petitioners are not being afforded the minority language educational facilities guaranteed to them by s. 23 of the [*Charter*]. I am satisfied, weighing all the evidence of the facilities made available to Francophone students in comparison with the facilities made available to

Anglophone students, that the former are not equivalent to the latter. I am further satisfied that the disparity is such as to limit enrolment in the minority Francophone program and contribute to the assimilation which is sought to be avoided by s. 23.

...

There will, therefore, be a declaration in favour of the parents living west of Main Street in the City of Vancouver who have the right to have their children receive primary school instruction in French that they are not being provided the minority language educational facilities guaranteed to them by s. 23 of the *Canadian Charter of Rights and Freedoms*.

[3539] Mr. Justice Willcock's decision was upheld in *Association des Parents- SCC*, the Supreme Court of Canada wrote at para. 63 that "the judge's declaration regarding the lack of s. 23 equivalence represents the equivalent of a declaration of a *prima facie* breach of s. 23, subject to the future determination of responsibility, justification for the breach (if applicable), and positive remedy."

[3540] As a result, the *prima facie* breach of s. 23 is confirmed, as is the finding that rightsholders in Vancouver (West) are not receiving a global educational experience equivalent to that offered in majority schools, as they are entitled to.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[3541] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Vancouver (West) and the dealings of the CSF, the Ministry and SD39-Vancouver in connection with it.

[3542] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Vancouver (West), I make findings that are of particular relevance to Chapter XXXV, Leases; Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; Chapter XXXVIII, Site and School Acquisition Projects; and Chapter XXXIX, Community Planning.

[3543] Officials from both the Ministry and the CSF testified that the École Élémentaire Rose-des-Vents file took up more of their time than any other. The Court heard considerable detailed evidence concerning all the negotiations that took place over the course of about 17 years, as the CSF pursued more than a dozen potential school sites. Even more so than in other areas of the claim, it would be disproportionate to discuss every piece of evidence that was proffered concerning the events that took place over those years. I have considered all the facts and evidence that I do not refer to.

1. History of Capital Planning

[3544] Soon after its inception, the CSF opened École Élémentaire Rose-des-Vents as École Élémentaire Anne-Hébert Annex to serve children living on the west side of Vancouver.

[3545] Initially, the CSF's capital planning for Vancouver envisioned a single capital project to consolidate its two elementary programmes and its heterogeneous secondary programme (the "Vancouver Regional Elementary/Secondary Project"). Dr. Ardanaz ventured that would eliminate the need to construct or acquire a large number of smaller facilities.

[3546] The CSF proposed a single regional school in its December 1997 Capital Plan Submission for 1998/99. It also proposed to continue leasing École Élémentaire Anne-Hébert and offering secondary instruction at Kitsilano Secondary School for two years, pending construction of the Vancouver Regional Elementary/Secondary Project.

[3547] The CSF continued to request that project in both its September 1998 Capital Plan Submission for 1999/00, its June 1999 Capital Plan Submission for 2000/01. The Vancouver Regional Elementary/Secondary Project became the CSF's second-highest priority project in its June 2000 Capital Plan Submission for 2001/02. At that point, the CSF was desperate to find a site in Vancouver for the

École Élémentaire Anne-Hébert Annex, and was in constant contact with the Ministry and SD39-Vancouver with respect to the project.

[3548] In March 2001, the Province announced funding for the CSF to acquire the Oakridge Site in Vancouver for the construction of its elementary/secondary school. The École Élémentaire Anne-Hébert Annex, which had been renamed École Élémentaire Rose-des-Vents, was relocated to the elementary school located on that site.

[3549] In the CSF's June 2001 Capital Plan Submission for 2002/03, the CSF requested funding to proceed with the construction of the Vancouver Regional Elementary/Secondary Project on the Oakridge Site as its highest-ranked project. By October of 2001, though, the CSF's plans changed. The CSF raised with the Ministry that it preferred to use the Oakridge Site to construct a dedicated secondary school, which would be fed by elementary schools to the east and west of the city. The existing elementary facility on the Oakridge Site would be used by École Élémentaire Rose-des-Vents "for some time until the number of elementary students residing in the west side of Vancouver justify acquiring a school in that geographical area". The CSF also proposed acquiring École Élémentaire Anne-Hébert from SD39-Vancouver to serve students east of Main Street in Vancouver.

[3550] After some internal discussions, Mr. Miller recalled, Ministry staff agreed to the proposal. The Ministry revised the CSF's June 2001 Capital Plan Submission for 2002/03 to include funding for a 325-student secondary school to be constructed on the Oakridge Site (the "Vancouver Secondary Project"). The same idea was reflected in the CSF's September 2002 Capital Plan Submission for 2003/04, where the CSF requested the Vancouver Secondary Project as its highest-ranked project. The CSF also sought renovations to the school on the Oakridge Site housing École Élémentaire Rose-des-Vents in both its September 2002 Capital Plan Submission for 2003/04 and its October 2003 Capital Plan Submission for 2004/05.

[3551] The Ministry approved funding for the Vancouver Secondary Project in 2003, and it opened around 2008. Meanwhile, the CSF began seeking a new site

and school for École Élémentaire Rose-des-Vents (the “École Élémentaire Rose-des-Vents Replacement Project”) beginning with its October 2004 Capital Plan Submission for 2005/06, when it was the CSF’s fifth-highest priority. In accordance with the Capital Plan Instructions, the CSF sought funding in the third year of the capital budget. The CSF also included, but did not rank, a long-term plan to acquire an asset from SD39-Vancouver. By its October 2005 Capital Plan Submission for 2006/07, the École Élémentaire Rose-des-Vents Replacement Project had become the CSF’s third-highest priority.

[3552] In 2006, though the CSF’s requests for the Vancouver (West) area might have seen a slight shift. Starting at that time, the CSF began seeking a new site and school in Vancouver (West) (the “Vancouver (West) Elementary Project”), which may or may not have been intended to replace École Élémentaire Rose-des-Vents. That project was the CSF’s second-highest priority in both its November 2006 Revised Capital Plan Submission for 2007/08, and its October 2007 Capital Plan Submission for 2008/09.

[3553] With the May 2009 Capital Plan Submission for 2009/10, the CSF moved to a ward-based system for prioritizing capital projects. The CSF ranked the Vancouver (West) Elementary Project as its highest priority in the Greater Vancouver ward. The CSF requested accelerated funding in year 1 and 2 of the capital plan for that project, as the CSF believed that the school was in crisis. The CSF also prepared a PIR in support of the project.

[3554] In 2010, with the start of this litigation, the CSF began requesting two new schools for Vancouver (West). In its June 2010 Capital Plan Submission for 2010/11, the CSF requested two elementary schools on the west side of Vancouver each with capacity for 80K/350 Grade 1-6 students, which were both said to be the CSF’s highest priority and to require accelerated funding in the first year of the capital budget, contrary to the Capital Plan Instructions. The Echo Report shows that the Ministry saw one of the projects as the CSF’s highest priority, with a high-priority Threshold Ranking. The other was shown as the CSF’s second-highest

priority, and had a threshold ranking of “NPIR”. In January 2011, the CSF also provided updated financial information for its 2009 PIR.

[3555] The Ministry did not request Capital Plan Submissions in the 2011/12 school year. Unexpectedly, though, Treasury Board allocated the Ministry a Capital Envelope for Expansion Projects in October 2011. As a result, the Ministry approved capital funding for a new west-side elementary school for the CSF in the Southeast False Creek area of Vancouver, near Olympic Village (the “Southeast False Creek Elementary Project”).

[3556] With the Project Agreement for the Southeast False Creek Elementary Project unfinalized, the CSF continued to seek that project and a Vancouver (West) Elementary Project in its November 2012 Capital Plan Submission for 2012/13. Under directions from Ministry staff, in its September 2013 Capital Plan Submission for 2013/14, the CSF only requested the Vancouver (West) Elementary Project because funding had already been announced for the Southeast False Creek Elementary Project. In both years, those projects were said to be the CSF’s highest priority and to require accelerated funding.

[3557] In November 2013, the CSF provided the Ministry with two In-House PIRs for Vancouver West of Main Street: one for the Central Vancouver Elementary Project and one for the West-Side Vancouver Elementary Project. The CSF’s enrolment projections in those PIRs focus on the number of children potentially eligible to attend the school based on census data.

[3558] In his feedback to the CSF, Mr. Cavelti advised that he did not perform a detailed review of the PIR for the Central Vancouver Elementary Project because the Ministry considered it had already supported it with the Southeast False Creek Elementary Project approval. In connection with the West-Side Vancouver Elementary Project, Mr. Cavelti proposed the Ministry would evaluate it based on the data concerning the Central Vancouver Elementary Project, but taking into account that a new school was already planned for construction in the area. He also

suggested that funds for the then-stalled Southeast False Creek Elementary Project could be applied to it.

[3559] In connection with both PIRs, Mr. Cavelti asked what the CSF proposed to do with the building housing École Élémentaire Rose-des-Vents at the Oakridge Site, particularly because the Ministry had recently funded seismic renovations to the building. Further, as with all other PIRs, Mr. Cavelti expressed concern that the CSF had not provided the type of detailed enrolment projections the Ministry required.

[3560] Mr. Allison responded to Mr. Cavelti by way of an October 22, 2014, letter. He reiterated that the CSF wanted to have two schools in Vancouver (West), which I do not take Mr. Cavelti to have misunderstood. Mr. Allison also clarified that the CSF planned to use the existing École Élémentaire Rose-des-Vents school as swing space while constructing its planned new elementary schools, then use it as expansion space for École Secondaire Jules-Verne.

[3561] The CSF submitted revised In-House PIRs for its two Vancouver (West) elementary projects in October and November 2014, respectively. In those PIRs, the CSF continued to focus on the number of students potentially eligible to attend the schools. The CSF also indicated it had engaged Mr. McRae to provide cohort retention enrolment forecasts, which it provided under separate cover. They do not consider the number of eligible children or the question of participation rate.

[3562] As of the end of trial, the Project Agreement for the Southeast False Creek Elementary Project had not been completed. École Élémentaire Rose-des-Vents continues to use the elementary school building on the Oakridge Site. The funding is still available and can be applied to a capital project once the CSF finds a suitable site to acquire.

2. École Élémentaire Rose-des-Vents' Early History

[3563] École Élémentaire Rose-des-Vents began as École Élémentaire Anne-Hébert Annex in the late 1990s, and was intended to serve students in primary grades. It was initially located in a townhouse before it moved to a church annex.

Facing eviction from the church so the annex could be demolished, in the spring of 2000 Deputy Minister Ungerleider intervened and persuaded SD39-Vancouver to lease Queen Elizabeth Annex to the CSF on a temporary basis.

[3564] The CSF's earliest capital plans involved acquiring a site and building a regional elementary/secondary school on that site to serve students from across Vancouver, western Burnaby and Richmond. The CSF preferred the regional format because it was challenging to identify and acquire sites in Vancouver from the CSF's earliest days. The CSF planned to consolidate École Élémentaire Rose-des-Vents into that school.

[3565] In its earliest searches for space for École Élémentaire Rose-des-Vents, the CSF looked at independent schools, vacant government sites, SD39-Vancouver schools and municipal sites. The Court heard about at least eight properties that the CSF pursued before 2001. The CSF was unable to acquire those sites either because the owner chose not to sell, or it was impractical to subdivide or rezone the property.

[3566] The most promising site between 1998 and 2000 was the Chrysler Site, located near Marine Drive at Ontario Street. The Ministry refused to support the CSF's plans to acquire that site because it was expensive, and because the CSF's needs did not seem urgent at that time. This was so even though students at École Élémentaire Rose-des-Vents were being accommodated in a church annex, and facing imminent eviction.

3. Acquisition of the Oakridge Site

[3567] In 2000 or 2001, Ministry staff learned through their connections that SD39-Vancouver was "quietly" marketing the Oakridge Site. The site was described as relatively small, with a small elementary school on the site ("Oakridge Elementary") being leased to an independent school, the Vancouver Hebrew Academy.

[3568] Ministry staff worked behind the scenes to persuade SD39-Vancouver to make the Oakridge Site available to the CSF. SD39-Vancouver staff asked the

Ministry to participate in the negotiations. The Deputy Minister appointed an independent facilitator to handle the negotiations. This was a unique appointment related to the pre-existing lease by the Vancouver Hebrew Academy. No one could say why the Deputy Minister did not use the *Education Mediation Regulation*.

[3569] Initially, SD39-Vancouver wanted to dispose of the Oakridge Site to the CSF by way of a 50-year lease, and also offered the CSF a 50-year lease of École Élémentaire Anne-Hébert. This is consistent with the evidence from both sides that SD39-Vancouver has a long-time policy against selling its school sites.

[3570] Initially, Ministry staff were open to a leasing arrangement. The CSF preferred an outright transfer, but was open to the idea because it would also secure long-term tenure of École Élémentaire Anne-Hébert. However, the idea fell away after the Ministry learned it could not use its Capital Envelopes to fund the lease.

[3571] The Ministry negotiated the purchase of the Oakridge Site by the CSF in the spring of 2001. SD39-Vancouver received full market value for the property: \$9,644,000. This was unusual, and belies the Ministry's practice at the time of only compensating districts for their Local Capital contribution to properties acquired by the CSF. SD39-Vancouver received half the funds to its Local Capital Reserve account and half to its Restricted Capital Reserve. The Ministry also approved SD39-Vancouver's use of its Restricted Capital on some lower-priority projects. The transaction was subject to an option for SD39-Vancouver to repurchase the property at a cost of \$1 in the event that the CSF no longer required the site for educational purposes: an eventuality that Mr. Stewart, at least, does not believe will ever arise.

[3572] Throughout the negotiations, the Minister had yet to approve a capital project for the CSF on the west side of Vancouver. Minister Joy McPhail announced support for the site acquisition in March 2001, around the time negotiations were concluding. This shows that the CSF was able to negotiate to acquire sites without capital approvals in its early years because the Ministry had ample capital funding and regular Capital Planning Cycles.

[3573] The CSF acquired the Oakridge Site from SD39-Vancouver in the spring of 2001, allowing École Élémentaire Rose-des-Vents to relocate to Oakridge Elementary.

4. Development of the Oakridge Site as a Secondary School

[3574] As I highlight above, in October 2001, after it acquired the Oakridge Site, the CSF changed its plan for Vancouver to a three-school configuration. The CSF would redevelop the Oakridge Site as a secondary school with capacity for 325 students. The CSF would use Oakridge Elementary for École Élémentaire Rose-des-Vents until the numbers warranted another school in Vancouver (West). The CSF also planned to acquire long-term tenure of École Élémentaire Anne-Hébert. Then, École Élémentaire Rose-des-Vents and École Élémentaire Anne-Hébert would serve as feeder schools for the new secondary school.

[3575] Interestingly, the CSF was not certain that it would have long-term tenure at École Élémentaire Anne-Hébert when it engaged in its earliest capital planning. Mr. Stewart's evidence was that SD39-Vancouver only confirmed that the CSF would have long-term use of Kitsilano Secondary and École Élémentaire Anne-Hébert around the fall of 1999, when the CSF was focused on the Chrysler Site. This led the Ministry to think that the CSF's needs in Vancouver were not as pressing as first thought. In the fall of 2000, SD39-Vancouver proposed a long-term lease of École Élémentaire Anne-Hébert to the CSF as part of the Oakridge Site negotiations. This likely reassured the CSF it would not need to consolidate all of its programmes on one site as first planned.

[3576] After the CSF proposed the three-school configuration, it received a report it had commissioned from Trillium, its consultant, (the "Trillium Oakridge Report"), which concluded the Oakridge Site was not large enough for a regional elementary/secondary school for 700 elementary and 325 secondary students from across Vancouver. The Trillium Report also suggested that Oakridge Elementary and École Élémentaire Anne-Hébert were too small to accommodate the CSF's projected 700 elementary students. It therefore recommended the three-school

configuration. It also proposed that once the CSF secured a new elementary school in Vancouver (West), Oakridge Elementary could be leased back to the Vancouver Hebrew Academy, which had been displaced to SD39-Vancouver's Shannon Park Annex.

[3577] In my view, the evidence shows that it was always intended that Oakridge Elementary would be retained on the Oakridge Site. In the course of planning for École Secondaire Jules-Verne, Mr. Bonnefoy and his consultants considered that even if Oakridge Elementary were demolished, the site would be too small for a secondary playfield. Going forward, the CSF invested capital funds in renovations to Oakridge Elementary. The CSF does not appear to have considered redeveloping Oakridge Elementary as a K-12 school with more elementary capacity than is available at Oakridge Elementary.

[3578] The CSF sent the Ministry a copy of the Trillium Oakridge Report, and proposed that it redevelop the Oakridge Site as a secondary school, and acquire another site for an elementary school in Vancouver (West). The Ministry agreed to that plan, relying on the CSF's representations. Mr. Miller encouraged the CSF to seek a long-term acquisition of École Élémentaire Anne-Hébert and develop a secondary school playfield near the Oakridge Site.

[3579] The Ministry approved the development of the Oakridge Site as a regional secondary school with capacity for 350 students in June 2003, at a cost of \$8.4 million. Due to cost escalation in the construction sector, the project budget grew to about \$25 million. The CSF delivered the project \$1.2 million below budget, and retained those savings for its Capital Reserve accounts.

[3580] École Secondaire Jules-Verne opened in September 2008. It is one of a few instances where the CSF was able to engage in some joint development with a municipality. As part of the Project Agreement, the CSF and the Ministry funded the development of a sports field nearby. The CSF was given a 20-year license to use the field during school hours.

5. Crowding at École Élémentaire Rose-des-Vents

[3581] When the CSF shifted to the three-school configuration, all agreed that the CSF would require a replacement for École Élémentaire Rose-des-Vents at some point. The CSF's projections suggested it would need a new home by about 2009, as the CSF would be able to accommodate students at École Secondaire Jules-Verne while the secondary programme transitioned from Kitsilano Secondary to École Secondaire Jules-Verne. Indeed, this was the CSF's plan when it first proposed developing the Oakridge Site as a secondary school.

[3582] Over time, École Élémentaire Rose-des-Vents began to grow crowded. As a result of the overcrowding, the CSF added four portables to the Oakridge Site between 2005 and 2007. The multipurpose room that formerly served as the gymnasium was converted into three classrooms. École Élémentaire Rose-des-Vents also shared space at École Secondaire Jules-Verne, but it has become increasingly difficult to schedule shared spaces like the gymnasium. Thus, the CSF constructed a temporary gymnasium on the site, which further reduced already limited schoolyard space.

[3583] After 2010, the Ministry assisted with the overcrowding problem by funding the addition of three modular classrooms. The Ministry also began funding the CSF's lease of a room in a nearby church basement, which École Secondaire Jules-Verne students use to do École Virtuel course work. Mr. Allison averted to plans to convert École Secondaire Jules-Verne's shop class space to classroom space due to growing enrolment. Even so, the CSF adheres to its policy of never removing early childhood services from its schools; it did not, for example, move the on-site daycare to the church basement.

[3584] There is a question about how crowded École Élémentaire Rose-des-Vents is. Various individuals testified to different operating capacities for Oakridge Elementary.

[3585] Justice Willcock found that École Élémentaire Rose-des-Vents had nominal capacity for 215 students and operating capacity for 199 students. This is the same capacity that the CSF reported in its 2009 PIR in connection with École Élémentaire Rose-des-Vents.

[3586] The Joint Fact Finder's Report states that École Élémentaire Rose-des-Vents has operating capacity for 249 students. Given the methodology used by the Fact-Finding Team, that capacity includes modular classrooms. Usually, capacity in modular structures is included in a school's capacity, while capacity in portables is not. This likely explains the greater capacity reported in the Joint Fact Finder's Report.

[3587] Mr. Allison's view is that, with full-day Kindergarten, École Élémentaire Rose-des-Vents has nominal capacity of 195 students and operating capacity for 180 students. It seems to me that Mr. Allison calculated capacity without reference to the rooms used for the CSF's early childhood services.

[3588] Usually, I prefer the evidence of operating capacity as reported in the Joint Fact Finder's Report. Consistent use of that source of evidence allows me to make comparisons between school facilities. However, the modulars at École Élémentaire Rose-des-Vents were only added to the site in about 2012, so its capacity did not include those spaces until quite recently. They were also used to replace portables, which typically are not included in a school's capacity. I also reject Mr. Allison's calculation of operating capacity because it omits the space the CSF uses for early childhood education, which is not something to which rightsholders are entitled, as I explain in Chapter XV, Linguistic and Cultural Programming. I therefore conclude that the operating capacity of École Élémentaire Rose-des-Vents at Oakridge Elementary is 199 students.

[3589] Given École Élémentaire Rose-des-Vents' enrolment of 64 students in 2001/02, it was operating at 32% of its operating capacity when it first occupied Oakridge Elementary. It surpassed its operating capacity in 2005/06, when its enrolment was 235 students and it was operating at 118% of its capacity. Its

capacity utilization has only grown since then. Its capacity utilization was 137% in 2006/07, about 152-154% between 2007/08 and 2009/10, and about 166-176% between 2010/11 and 2014/15.

[3590] Of course, École Élémentaire Rose-des-Vents used space at École Secondaire Jules-Verne, which was operating below its capacity in its earliest years. École Secondaire Jules-Verne was built with capacity for 350 secondary students, bringing the combined capacity for both schools to 549 students. Taking the combined enrolments and capacities together, the two schools were operating at 90% capacity in 2008/09, 92% capacity in 2009/10, 99% capacity in 2010/11, 107% capacity in 2011/12, 110% capacity in 2013/14 and 117% capacity in 2014/15. Thus, the situation truly reached the point of crisis in about 2010/11, when École Secondaire Jules-Verne and École Élémentaire Rose-des-Vents, together, were operating at about full capacity. Because the CSF has chosen to continue to use several classrooms for early childhood services, it felt the effects of overcrowding sooner.

6. The Search for Space in Vancouver (West)

[3591] When the Ministry and the CSF agreed to the three-school configuration, no one realized how difficult it would be for the CSF to find another site in Vancouver (West). Mr. Miller confirmed that he was not concerned about finding another site when he approved the three-school configuration. Mr. Bonnefoy testified he did not realize what a struggle it would be to secure appropriate space. While he eventually conceded that CSF enrolment tends to be weighted more toward elementary students than secondary students, he refused to say that in retrospect, it would have been better for the CSF to build combined elementary/secondary space on the Oakridge Site.

[3592] There are a number of sites that the CSF pursued on several occasions over several years: the Jericho Lands and the West Point Grey Academy, the Fairmont Site, the Pearson/Dogwood Site, the Southeast False Creek Site, and the Sexsmith Elementary Site.

[3593] The “Fairmont Site” is located a five-to-ten minute walk northeast of École Élémentaire Rose-des-Vents. It is common ground that the Fairmont Site is owned or controlled by the Federal Government, and formerly housed the RCMP headquarters. Mr. Allison explained that the site is in the centre of the proposed catchment area for the Central Vancouver Elementary Project. He described the site as being quite large, with a single building in the centre. The building contains administrative spaces and some former classrooms, but no gymnasium.

[3594] The “Pearson/Dogwood Site” is located south of École Élémentaire Rose-des-Vents. According to Mr. Allison, it is close to the Oakridge Site and is easily accessible from major arteries. It currently serves as a home to two long-term care facilities. It is common ground that the Pearson/Dogwood Site is owned by the Province, and is slated for redevelopment. The CSF first considered the Pearson/Dogwood Site in the fall of 1999. The CSF decided against the site at that time because it was too narrow for a regional elementary/secondary school.

[3595] The “Southeast False Creek Site” is located in the Southeast False Creek, or Olympic Village, area of Vancouver. It consists of a large plot of undeveloped land located to the northeast of the proposed catchment area for the Central Vancouver Elementary Project, on the south shore of English Bay near the southernmost base of the Cambie Street Bridge.

[3596] The “Sexsmith Elementary Site”, a site owned by SD39-Vancouver, is located about a seven to eight minute drive from École Élémentaire Rose-des-Vents. The site is large, about 6.5 acres. A large brick building lies to the east of the site and was vacant as of 2013; it was formerly used as Sexsmith Elementary School (the “Old Sexsmith School”). It was replaced as a seismic project, and SD39-Vancouver now uses the replacement school to the west side of the site (the “New Sexsmith School”). The two buildings are separated by a fence. It is located to the south of the proposed catchment area for the Central Vancouver Elementary Project, on 59th Avenue in between Main Street and Cambie Street.

[3597] The “Jericho Lands” are located on the south shore of English Bay, to the north of the proposed catchment area for the West-Side Vancouver Elementary Project. Some of the lands are owned by the Province, and some are owned by the Federal Government. The Jericho Lands were first examined by the CSF in about 2001, and the Ministry encouraged the CSF to look at them. The CSF did not actively pursue them because they were subject to unresolved land claims. The “West Point Grey Academy” is located on the Provincially-owned portion of the Jericho Lands, and is leased to an independent school.

a) Mr. Bonnefoy’s Site Search

[3598] Mr. Bonnefoy was the CSF’s Secretary-Treasurer between 2004 and the end of 2009, and led the search for space to replace École Élémentaire Rose-des-Vents in that period.

[3599] In 2005 and 2006, Mr. Bonnefoy looked at many sites including a Translink site, the Jericho Lands, the West Point Grey Academy on the Jericho Lands and smaller sites requiring land assembly. In 2007, the CSF explored developing a site in conjunction with UBC. In 2008 and 2009, the CSF looked at a Vancouver Coastal Health property and an independent school. All these proposals fell through.

[3600] In 2006, Mr. Bonnefoy started to pursue SD39-Vancouver’s Shannon Park Annex, but ceased doing so after Mr. Miller informed him that it was being leased by the Vancouver Hebrew Academy, which had been displaced from the Oakridge Site.

[3601] The CSF also looked at two municipal sites that the City of Vancouver had set aside for SD39-Vancouver. First, he examined the Southeast False Creek Site. The City of Vancouver preferred a SD39-Vancouver school, citing its desire to create a walkable neighbourhood, which was inconsistent with the CSF’s transportation requirements. The City of Vancouver proposed that the CSF acquire a site it had set aside for SD39-Vancouver in the International Village area of Vancouver. SD39-Vancouver intervened and retained that site for itself.

[3602] In 2006, in joint discussions between the CSF, the City of Vancouver and SD39-Vancouver, a number of further SD39-Vancouver schools were identified to the CSF. Only three schools were located in Vancouver (West). The rest were in Vancouver (East). On further discussion, though, SD39-Vancouver declined to make the west side schools available to the CSF.

[3603] In 2008, SD39-Vancouver did some planning around its facilities and was considering closing Queen Elizabeth Annex to justify a school in a new residential area at UBC. The CSF followed the process and proposed that it might acquire Queen Elizabeth Annex. SD39-Vancouver eventually decided not to pursue that idea.

[3604] Mr. Stewart also confirmed that the Ministry approved some SD39-Vancouver projects at UBC around this time. Ministry staff did not attempt to tie project funding to the disposal of Queen Elizabeth Annex to the CSF. Instead, since Queen Elizabeth Annex had not been closed by SD39-Vancouver, the Ministry tied the SD39-Vancouver approvals to the transfer of École Élémentaire Anne-Hébert to the CSF.

[3605] The CSF also spent some time working toward the acquisition of the Fairmont Site in 2007. The CSF worked with a government-relations firm, and was in contact with a number of Federal ministers before learning that the Federal Government would consult with the Province prior to disposing of the Fairmont Site. Minister Bond suggested that Ministry staff would assist, but at that time, the Ministry's position was that the CSF was largely responsible for the negotiations.

b) Move to a Two-School configuration for the West Side of Vancouver

[3606] It is clear that the CSF believed it had reached the point of crisis by the 2008/09 school year. That was when it was operating at above 150% of its capacity at École Élémentaire Rose-des-Vents, and at about 90% capacity between École Secondaire Jules-Verne and École Élémentaire Rose-des-Vents. By 2008, both the

CSF and the École Élémentaire Rose-des-Vents APÉ were pressuring the Ministry to assist the CSF to locate space.

[3607] In 2008 or 2009, Mr. Bonnefoy came to believe that it was unlikely that he would be able to identify a single large site for a school in Vancouver (West). The CSF began exploring the idea of developing two smaller elementary schools. The idea seems to have arisen first at a meeting between CSF and Ministry officials.

[3608] In the spring of 2009, the CSF prepared a PIR for Vancouver (West). The CSF identified a number of options: acquiring Shannon Park Annex or the Pearson/Dogwood Site; jointly developing a smaller school at SD39-Vancouver's Carnarvon Elementary or Queen Mary Elementary; or pursuing government sites like the Jericho Lands, the Fairmont Site or the Translink transit depot; and privately-owned residential lands.

[3609] Mr. Stewart confirmed that the Ministry did not become engaged in discussions around those sites even after receiving the 2009 PIR. According to Mr. Stewart, staff knew at that time that the Ministry would have limited capital funds for a site acquisition.

[3610] By 2009, as the CSF was exploring options for a two-school solution in Vancouver (West), Mr. Bonnefoy considered the co-development of a school with SD39-Vancouver. However, SD39-Vancouver would only suggest schools in Vancouver (East), where the CSF was not interested in adding space.

[3611] In September 2009, the CSF prepared an internal Briefing Note for an *in camera* Board meeting concerning the co-development of a school on an SD39-Vancouver site: at University Hill Elementary, Queen Mary Elementary, Queen Elizabeth Elementary or Carnarvon Elementary. When Mr. Bonnefoy notified his equivalent at SD39-Vancouver, it gave rise to a dispute between the two districts because SD39-Vancouver had not agreed to give the CSF space at any of those schools. SD39-Vancouver and the CSF reached an impasse.

c) Mr. Allison's Site Search

[3612] Mr. Allison became Secretary-Treasurer in 2010. That year, which coincides with the start of this litigation, also marked the CSF's official move to a two elementary school configuration. That year, the CSF sought the Central Vancouver Elementary Project and the West-Side Vancouver Elementary Project. The CSF sought capacity for about 430 students in each school. The Ministry recognized one of the two projects as a high priority. The other it saw as NPIR, which generally means that the Ministry does not actively evaluate the project.

[3613] Around this time, the Ministry also became actively engaged in the CSF's search for space in Vancouver (West). Notably, the Ministry's reinvolvement began shortly before the Province was able to announce funding for the CSF to acquire a site. This suggests to me that the Ministry's lack of action to assist the CSF between 2004 and 2010 arose out of a lack of funding and the knowledge that if the CSF were to find a site, the Ministry would not be able to fund its acquisition.

[3614] Notably, the CSF requested two large elementary schools. The CSF's planning toward the end of Mr. Bonnefoy's tenure had envisioned building two smaller schools, possibly co-located on VSB sites. With Mr. Allison's tenure, the CSF began seeking larger schools for Vancouver (West), and became less willing to compromise to secure space.

i. Central Vancouver Sites

[3615] The CSF pursued a number of sites in the catchment area for the Central Vancouver Elementary Project since 2010. Two parcels were at a late stage of redevelopment, and one was in an inappropriate location. The most viable options were the Southeast False Creek Site, the Fairmont Site, the Sexsmith Elementary Site and the Pearson/Dogwood Site.

[3616] In 2011 and 2012, the CSF and the Ministry focused considerable efforts on the Southeast False Creek Site, which Mr. Bonnefoy had pursued in about 2005. In the spring of 2011 Mr. Allison asked the City of Vancouver if it would reserve that

site for the CSF. At the City of Vancouver and SD39-Vancouver's request, the Ministry became involved to give assurances that funding would be forthcoming.

[3617] In October 2011, the Ministry announced funding support for the Southeast False Creek Elementary Project after the Ministry received an unexpected Capital Envelope for Expansion Projects. The Ministry expedited funding, contrary to its usual practice, because the project seemed to be critical. However, the Ministry recognized that the parties were in early negotiations.

[3618] Negotiations for the Southeast False Creek Elementary Project proved difficult. The site was small. The City of Vancouver required the co-location of an SD39-Vancouver school with the CSF school. The City proposed an even smaller site- only 1,850 square metres- if the CSF were to build a stand-alone homogeneous school. The Ministry was prepared to support a new school for SD39-Vancouver to move the project forward even though enrolment did not yet justify an SD39-Vancouver school.

[3619] The CSF's consistent position in negotiations was that it was willing to share a site, but would not share any amenities, or even a wall, with the SD39-Vancouver school. The Ministry, interested in saving public funds, thought that the CSF ought to share at least some facilities- like a schoolyard or gymnasium-- so long as it could retain a homogeneous culture.

[3620] Then, the City of Vancouver changed the proposed location for the school on the plot of land. The new site was proximate to the Cambie Street Bridge. Concerns arose that it might present a risk to student safety due to the seismic condition of the bridge. By June 2012, progress on the project slowed. It was effectively abandoned after February 2013 when a seismic evaluation suggested that upgrading the bridge would be costly and complex, and after the City of Vancouver suggested the bridge upgrades would not proceed for some time.

[3621] Although Mr. Palmer seemed to be considering the idea in the spring of 2015, Mr. Stewart would not have recommended funding the bridge upgrades to the

Minister because he believed education dollars ought to be spent on education. Ministry staff did not enquire about bridge upgrades with the minister responsible for infrastructure funding.

[3622] As negotiations stalled then halted in connection with the Southeast False Creek Elementary Project, the Ministry informed the CSF that the funds for that project could be applied to a site and school elsewhere in Vancouver (West). So, the CSF pursued a number of other sites.

[3623] Among them, the CSF considered the Fairmont Site, which Mr. Bonnefoy had considered in about 2007.

[3624] In 2010, the Province received a call for interest from the Federal Government in connection with the Fairmont Site as well as the Federal portion of the Jericho Lands. Aware of the CSF's interest, Ministry officials had several telephone calls with Federal Government officials, and the CSF's "potential interest" was communicated to the Federal Government by way of a letter.

[3625] Mr. Miller followed up with the Federal Government and gave them more detail about the CSF's needs in June 2011 and November 2011. After Mr. Miller's March 2012 retirement, Mr. Stewart received a letter indicating the Federal Government anticipated disposing of the Fairmont and Federal Jericho Lands in 2013. He followed up again in 2013, prior to 2014 retirement. Mr. Palmer then became responsible for the file and followed up in September 2014, when he was told that the properties would be transferred to Canada Lands to oversee their disposal by the end of 2014. At the time he gave evidence in the spring of 2015, he had not followed up again, as he had been told that the Ministry would be informed once the transfer was complete and the redevelopment process had begun.

[3626] In the interim, the CSF sent several letters to the Ministry urging it to follow up with the Federal Government. At least once, such a letter spurred the Ministry to follow up. The Ministry typically responded by assuring the CSF that the Federal Government was aware of its interest.

[3627] In October 2012, the CSF attempted to lease part of the Fairmont Site to relieve overcrowding at École Élémentaire Rose-des-Vents pending construction of a new school. Mr. Allison visited the site with an architect and began planning to transform the building into a school. However, by February 2013 it became clear that the building would need to be rezoned and undergo full building code and seismic upgrades before the CSF could use it. Given that the cost of preparing the building could be about \$3 million and that the building would only be available to the CSF for about three years, Mr. Allison abandoned the idea of using the site as a short-term solution.

[3628] The CSF also examined the Sexsmith Elementary Site in about 2013. Notably, the CSF did some feasibility work around constructing a regional elementary/secondary school at Sexsmith Elementary in 1998, and sharing the site with SD39-Vancouver. At that time, the site was considered to be too small to support two schools, and SD39-Vancouver was not interested in the CSF's proposal. The CSF also considered it briefly in around 2006.

[3629] In 2013, after Sexsmith Elementary was raised by an SD39-Vancouver official, Mr. Allison asked to lease the Old Sexsmith School temporarily to relieve overcrowding at École Élémentaire Rose-des-Vents. That request was refused on the basis that the site could not support two schools, but SD39-Vancouver offered some space in Vancouver (East), specifically at Admiral Seymour Elementary. Mr. Stewart had previously cautioned Mr. Allison that he believed the Old Sexsmith School was not seismically sound, but he confirmed that if the districts reached agreement the Ministry would have supported a temporary lease.

[3630] The CSF followed up with a formal request to lease Sexsmith Elementary on March 13, 2013. Six days later, having received no response, Mr. Allison wrote to Minister McRae and the Superintendent of SD39-Vancouver and issued a Notice to Mediate pursuant to the *Education Mediation Regulation*. A mediator was appointed and the CSF prepared its statement of facts and issues. Mr. Stewart was appointed

as the Ministry's representative. Then, SD39-Vancouver refused to participate because it took the position that no dispute had arisen: a precondition to mediation.

[3631] The CSF also pursued the Pearson/Dogwood Site in about 2013. At that time, the Pearson/Dogwood Site was being redeveloped, and the CSF expressed to the Ministry an interest in acquiring a portion of it. Mr. Stewart was tasked with investigating but found his powers were limited to making inquiries. He confirmed that it would have required someone in a senior government position, like the Premier, to direct that the CSF be included in the redevelopment plans. To the best of Mr. Stewart's knowledge, no senior officials intervened. Ultimately, the CSF was told the Pearson/Dogwood Site was not available because it had been promised to a health authority. The CSF also appealed directly to the Project Manager for the redevelopment, but was told again that the CSF could not have the site.

ii. West-Side Vancouver Sites

[3632] The most promising sites in the CSF's catchment area for the West-Side Vancouver Elementary Project have been SD39-Vancouver sites (including the Wesbrook Site), the Paprican Site, the Jericho Lands, Musqueam Lands, and the UEL Site.

[3633] Acquiring a former SD39-Vancouver site was always front of mind for the CSF and the Ministry.

[3634] It appears as though there was a faint hope that the CSF might acquire an SD39-Vancouver facility in 2010. In 2010, SD39-Vancouver had declining enrolment and a number of surplus and underused schools in Vancouver (East). It was also struggling to balance its budget, so the Ministry appointed a special advisor, the Comptroller General, to help it find cost efficiencies and to encourage it to complete a long-term facilities plan. The Comptroller General recommended that SD39-Vancouver revisit the idea of closing schools and leasing them privately.

[3635] As a result of the process, SD39-Vancouver identified eleven candidates for school closures. The CSF met with SD39-Vancouver officials and followed the

consultation process. However, SD39-Vancouver decided not to close any of the schools, so the CSF could not acquire them. Then, SD39-Vancouver placed a moratorium on school closures, which from Mr. Stewart's perspective effectively halted any opportunity to arrange a transfer of an SD39-Vancouver school to the CSF.

[3636] Mr. Stewart advised that if SD39-Vancouver had decided to close schools, it would have presented an opportunity for the CSF. However, the Ministry did not pursue legislative changes to force school closures out of respect for school district autonomy. Nor did Ministry staff discuss with SD39-Vancouver the idea that it could repurpose schools by way of long-term lease or transfer to the CSF. As the Ministry moved forward and approved projects for SD39-Vancouver, it did not consider tying project approvals to school closures and transfers of Vancouver (West) sites to the CSF.

[3637] The CSF worked with SD39-Vancouver and the Ministry to identify opportunities in the fall of 2011. They examined the former University Hill Secondary, which had been explored by Mr. Bonnefoy previously. It was not a possibility because of land-use constraints and potential community protest if some trees and running trails were lost. Then, SD39-Vancouver offered the CSF five classrooms in surplus space in a heterogeneous environment at its newest school, the NRC Secondary. The CSF had immediate need for three classrooms to relieve overcrowding, but Mr. Allison wanted to have 10 classrooms to start a full programme. Thus, the CSF refused that offer.

[3638] SD39-Vancouver also offered the CSF space in several other schools including Sir Alexander Mackenzie Elementary (located at the intersection of East 41st Avenue and Fraser Street), a heritage building at Seymour Elementary, and General Brock Elementary. The CSF refused some schools because they were located in Vancouver (East), while SD39-Vancouver decided that it would not make General Brock Elementary available due to a lack of space. In any event, Mr. Allison

stated he always preferred to use portables to ensure homogeneity instead of leasing space in heterogeneous schools.

[3639] SD39-Vancouver and the CSF also examined developing Southlands Elementary as a joint-use site, but it initially appeared to be too small and there was concern about the politics of dealing with the site. SD39-Vancouver was not in favour of the proposal.

[3640] In the spring of 2011 the CSF was interested in a finding a way to co-locate a school at a site at UBC known as the Wesbrook Site. The Wesbrook Site is located on the south end of the UBC Campus in the Wesbrook area. Mr. Allison described it as a small site, directly across a sportsfield from an SD39-Vancouver secondary school. UBC had set aside that site for an SD39-Vancouver elementary school, and was only prepared to allow the CSF to use it by way of a joint-use arrangement.

[3641] While all parties, including UBC, were open to the joint development of the Wesbrook Site in the summer of 2011, staff from UBC were adamant both schools be built concurrently. The Ministry did not see a demonstrated need to build a school for SD39-Vancouver in that area at that time. Then, SD39-Vancouver moved away from the joint-development idea because it considered the site to be too small to be shared. As UBC insisted that the school be developed as an SD39-Vancouver school, the parties also considered the construction of a single new school for SD39-Vancouver that the CSF could lease until SD39-Vancouver's enrolment needs materialized. That ideal fell away as the parties' attention shifted to other properties.

[3642] In the summer of 2012, the CSF offered SD39-Vancouver the waterfront location at the Southeast False Creek Site as a bargaining chip to re-open negotiations concerning the Wesbrook Site. When seismic concerns with the Cambie Street Bridge stalled negotiations for the Southeast False Creek Site, the CSF redoubled its efforts on the Wesbrook Site, preparing an In-House PIR for a new elementary school at the site, and exploring ways it could be used temporarily.

[3643] Contemporaneously with the CSF's invocation of the *Education Mediation Regulation* in connection with the Sexsmith Elementary Site in 2013, SD39-Vancouver moved away from the negotiations and from the idea that the CSF might be able to use the Wesbrook Site temporarily.

[3644] Even without support from SD39-Vancouver, in the spring of 2013 the CSF wrote to the Ministry suggesting that an SD39-Vancouver school be built and leased by the CSF at the Wesbrook Site. Mr. Stewart raised the idea with SD39-Vancouver staff, but they refused the idea. Mr. Stewart and Mr. Palmer also met with UBC staff in the summer of 2013 to ask if the CSF could have the Wesbrook Site independently, but UBC staff refused to even bring the idea to the UBC Board of Directors.

[3645] Mr. Stewart's evidence was that although the Ministry was prepared to exercise leniency from its usual requirements to move a project ahead at the Wesbrook Site, the parties would need to reach some form of agreement for the Ministry to commit funding. Since the parties did not reach agreement, the Ministry ceased following up on the Wesbrook Site after the summer of 2013.

[3646] The Paprican Site is another site at UBC, but is unaffiliated with SD39-Vancouver. The Paprican Site is located to the far west of the catchment area for the West-Side Vancouver Elementary Project. It is situated south of Wesbrook Mall, against the University Endowment Lands. The site includes a building formerly used as a research centre that Mr. Allison wanted to transform into a school.

[3647] The CSF first became interested in the Paprican Site in the fall and winter of 2011, around the same time it was entering into negotiations concerning the Southeast False Creek Site. In December 2011, the CSF sent a with-prejudice letter to the Ministry seeking funding to purchase and renovate the Paprican Site. While the Ministry was open to the idea, it was concerned that the CSF was seeking to build a school for more space than it seemed to need. It also wanted to ensure that it would be more cost-effective to acquire and renovate that site than it would be to

build a new school. Ultimately, UBC declined to rezone the property for use as a school.

[3648] The CSF also pursued the federal and provincial Jericho Lands during Mr. Allison's tenure. The CSF's and the Ministry's lobbying efforts with the Federal Government concerning the Fairmont Site were always coupled with lobbying efforts concerning the Federal Jericho Land. As with the Fairmont Site, the Ministry expressed the CSF's interests in the Jericho Lands to the Federal Government a number of times between 2011 and 2014. The properties were due to be transferred to Canada Lands at the end of 2014, and the Ministry was awaiting notice of the transfer, but had received no further communication when Mr. Palmer testified in the spring of 2015.

[3649] The CSF actively pursued the Federal Jericho Lands, too. In 2014, the CSF sought information about the Federal Jericho Lands from a Member of Parliament and attended a community consultation about the site redevelopment. Mr. Allison wrote to Canada Lands. He pressed the Province to take action. The efforts did not lead to any results.

[3650] The Province also owns some territory in the Jericho Lands: a large plot of green space, and the West Point Grey Academy. The provincial portion houses a few other buildings and a swimming pool. Because the site is subject to unresolved land claims, it has always been a distant possibility for acquisition by the CSF.

[3651] As Capital Branch staff worked with Shared Services BC staff toward standardization of CSF leases in 2010 (as I discuss in detail in Chapter XXXV, Leases), they learned that the West Point Grey Academy lease was being renegotiated and was nearing finalization. The Ministry was not aware of that process previously; Ministry staff had never investigated the site. Mr. Stewart came to believe it would be too late to intervene in the lease renewal. However, he thought that perhaps a second school could be built on the site for the CSF.

[3652] Mr. Stewart brought the issue to Deputy Minister James Gorman's attention because it was a high-priority issue, and he thought it best addressed between Deputy Ministers for the respective ministries involved given the sensitivity of the issue. Mr. Stewart did not follow up from there. He did not contact the CSF to inform them of the situation. He did not independently pursue accommodating the CSF using modulars on the site or in some other way.

[3653] When the CSF learned of the lease renewal in the spring of 2013, it demanded the Province block the lease and provide the site to the CSF. Ministry staff eventually assured the CSF that the Ministry would ensure all land-holding Ministries were made aware of the CSF's needs. Mr. Stewart confirmed that prior to 2013, no one from the Ministry had made general inquiries from other land-holding ministries.

[3654] As a result, in the spring of 2013, at Mr. Stewart's direction, Mr. Palmer made inquiries of all land-holding ministries about potential surplus sites. Due to those inquiries, a potential site was identified at the University Endowment Lands (the "UEL Site"). Over the course of the trial, the CSF and the Ministry were in ongoing negotiations for the CSF to acquire that site and build a new school there.

[3655] The parties were cautious that evidence in the trial might undermine the opportunity for the CSF to acquire the UEL Site. Since the situation is sensitive, evidence in connection with the UEL Site was presented by way of an Agreed Statement of Facts. The parties agree as follows with respect to this site:

1. The [CSF] has expressed an interest in securing a portion of the [UEL Site] for the construction of a new elementary school.
2. The 9.9 acre UEL site is located at the northeast corner of Chancellor Boulevard and Acadia Road. This site is currently used, among other things, as the UEL administration centre and as a public works yard.
3. In August 2013, [Mr. Stewart] brought the UEL site to the attention of the [CSF] as a possible site for the construction of a K-6 [CSF] school. In August 2013, Mr. Stewart provided [Mr. Allison] with a number of documents describing the UEL site ...
4. Mr. Stewart also sent Mr. Allison a Survey Plan of the UEL site

5. There have been discussions between the [CSF] and the Ministry about the possibility of securing a portion of the UEL site for use by the [CSF]. The parties have discussed the use of a long-term lease agreement or a sponsored Crown grant to secure the site. The [CSF] has proposed, and sent to the Ministry, a site study that illustrates the potential school site organization and traffic flow in order to demonstrate a concept for a K-6 school on the UEL site. ...

6. The Musqueam Indian Band claims rights in relation to land in and around Vancouver, including the UEL site.

7. The Ministry of Technology, Innovations and Citizens' Services ("MTICS") has taken the lead in engaging the Musqueam Indian Band in discussions around the possibility of securing the UEL site for the [CSF]'s use.

8. MTICS has approached a representative of the Musqueam Indian Band about the potential use of the UEL site for a [CSF] school, who advised that further discussion with Band Council is required. As of January 22, 2015, no formal response has yet been received from the Musqueam Indian Band's Band Council. The [Ministry] cannot proceed with a sponsored Crown grant application or a long-term lease agreement until the position of the Musqueam is known.

9. In addition to discussions with the Musqueam Indian Band, the construction of a [CSF] elementary school on the UEL site will be subject to consultations with residents in the surrounding area, the preparation of a sponsored Crown grant or long-term lease agreement, as well as possible transportation, environmental, and regulatory issues.

[3656] The CSF cross-examined Mr. Stewart about the UEL Site and the process by which the Ministry learned of it. Mr. Stewart confirmed there were a number of issues with the site acquisition relating to rezoning, a need for subdivision, First Nations consultation and others, but the problems did not seem insurmountable.

[3657] In addition to those sites, both the CSF and the Ministry have approached the Musqueam Indian Band about a CSF school. The CSF first approached the Musqueam Indian Band to find temporary space for École Élémentaire Rose-des-Vents students in the spring of 2000, but that request was refused. In 2010 and 2012, the CSF wrote to the band again about jointly developing a First Nations school along with a minority language school on Musqueam land. The request was refused. In 2013, Mr. Stewart independently made direct inquiries of the Musqueam Indian Band. Mr. Stewart presented the idea at a meeting, and the Business Enterprise Coordinator for the Musqueam Capital Corporation indicated he would

bring the matter before the Musqueam Band Council. Mr. Stewart followed up on several occasions, but his advances were ignored, which he took as his answer.

[3658] Around the time of trial a few further sites appeared on the horizon: the potential redevelopment of the Langara Golf Course came to the CSF's attention, and the CSF provided that information to the Ministry. Mr. Stewart made no follow up. At some point, the parties also realized the Province owns some land that is leased to the City of Vancouver as a playfield, but it appears that no one, including the CSF, had actively pursued that property.

[3659] At the time of trial, the CSF was still in need of space in Vancouver (West). All are in agreement that Vancouver presents a number of challenges because there are few undeveloped parcels of land large enough for a school, and there is a great deal of competition from private developers.

7. Conclusions

[3660] The parties both attribute responsibility for the situation in Vancouver (West) to one another. The defendants submit that the current situation arises out of a combination of decisions taken by the plaintiffs, particularly those concerning the development of the Oakridge Site, and bad luck. The plaintiffs say the situation arises out of disadvantages that the CSF faces acquiring school sites, including a lack of advance funding from the Ministry, a failure by the Ministry to exert influence or motivate others to assist the CSF, a system that makes the CSF reliant on SD39-Vancouver's needs, and the Ministry choosing other priorities over its constitutional obligations.

a) Development of the Oakridge Site

[3661] The defendants say the CSF is responsible for the situation in Vancouver (West) because it chose to develop the Oakridge Site as a secondary school rather than a regional elementary/secondary school as the CSF had originally envisioned. The defendants acknowledge that the Trillium Oakridge Report suggested the site was not large enough to accommodate the CSF's enrolment projections. They say,

however, that enrolment at École Élémentaire Rose-des-Vents falls short of those projections.

[3662] The defendants also take the position that the situation in Vancouver (West) has only become urgent in recent years. They note the CSF did not begin requesting a new school in Vancouver (West) until about 2005/06. They suggest the CSF had always planned to use extra space at École Secondaire Jules-Verne to accommodate École Élémentaire Rose-des-Vents students. They also assert École Secondaire Jules-Verne did not begin to fill until quite recently, which is when the situation became urgent. They point to the cross-examination of Mr. Allison, where he admitted it would be helpful to know capacity at École Secondaire Jules-Verne for École Élémentaire Rose-des-Vents' planning purposes.

[3663] In response, the plaintiffs suggest the CSF's decision to build École Secondaire Jules-Verne at the Oakridge Site was justified. In their submission, the CSF would have been unlikely to ever find a site large enough for a secondary school in Vancouver other than the Oakridge Site. They also say the CSF made a prompt request for a new school in Vancouver (West) beginning in 2004.

[3664] Additionally, the plaintiffs urge that the Ministry "concedes that the space crisis at [École Élémentaire Rose-des-Vents] does not result from the [CSF's] capital planning decision". In that connection, they cite evidence from Mr. Miller that the plan from the time the three-school configuration was approved was that the CSF would secure space in Vancouver (West) to replace École Élémentaire Rose-des-Vents. They also point to a comment by Mr. Miller that when the three-school configuration was approved, he did not have concerns about the CSF temporarily housing students at École Secondaire Jules-Verne until the CSF secured a new site.

[3665] As I see it, after the CSF acquired the Oakridge Site, it changed its capital planning for Vancouver to an arrangement that foresaw the CSF acquiring a new elementary school on the west side of Vancouver, retaining École Élémentaire Anne-Hébert on the east side and constructing a secondary school in the centre of Vancouver. Dr. Ardanaz said this was always the CSF's long-term vision, but its

capital requests until that time had focused on a single, regional elementary/secondary school. It appears to me that the CSF officially changed its approach to a three-school configuration in 2000 after SD39-Vancouver gave it some assurance it could retain École Élémentaire Anne-Hébert for the long term.

[3666] When the CSF adopted the three-school configuration, it anticipated enrolment of 700 elementary and 325 secondary students from across all of Vancouver. Its decision to move to a three-school configuration was based, in part, on the Trillium Oakridge Report's conclusion that the Oakridge Site could not accommodate a school for all those students. The decision was also based on its long-term vision of a three-school configuration.

[3667] However, the CSF always intended to retain Oakridge Elementary after the construction of a secondary school. Initial thinking was that the CSF would lease Oakridge Elementary to the Vancouver Hebrew Academy. No thought appears to have been given to developing the Oakridge Site as an elementary/secondary school with more elementary capacity than was available at Oakridge Elementary while simultaneously retaining École Élémentaire Anne-Hébert.

[3668] Since that time, École Élémentaire Rose-des-Vents has grown crowded. Taking into account only the space at École Élémentaire Rose-des-Vents, the school has been operating at more than 100% of its capacity since 2005/06. It has consistently operated at more than 150% of its capacity since 2007/08. Taking into account surplus space at École Secondaire Jules-Verne, the situation became dire in 2010/11, when the two schools together filled 99% of their capacity. As of 2014/15, the two schools were operating at 117% of their capacity.

[3669] As a result of overcrowding, the CSF uses several modular structures, portables, a temporary gymnasium, and leases space in a church basement. It has converted space designed for other purposes to classroom space. École Élémentaire Rose-des-Vents has also used surplus space at École Secondaire Jules-Verne, which all parties had agreed would be appropriate.

[3670] The defendants put to Mr. Bonnefoy while he was under cross-examination that the three-school configuration was poor planning. Mr. Bonnefoy eventually conceded that CSF enrolment is typically weighted more heavily toward elementary than secondary students. However, he refused to say that in retrospect it would have been better for the CSF to build combined elementary/secondary space on the Oakridge Site. Later, he conceded that the crisis of space for École Élémentaire Rose-des-Vents students was caused in part by the decision not to develop the Oakridge Site as elementary/secondary space.

[3671] In hindsight, it would have been advisable for the CSF to have constructed an elementary/secondary school on the Oakridge Site, particularly since the CSF always intended to retain Oakridge Elementary and use it for elementary purposes. No thought appears to have been given to building an elementary/secondary school with capacity for only those elementary students that lived in Vancouver (West). If the CSF had done so, it might not be experiencing the crisis of space that it experiences today.

[3672] However, the CSF cannot be faulted for taking the decision it did. When the plan was approved, no one foresaw the difficulties that would arise trying to find a site for the CSF in Vancouver (West). All agreed the plan was reasonable based on the information before them.

[3673] I also do not consider that the CSF can be faulted for not requesting a capital project in the first two years after École Élémentaire Rose-des-Vents occupied the Oakridge Site, as it was clearly in everyone's mind that the CSF would need a new school in about 2009, after École Secondaire Jules-Verne was in full operation. Beginning planning five years in advance of that date was reasonable, particularly given that it took about three years for the CSF to acquire the Oakridge Site.

[3674] Moreover, any effect arising out of the CSF's decision has been mitigated by time. The idea of a replacement school for École Élémentaire Rose-des-Vents has been in everyone's mind since 2001. Fifteen years have passed since then. École

Secondaire Jules-Verne and École Élémentaire Rose-des-Vents together reached capacity in 2010, more than five years ago.

b) Funding for a Site

[3675] The plaintiffs argue that the defendants caused the rights breach in Vancouver (West) by failing to make funding available quickly or in advance for the CSF to secure sites. In their submission, without funding approvals from the Ministry, the CSF is in a position of weakness when negotiating for sites. The plaintiffs say that Dr. Ardanaz was unable to secure a site between 1997 and 1994 because of a lack of funding, with specific reference to the Chrysler Site. The plaintiffs also urge that between 2004 and 2011, the CSF's search for space was hampered by the Ministry's failure to announce funding before a site had been identified. They say that Mr. Allison, too, was unable to secure sites because of a lack of funding, pointing to the Paprican Site and the Ministry's unwillingness to fund renovations to the Fairmont Site. The plaintiffs also suggest the Southeast False Creek Elementary Project would have moved forward if the Province had funded the seismic remediation of the Cambie Street Bridge. They say a lack of funding was likewise an issue with respect to the Pearson/Dogwood Site.

[3676] The defendants counter that funding is not the problem. They say funding has been available for a new school in Vancouver (West) since 2011. They note that the Chrysler Site was a pre-Oakridge opportunity. With respect to the failure to provide \$15 million in funding to upgrade the Cambie Street Bridge, the defendants say the bridge upgrade would additionally have caused significant delay.

[3677] The Ministry declined to approve the CSF's acquisition of the Chrysler Site in part because of its cost. Further, there were other opportunities on the horizon, including the Oakridge Site. The Chrysler Site was on offer for \$15 million. The Oakridge Site acquisition cost \$10 million. At that point in time, capital funding was being made available annually. Because of that, in the early years, a lack of advance funding did not harm the CSF's ability to secure sites. Indeed, the CSF was able to negotiate the acquisition of the Oakridge Site without announced project

funding. The real issue concerning the Chrysler Site was a disagreement between the Ministry and the CSF about whether that site was the most appropriate and cost effective. Given that the CSF acquired Oakridge Elementary after it failed to acquire the Chrysler Site, the failure to fund the Chrysler Site did not materially contribute to the situation that exists today at the Oakridge Site.

[3678] Thereafter, between 2004 and about 2010, Mr. Bonnefoy explored a wide range of municipal, SD39-Vancouver and government sites. None was realistically available to the CSF. It appears that lack of a capital approval and funding from the Ministry between 2004 and 2010 had no impact on the CSF's ability to negotiate for sites. The real issue was that there were no suitable sites available for acquisition. If sites were available, a lack of funds might have had an impact; but without any sites, the lack of funding is irrelevant.

[3679] The CSF was unable to acquire the Paprican Site in 2011 primarily because the site was never realistically available to it. UBC was not interested in the CSF using that site. While there was no funding available for the West-Side Vancouver Elementary Project at that time, the lack of funding had no impact on the project's failure because the project could not be zoned for school use.

[3680] In the fall of 2011, the Ministry approved funding for the CSF to acquire a site in Vancouver (West). While that approval was notionally tied to the Southeast False Creek Site, as negotiations stalled, it was made clear to Mr. Allison that the CSF could apply those funds to purchase a different site. The evidence shows the project did not go ahead at Southeast False Creek largely because of the concern about the Cambie Street Bridge's seismic vulnerability. Remedial work on the bridge would have been complex, and likely would have involved delay. While the CSF would have had a site and school if the bridge work had been funded, given that the CSF is always pursuing other options, it was not unreasonable for the Ministry to decide not to fund that project. The problem was not a lack of funding but that the site was not suitable.

[3681] The CSF was unsuccessful acquiring a portion of the Fairmont Site on a temporary basis because of measures beyond its control: City of Vancouver zoning requirements and the high cost associated with renovating a building that the CSF would not be able to keep. In my view, given that it would have cost about \$3 million for that site to be renovated and the CSF would have only used the site for three years, the Ministry was justified in not funding that project. Again, the real problem is not a lack of funding but that the site was not suitable for the CSF.

[3682] With respect to the Pearson/Dogwood Site, the plaintiffs point to some documentary evidence appended to an affidavit that was not spoken to which suggests that some portions of the Pearson/Dogwood Site were transferred to private developers in 2015. However, the evidence from Mr. Stewart is that the property was reserved for a health authority. More likely than not, the sale to private developers formed part of a public private partnership arrangement allowing the health authority to develop the property. I do not consider that an absence of funding had any impact on the CSF's ability to acquire the site. Again, the problem was that the site was not available. It had been promised to someone else.

[3683] After taking into account all the evidence, a lack of funding has never been the real issue for the CSF in Vancouver (West). The issue is a lack of a site suitable for the construction of a homogeneous minority language school.

c) Dependence on SD39-Vancouver

[3684] The plaintiffs suggest the CSF's attempts to secure a site in Vancouver (West) are dependent on SD39-Vancouver's needs and priorities. They say there were legitimate opportunities for the CSF to share sites with SD39-Vancouver, but SD39-Vancouver refused to dispose of surplus assets to anyone, including the CSF. They also say the Ministry typically has not exercised any influence on SD39-Vancouver to assist the CSF. They also point to the CSF's unsuccessful attempts to acquire sites set aside for SD39-Vancouver by municipalities, saying the CSF was hampered by SD39-Vancouver's lack of contemporaneous need for new schools.

[3685] The defendants counter that SD39-Vancouver has tried to assist the CSF, but the CSF has not been willing to avail themselves of those opportunities. They point out that SD39-Vancouver offered the CSF a number of schools that fell only slightly east of the Central Vancouver Catchment Area, and the CSF refused them all.

[3686] The Ministry and the CSF have always had in mind that the CSF might be able to acquire a site from SD39-Vancouver. However, this has proven difficult. SD39-Vancouver has always been reluctant to dispose of its properties. It is common ground that it has a long-standing policy of never disposing of school sites. Further, enrolment patterns in Vancouver are such that SD39-Vancouver schools on the west side of Vancouver are closer to capacity than those on the east side.

[3687] The early history of École Élémentaire Rose-des-Vents presents some examples of the Ministry intervening to assist the CSF to find space in SD39-Vancouver schools. Deputy Minister Ungerleider persuaded SD39-Vancouver to lease Queen Elizabeth Annex to the CSF on a temporary basis while it was searching for space for a regional elementary/secondary school. The Ministry played a central role identifying the Oakridge Site for the CSF and negotiating the purchase and sale.

[3688] In the period between 2004 and 2010, the CSF was largely left to search for space in Vancouver (West) without assistance from the Ministry. This is not surprising. There was limited capital funding available at the time; it is no wonder that the Ministry did not actively assist the CSF to find a site to purchase when it was not sure it would have the funds to support it. In any event, as previously mentioned, there were no sites realistically available to the CSF in that period.

[3689] In 2008, SD39-Vancouver considered closing Queen Elizabeth Annex, but ultimately decided not to do so. The Ministry did not attempt to persuade SD39-Vancouver to close the school and make it available to the CSF despite the CSF's stated interest in the project. However, the Ministry did use project approvals to persuade SD39-Vancouver to transfer École Élémentaire Anne-Hébert to the CSF at

that time, as discussed in Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)). Notably, enrolment between École Élémentaire Rose-des-Vents and École Secondaire Jules-Verne had not reached capacity at that point, making it reasonable for the Ministry to focus on the transfer of École Élémentaire Anne-Hébert, which the CSF had occupied and been interested in acquiring for many years.

[3690] In 2010, the Comptroller General encouraged SD39-Vancouver to close schools. SD39-Vancouver explored the idea of closing schools that might have been suitable for the CSF. SD39-Vancouver elected not to close any schools, then impeded the CSF's opportunity to acquire a site by putting a moratorium on school closures. The Ministry maintained a hands-off approach during that process, prioritizing school board autonomy over the needs of the CSF.

[3691] Other SD39-Vancouver sites have been discussed, particularly in 2011 as temporary solutions. At a number of points, SD39-Vancouver offered the CSF surplus space in Vancouver (East). Some of those sites are close to Main Street, the eastern boundary of the catchment area for the Central Vancouver Elementary Project. The CSF was unwilling to consider redrawing its catchment areas to relieve pressure at École Élémentaire Rose-des-Vents. The CSF also refused heterogeneous accommodation at other SD39-Vancouver schools in Vancouver (West) because it prioritized homogeneity above relieving space pressure at École Élémentaire Rose-des-Vents: for example, at NRC Secondary.

[3692] At the same time, SD39-Vancouver refused a proposal that would have seen the Old Sexsmith School used by the CSF temporarily. Notably, since about 1998 some have been of the mind that the site is not large enough to support two schools. The Ministry would have supported the idea if SD39-Vancouver had agreed, but it was not willing to force SD39-Vancouver to accept the proposal out of respect for school board autonomy and the problems that would arise from unhappy neighbours sharing the same site.

[3693] The CSF acted swiftly to invoke the *Education Mediation Regulation* to resolve the Sexsmith Elementary Site dispute. When the CSF resorted to the

Education Mediation Regulation, the parties had only just begun discussing the idea of the CSF using the space, and the CSF waited only six days following its formal request. It had not received a response from SD39-Vancouver. Mr. Allison suggested he moved quickly because he thought the mediation could take some time. However, by resorting to mediation without engaging in dialogue or negotiation, Mr. Allison ensured the mediation's failure and harmed the CSF's relationship with SD39-Vancouver.

[3694] In my view, the situation with the Sexsmith Elementary Site had a direct impact on the opportunity for the CSF at the Wesbrook Site. There was a possibility in 2012 or 2013 that the CSF would be able to construct and use a school at the Wesbrook Site pending need for the site by SD39-Vancouver. When Mr. Allison prematurely invoked the *Education Mediation Regulation*, it poisoned the negotiations concerning that opportunity. Moreover, UBC senior staff were not interested in the proposal.

[3695] Overall, the evidence shows that in the CSF's early years, the Ministry was willing to assist the CSF to negotiate with SD39-Vancouver. As the years went on, and particularly between about 2004 and 2010, when enrolment pressures at École Élémentaire Rose-des-Vents were not as severe as they are today, the CSF's needs were not always front of mind. In 2008, the Ministry tied the transfer of École Élémentaire Anne-Hébert to the CSF to a funding approval for SD39-Vancouver.

[3696] Meanwhile, the relationship between the CSF and SD39-Vancouver has not been an easy one. Both districts are rightfully pursuing their own self-interest. The CSF, pursuing its own interest in homogeneity and its desired catchment areas, has refused what space SD39-Vancouver has made available. SD39-Vancouver, in its own self-interest, has been focused on keeping schools open and retaining sites in case its own enrolment increases-- not an unreasonable choice given how challenging it is to find appropriate school sites in Vancouver.

[3697] Especially since 2010, the Ministry has taken a more passive approach than it did in the CSF's early years, and tried to maintain neutrality between the CSF and

SD39-Vancouver. The Ministry's view has been that the districts must reach agreement between themselves, and then the Ministry will support that agreement. That position has left the CSF at a disadvantage as the party with all the need, and very few bargaining chips.

[3698] Notably, the Ministry's new position coincides with the start of this litigation. It is not surprising that the Ministry changed its tune around this time. However, the new practice also coincides with the start of severe overcrowding at École Secondaire Jules-Verne and École Élémentaire Rose-des-Vents. Francophone children are the unfortunate victims of how this litigation has caused the parties to behave.

[3699] The evidence also shows that the CSF is also sometimes subject to municipal planning priorities. The Southeast False Creek Elementary Project has not gone forward because the City of Vancouver planned to accommodate majority students in the area. The site that was set aside is not large enough to accommodate two schools, and the CSF is not willing to share amenities. The only other site on the property poses seismic risks. Funding has been available for that project since 2011, and the Ministry has worked collaboratively with all involved to help secure the site for the CSF, to no avail.

[3700] Similarly, the CSF was unable to secure the Wesbrook Site because it was set aside for an SD39-Vancouver school, and because the site was too small to accommodate two homogeneous schools. By 2012 or 2013, the Ministry was willing to be flexible to approve a project for SD39-Vancouver despite its lack of need to accommodate the CSF.

[3701] Given that the Ministry is willing to be flexible, the confluence of municipal planning and SD39-Vancouver's enrolment needs does not harm the CSF's position. The bigger issue is that municipalities set aside space for SD39-Vancouver schools and not CSF schools. Undoubtedly, the majority will need schools in those neighbourhoods, too. The sites are set aside because of the limited number of suitable sites. Thus, SD39-Vancouver suffers from the same problems that the CSF

does. It is fortunate to have the support of municipalities. In light of that, support from the Ministry advocating for the CSF's needs is all the more important.

[3702] The plaintiffs also take the position that the Province is not prepared to use its powers under the *School Act* to assist the CSF. In Chapter X, Remedies, I conclude that the Ministry does not have powers to compel school boards to deal with their properties in the ways that the plaintiffs suggest.

d) Ministry's Other Priorities

[3703] Finally, the plaintiffs say that the defendants have prioritized other interests above the CSF's needs. In that connection, they point to the redevelopment of the Pearson/Dogwood Site and the renewal of the lease of West Point Grey Academy.

[3704] In response, the defendants take the position that the Pearson/Dogwood Site is only of recent interest to the CSF. The defendants argue that the lease of West Point Grey Academy was being negotiated when École Élémentaire Rose-des-Vents and École Secondaire Jules-Verne were operating below capacity, and the CSF's needs were not urgent. The defendants also suggest the Ministry has not been passive with respect to École Élémentaire Rose-des-Vents, with particular reference to the Ministry's advocacy on the CSF's behalf in relation to the Federal properties.

[3705] The CSF brought the Pearson/Dogwood Site to the Ministry's attention in 1999, prior to the acquisition of the Oakridge Site. However, the site was considered to be too small for an elementary/secondary school. It was raised again in the CSF's 2009 PIR concerning Vancouver (West). The CSF specifically raised its desire to acquire a portion of the Pearson/Dogwood Site with the Ministry in 2013, when École Secondaire Jules-Verne and École Élémentaire Rose-des-Vents were together operating at about 110% capacity.

[3706] The CSF was unable to acquire a portion of the Pearson/Dogwood Site for a school because the Province chose to prioritize other uses for the site. The site was not owned and controlled by the Ministry, and Ministry staff had no power to direct

how the site was dealt with. While both Ministry staff and the CSF brought the CSF's need for part of the site to the attention of senior government officials, the Province declined to provide the site to the CSF because it was slated for use by a health authority.

[3707] With reference to the Provincial Jericho Lands, the CSF has largely been unable to acquire a permanent site there because the lands are subject to unresolved land claims and have not been made available. But, the CSF was unable to acquire use of that site temporarily because of a lack of political will. As a result of a lack of information sharing between ministries, the Ministry did not know that West Point Grey Academy held provincial land by way of a long-term lease until shortly before the school's lease was renewed. Politicians were not willing to displace the independent school because doing so would have political consequences. There was no credible reason given why the CSF has not been allowed to place a temporary, modular structure on that site.

[3708] At the time the trial concluded in the summer of 2015, the UEL Site appeared to be on the table and the parties were negotiating for the CSF to acquire it. However, it is troubling that the Ministry failed to assist the CSF by canvassing other land-holding ministries prior to 2013. Indeed, it appears to have only done so after the CSF chastised Ministry staff for its dealings with West Point Grey Academy.

[3709] The CSF has also been unsuccessful acquiring a permanent site at the Federal Fairmont Site or and the Federal Jericho Lands. That is because the sites are not available. The redevelopment process has faced long delays, and is being controlled by the Federal Government. Between 2010 and 2014, the Ministry consistently kept the Federal Government informed of the CSF's interest in the properties. Between the end of 2014 and the end of trial, the Ministry staff did not follow up, but Mr. Palmer was assured that the Federal Government would take the CSF's needs into account and notify him of future developments.

[3710] In my view, with reference to both the Pearson/Dogwood Site and the West Point Grey Academy, the CSF's needs have fallen victim to the Province's

bureaucracy. The Ministry of Education is tasked with ensuring the CSF's space needs are met. The Province as a whole, though, is responsible for meeting Government's obligations under the *Charter*. Unfortunately, when land was dealt with by other provincial ministries, they were not always aware of the CSF's needs and prioritized their own interests. Due to the lack of inter-Ministry coordination, two opportunities that could have relieved the serious overcrowding at École Élémentaire Rose-des-Vents went unexplored: the West Point Grey Academy Site and the Pearson/Dogwood Site.

[3711] This is not to say that the Ministry has not tried to assist the CSF. The Ministry advocated for the CSF with the Federal Government. The Ministry also advocated strongly for the CSF to acquire the UEL Property. To date, that assistance has not resulted in any new sites for the CSF.

e) Conclusion

[3712] The defendants suggest that considerable actions have been taken by the CSF and the Province, together, to try to remedy the situation at École Élémentaire Rose-des-Vents. They suggest that all involved have worked diligently to identify a site, but opportunities that at first seemed valid fell through. They say the current situation is a result of "bad luck". The plaintiffs attribute full responsibility to the Province.

[3713] I find that the current situation in Vancouver is the result of the unique interplay of Vancouver's land constraints and actors pursuing their own self-interests.

[3714] The biggest issue in Vancouver is a serious lack of available, suitable sites. What sites do become available are being sought by actors pursuing their own self-interest, competing for the small amount of land that exists. The CSF has pursued its interest in homogeneity. SD39-Vancouver has pursued its interest in retaining properties due to potential need and the likely lack of suitable space. Municipalities have pursued the interests of majority citizens. Land-holding ministries have

favoured the interests of a health authority and, problematically, an independent school. With hindsight, it certainly would have been ideal for the Oakridge Site to be developed as an elementary/secondary school, but that does not serve rightsholders' needs today.

[3715] Given those circumstances, the CSF needs an advocate. While the Ministry was willing to serve as that advocate in the CSF's early days, it has since adopted a practice of maintaining neutrality when it is engaged in negotiations between the CSF and SD39-Vancouver, at least.

[3716] Given the lack of suitable school spaces in the Lower Mainland, I find that the Ministry's policies materially contributed to the current situation at École Élémentaire Rose-des-Vents. Ministry policies require school boards to take primary responsibility identifying sites for acquisition. While that policy is generally appropriate with regard to the CSF, since this litigation, the policy has been coupled with a practice of maintaining neutrality in inter-district negotiations. Due to that practice, the overarching policy has resulted in rightsholders in Vancouver (West) not receiving the types of minority language facilities they are entitled to, contrary to s. 23.

F. Justification

[3717] Rightsholders living in Vancouver (West) are not receiving the minority language education facilities to which they are entitled. That breach is caused by the Ministry's policies that require school boards to identify sites without assistance. The remaining question is whether the breach is justified.

[3718] The Petitioners fault the defendants for raising justification late in the day, and raising it at all.

[3719] In response, the defendants point out that Mr. Justice Willcock phased justification out of the initial Petition proceedings. The defendants' initial position examined many issues relevant to the education system as a whole, which later were held to be irrelevant by the Supreme Court of Canada in *Association des*

Parents- SCC. Thus, they say it was necessary for the Province to raise s. 1 to have the opportunity to present the systemic evidence they believe to be crucial to the determination of the claim. Defending the case, they say, is not unconstitutional delay.

[3720] In my view, the defendants should not be faulted for raising justification at this phase of the Petition proceedings. The petitioners took a risk that the defendants might raise s. 1. The *Charter* gives the defendants the right to justify a breach of s. 23. The mere fact that many governments have chosen not to attempt to justify breaches of s. 23 does not deprive the defendants of their right to do so now.

[3721] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". As I see it, the particular infringing measure that relies on school districts to identify sites is likewise focused on the fair and rational allocation of public funds.

[3722] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective.

[3723] I am satisfied that there is a rational connection between the fair and rational allocation of public funds and a system that relies on school boards to identify school sites. School boards have access to local knowledge that places them in the best position to identify appropriate, cost-effective sites and negotiate to acquire them.

[3724] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests

and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[3725] The extent to which the measure minimally impairs the respondents' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. In this case, the infringing measure that relied on the CSF to identify sites was minimally impairing. Although the Ministry primarily relied on the CSF to search for sites, it offered the CSF some assistance. The Ministry helped the CSF to negotiate with the Federal Government, and eventually identified the UEL Site. Additionally, students attending École Élémentaire Rose-des-Vents had access to surplus space in a newly-constructed secondary school, École Secondaire Jules-Verne, to relieve overcrowding. The Ministry also funded modular structures to accommodate students at École Élémentaire Rose-des-Vents and a lease of space in a nearby church basement to relieve overcrowding.

[3726] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[3727] With reference to the situation in Vancouver (West), the salutary effects of relying on the CSF to identify sites are minimal. The CSF was not able to identify any suitable, readily available sites in Vancouver (West).

[3728] Systemically, though, the salutary effects are that the Ministry is able to ensure that the sites that it does acquire are ones that are of interest to and wanted by school boards. The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that

majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[3729] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[3730] It is also relevant to note that students attending École Élémentaire Rose-des-Vents are in a similar position to students in other growing school districts. Other growing districts, like SD36-Surrey, house students in portables. Students attending École Élémentaire Rose-des-Vents are in a similar position to students in that area.

[3731] The deleterious effects, at the local level, are severe. By relying on the CSF to act at first instance to identify sites, the Ministry missed Government sites that could have been made available to the CSF earlier: particularly the Pearson/Dogwood Site and the West Point Grey Academy Site. The deleterious effects also include that since 2010/11, students attending École Élémentaire Rose-des-Vents have been educated in facilities that are severely overcrowded and inferior to majority schools.

[3732] The deleterious effects at the systemic level must also take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial

Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[3733] As Mr. Justice Willcock concluded in *Association des Parents- BCSC*, the facilities-- particularly the long transportation times-- likely deter some students from attending École Élémentaire Rose-des-Vents. However, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. This is particularly so with respect to École Élémentaire Rose-des-Vents, as the minority community has newly-built secondary facilities with ample community space on the same site.

[3734] Weighing those effects together, I find that the deleterious effects outweigh the salutary effects. A system that relies on the CSF to identify sites on its own has not led to the identification of any appropriate, available sites for the CSF in Vancouver (West). It has additionally resulted in the CSF missing out on two opportunities for the CSF to acquire or build on government property, even as a means of temporarily resolving overcrowding. While the system as a whole has resulted in generally fair outcomes for the CSF, that does not outweigh the poor global educational experience afforded to rightsholders' children in Vancouver (West). I therefore conclude that the Province has failed to show proportionate effects.

G. Remedy

[3735] In the plaintiffs' submission, given the fact that the CSF has been unable to identify a suitable site, the Minister ought to be ordered to exercise his powers under s. 74(1) of the *School Act*, as amended, to force SD39-Vancouver to transfer a

school to the CSF. As I explain in Chapter X, Remedies, I do not consider that the Minister has such a power.

[3736] The plaintiffs also seek a declaration that two new homogeneous schools are warranted. The defendants agree that a declaration is an appropriate remedy, but dispute that two schools are warranted. The disagreement raises the question whether the Ministry and the CSF have previously recognized the need for two schools.

[3737] In about 2008 and 2009, the CSF began considering building two schools on the west side of Vancouver rather than one school. The CSF did not change its planning because its enrolment projections had changed. Rather, it had proven so challenging to locate a site that the CSF, under Mr. Bonnefoy's leadership, was prepared to compromise by building smaller schools on smaller sites, or co-locating schools on SD39-Vancouver sites. The CSF explored ideas for co-locating two schools on SD39-Vancouver sites, even when it did not have agreement from SD39-Vancouver.

[3738] When Mr. Allison became Secretary-Treasurer in 2010, the CSF formalized its plans to move to a two-school configuration. However, it also significantly expanded its requested capacity and backtracked from its desire to compromise. The CSF essentially began looking for space for two large elementary schools in Vancouver (West). Mr. Allison also began insisting on full homogeneity again, and was reluctant to share amenities with SD39-Vancouver schools.

[3739] In 2011, the Province announced support for one of the CSF's two project requests for Vancouver (West). The project approval states that it is specific to Southeast False Creek. While the plaintiffs argue that the CSF had not prepared a PIR for that project, I find that the CSF had updated its 2009 PIR for Vancouver (West) in 2011. While the Southeast False Creek Site is not mentioned in that PIR, the CSF informed the Ministry of the site and the Ministry was willing to exercise some leniency given the CSF's due diligence.

[3740] Since that approval, the CSF has continued to request a second site and school for its West-Side Vancouver Elementary Project. Mr. Allison recalled Mr. Miller telling him that the West-Side Vancouver Elementary Project might be approved in the spring of 2011 if more funding became available, but that was not put to Mr. Miller while he was under cross-examination. Mr. Miller did indicate in a letter to the Federal Government that the CSF would eventually require two schools in Vancouver.

[3741] Taking into account all the evidence, including evidence subject to the Confidentiality Order, I conclude that the Ministry recognizes that the CSF needs sites for two new elementary schools in Vancouver. However, the Province does not see the need for a second CSF elementary school in Vancouver (West) to be an immediate, pressing need.

[3742] Even so, while I am satisfied that two schools might ultimately be necessary, they will not both be necessary at the same time. Further, the CSF has other pressing needs across the Province and it is simply not practical for the Ministry to fund all the CSF's priority projects at once.

[3743] As I outline Chapter X, Remedies, the most appropriate and just remedy for the plaintiffs' Community Claims will typically be a declaration of the positive rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches. With respect to Vancouver (West), the Ministry could remedy the situation in a number of ways. It could meet the CSF's needs temporarily by building a modular structure on the Jericho Lands, then wait to secure a site from that parcel when it is redeveloped. It could terminate the lease with the West Point Grey Academy and provide that school to the CSF. It could provide space for 500 elementary students on a single site. Or, it could assist the CSF to secure several smaller SD39-Vancouver sites and occupy those schools, with renovations or reconstructions as necessary.

[3744] In the circumstances, I find that an appropriate remedy is to issue a declaration. I declare that:

- a) Rightsholders under section 23 of the *Charter* living in Vancouver (West) are entitled to have their elementary-age children (age 5-12) receive minority language education in homogeneous facilities with space for 500 elementary-age children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools.
- b) The school facility presently housing École Élémentaire Rose-des-Vents does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools.

[3745] However, given that several *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[3746] Moreover, given that the requirement that the CSF identify sites on its own only became truly problematic due to the Ministry's policy of neutrality and failure to assist the CSF by canvassing other Ministries, a further remedy is warranted to ensure that the CSF has the assistance it needs to identify sites in appropriate circumstances. As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[3747] The plaintiffs also argue that *Charter* damages ought to be granted concerning the breach in Vancouver (West). I describe my approach to *Charter* damages in Chapter X, Remedies. There, I explain that in many instances where the government is acting in good faith pursuant to an unconstitutional law or policy, countervailing factors concerning the "public good" will tend to negate the plaintiffs'

claims for *Charter* damages. This ensures that government actors will continue to enforce laws without fear of retribution if they are later found to be invalid.

[3748] In this instance, I am satisfied that the Minister was always acting in good faith in connection when implementing its capital funding system in connection with the CSF's needs in Vancouver (West). There are many competing needs for capital projects in the Province. Awarding damages in this instance could have a chilling effect by leading Government to allocate a disproportionate amount of funding to the CSF out of fear of retribution.

H. Summary

[3749] I conclude that the best estimate of the number of children in Kindergarten to Grade 6 likely to take advantage of CSF elementary-school programmes across Vancouver (West) is about 500 students. Those numbers fall at the high end of the sliding scale, warranting facilities that are equivalent to those afforded to the majority in the same area. As was found in *Association des Parents- SCC*, the global educational experience afforded to rightsholders' children in the area is not equivalent to the global educational experience afforded to the majority, contrary to s. 23.

[3750] Responsibility for the rights breach is difficult to assign. The biggest issue in Vancouver is a serious lack of available, suitable sites. What sites do become available are being sought by actors acting in their own self-interest, competing for the small amount of land that exists. Thus, in the particular context of Vancouver, the Ministry's policy of relying primarily on the CSF to identify sites caused the rights breach, particularly after 2010 when the Ministry's practice was to maintain neutrality between the CSF and SD39-Vancouver. In my view, the salutary effects of the Ministry's policy of relying on the CSF to identify sites are not proportionate to the deleterious effects. Thus, in my view, the defendants have not justified a breach.

[3751] I find that declarations are the most appropriate remedy. As I develop in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF, to ensure that the declaration has an impact, the Province will be required to establish a separate

rolling Capital Envelope to respond to the CSF's needs. Additionally, in light of the Ministry's recent stance of neutrality, as I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

XXV. ÉCOLE ÉLÉMENTAIRE ANNE-HÉBERT (VANCOUVER (EAST))

[3752] Vancouver is located in the Lower Mainland region of British Columbia. In Vancouver (East), the CSF operates École Élémentaire Anne-Hébert, a homogeneous, French-language elementary school serving children in Kindergarten to Grade 6. École Élémentaire Anne-Hébert was British Columbia's first homogeneous minority language school. It has operated out of the former Cook Annex since about 1981. The Province acquired École Élémentaire Anne-Hébert for the CSF from SD39-Vancouver in 2009. In 2014/15, 392 students were enrolled at École Élémentaire Anne-Hébert.

[3753] The CSF proposes to divide the École Élémentaire Anne-Hébert catchment area along an east-west axis to create two new catchment areas. The CSF will build a new school in the northeast quadrant of Vancouver to serve children living north of 29th Avenue, east of Main Street in Vancouver to about Canada Way in Burnaby (the "Northeast Vancouver Elementary Project"). In 2014, the CSF estimated that school would cost more than \$11 million, excluding the cost of acquiring a site and preparing it for construction.

[3754] The CSF also proposes to demolish and reconstruct École Élémentaire Anne-Hébert where it will serve children living in the southeast quadrant of Vancouver, south of 29th Avenue, and east of Main Street to about Canada Way in Burnaby (the "École Élémentaire Anne-Hébert Replacement Project"). In 2014, the CSF estimated that project would cost nearly \$14 million.

A. Evidence

[3755] École Élémentaire Anne-Hébert was described by Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison. Mr. Miller, Mr. Palmer and Mr. Stewart also provided evidence about their dealings with the CSF and SD39-Vancouver concerning École Élémentaire Anne-Hébert.

[3756] Additionally, the Court heard evidence from several educators who worked at École Élémentaire Anne-Hébert. Mr. Gosselin, the current principal of École Élémentaire des Navigateurs (Richmond), taught at École Élémentaire Anne-Hébert between 2000/01 and 2006/07, and served as a vice principal and taught Grade 3 between 2008/09 and 2010/11. He gave evidence about the state of the facility in those years.

[3757] Ms. Asselin is the current principal at École Élémentaire Anne-Hébert. Ms. Asselin taught at École Victor-Brodeur (Victoria) for 27 years. She moved to Vancouver and became principal of École Élémentaire Anne-Hébert in about 2013/14.

[3758] The Joint Fact Finder's Report also describes École Élémentaire Anne-Hébert and comparator schools. The Fact-Finding Team relied on Ministry and District Data. A member of the Fact-Finding Team visited 16 of 42 comparator schools in SD39-Vancouver, 5 of 15 SD41-Burnaby comparator schools and all 3 comparator schools in SD40-New Westminster. I find this source of evidence to be highly reliable.

B. History and Context

1. The École Élémentaire Anne-Hébert Catchment Area

[3759] As I describe in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), Dr. Kenny described the Lower Mainland as the central hub of BC's Francophone community. Although Vancouver was predominantly settled by Anglophones beginning in about 1886, early Vancouver included many Francophones.

[3760] Francophone education in Vancouver was quite limited in its early years. French was available as a course of instruction in two majority schools, and as a language of instruction in two religious schools.

[3761] SD39-Vancouver launched a Programme Cadre beginning in about 1980 with 23 students in Kindergarten through Grade 7 divided into two divisions. The programme began at Annie B. Jamieson Elementary, and grew to 85 students in two years. It was moved to the former Cook Annex and renamed École Élémentaire Anne-Hébert, becoming British Columbia's first stand-alone minority language public school. SD39-Vancouver began offering heterogeneous secondary instruction at Kitsilano Secondary in 1985.

[3762] Today, the CSF owns and operates École Élémentaire Anne-Hébert, a homogeneous minority language elementary (K-6) school. École Élémentaire Anne-Hébert has a French-language preschool and Strong Start, both housed in portable classrooms. On graduation from École Élémentaire Anne-Hébert, secondary students may attend École Secondaire Jules-Verne, a homogeneous secondary school located in south-central Vancouver, in the east side of the Current École Élémentaire Rose-des-Vents Catchment Area, on the Oakridge Site.

[3763] École Anne-Hébert is located in a residential community in the Killarney area of Vancouver, near the intersection of Killarney Street and 54th Avenue. The school is on the south side of a large catchment area, stretching from Main Street in Vancouver, due east through part of Burnaby to Willingdon Avenue, and spreading from the Fraser River to the south to the Burrard Inlet to the north (the "Current École Élémentaire Anne-Hébert Catchment Area"). Its territory therefore currently includes the eastern portion of the territory of SD39-Vancouver and the western portions of SD40-New Westminster and SD41-Burnaby.

[3764] In the Current École Élémentaire Anne-Hébert Catchment Area, SD39-Vancouver operates 56 elementary schools, SD40-New Westminster operates 3 elementary schools and SD41-Burnaby operates 26 elementary schools. French

immersion is offered at six SD39-Vancouver elementary schools, one SD40-New Westminster elementary school and six SD41-Burnaby elementary schools.

2. Conclusions

[3765] When analyzing the Vancouver (East) Community Claim, I will take into account the school's urban setting, and the large number of schools in the catchment area, including many French immersion schools. Thus, École Élémentaire Anne-Hébert competes with many SD39-Vancouver, SD40-New Westminster and SD41-Burnaby neighbourhood and French immersion schools that are closer to the homes of CSF students than is École Élémentaire Anne-Hébert. I will also take into account the long history of homogeneous Francophone education at École Élémentaire Anne-Hébert in its current location: the longest history in the Province.

[3766] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[3767] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[3768] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue)

Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[3769] The evidence concerning the universe of eligible students is broken down by catchment area for the CSF's proposed new schools.

[3770] With connection to the Northeast Vancouver Elementary Project, Dr. Landry estimated that in 2011 there were 308 elementary-age children (age 5-12) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 321 such children living in the catchment area, which is stable.

[3771] With reference to the École Élémentaire Anne-Hébert Replacement Project, which would serve students in the southeast quadrant of Vancouver, Dr. Landry counted 240 elementary-age children (age 5-12) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area. Mr. McRae forecasted that number would grow to 251 students by 2023, which again suggests stability.

[3772] I note that Dr. Landry also counted 1,040 elementary-age children of non-Francophones in the Knowledge Category living in the catchment area for the Northeast Vancouver Elementary Project, and 320 in the Regular Home Use Category. In the École Élémentaire Anne-Hébert Replacement Project catchment area, he counted 1,190 children of non-Francophones in the Knowledge Category and 355 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children Education or Sibling Rightsholders in the Vancouver (East) area.

[3773] I find that a reasonable proxy for the universe of rightsholders' children in the Current École Élémentaire Anne-Hébert catchment area is about 570 elementary-age (age 5-12) children: 320 in the catchment area for the Northeast Vancouver Elementary Project and 250 in the catchment area for the École Élémentaire Anne-Hébert Replacement Project. I consider it to be a proxy because

it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[3774] École Élémentaire Anne-Hébert serves students in Kindergarten through Grade 6. The evidence shows that enrolment at École Élémentaire Anne-Hébert has grown from 329 in the 1996/97 school year, to 392 in the 2014/15 school year.

[3775] École Élémentaire Anne-Hébert saw a net decrease in enrolment from 1996 through the 2007/08 school year, from 329 to 275 students: a decrease of about 16%. The school surpassed its 1996/97 capacity for the first time in 2013/14, when its enrolment surged from 324 to 376 students in one year. Enrolment surged again for the 2014/15 school year. Between 2012/13 and 2014/15, enrolment grew by 21%. Only one child was admitted to École Élémentaire Anne-Hébert pursuant to the Descendant Clause or the Francophile Clause of the CSF's Expanded Admissions Policy when it was in force.

[3776] The plaintiffs also provided evidence dividing current enrolment between its two new catchment areas. That evidence suggests that 185 École Élémentaire Anne-Hébert students live in the catchment area for the Northeast Vancouver Elementary Project, and 182 live in the catchment area for the École Élémentaire Anne-Hébert Replacement Project.

[3777] Unfortunately, there appear to be some problems with the catchment area enrolment evidence for the Lower Mainland. The total number of children living in the two new catchment areas (367 students total) is 25 students fewer than the total enrolment at École Élémentaire Anne-Hébert (392 students). Similarly, there appear to be about 12 students missing from the Port Coquitlam and Burnaby catchment areas, and a further 15 students missing from the students that live in the proposed new catchment areas for Vancouver (West). Overall, the enrolment data divided by

catchment area falls 52 students short of the CSF's actual 2014/15 enrolment in its Lower Mainland schools.

[3778] It is impossible to know in what catchment area the omitted students reside because all the proposed new catchment areas border one another. Some of the missing École Élémentaire Anne-Hébert students could reside in the Proposed Burnaby Catchment Area or the catchment area for the Central Vancouver Elementary Project, both of which border the proposed Vancouver (East) catchment areas. As a result, I deal with the discrepancy by equally apportioning the 52 students between catchment areas by adding nine students to the known demand for each proposed programme. This overstates enrolment across the six catchment areas by two students total, but appears to be the most fair way of dealing with the problem.

[3779] As a result, I conclude that the known demand for elementary (K-6) education in the catchment area for the Northeast Vancouver Elementary Project is 194 students; known demand in the Southeast Vancouver Catchment Area is 191 students.

3. The Uptake Rate

[3780] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[3781] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language

to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[3782] The plaintiffs say that the CSF wants to build two schools to serve children in Kindergarten to Grade 6: the Northeast Vancouver Elementary Project with nominal capacity for at least 360 students or operating capacity for 336 students (15 elementary divisions); and the Southeast Vancouver Elementary Project with nominal capacity for 260 students or operating capacity for 243 students (11 elementary divisions). It seeks total operating capacity across the two catchment areas for 579 students. This, they say, would give the CSF space for its projected enrolment and flexibility to redraw catchment areas to accommodate shifts in enrolment growth.

[3783] The defendants suggest those requests are unreasonable, focusing on participation rate. They suggest that in order to fill the proposed schools, the CSF would have to achieve an 81% participation rate by 2023 in the Proposed Northeast Vancouver Catchment Area and 143% in the Proposed Southeast Vancouver Catchment Area. They note that in the Proposed Northeast Vancouver Catchment Area, to fill the facility the CSF would need to achieve more than double the participation rate it has achieved at École Élémentaire Anne-Hébert.

[3784] As I see it, to fill the two schools the CSF seeks, the CSF would require 98% of the 570-student proxy universe to attend its two proposed schools. In an urban area like Vancouver where the CSF competes with neighbourhood majority schools, including French immersion schools, the CSF cannot expect to achieve that level of participation. As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their projection of more than 572 students is not realistic.

[3785] I address the potential enrolment for the École Élémentaire Anne-Hébert Replacement Project and the Northeast Vancouver Elementary Project separately.

[3786] École Élémentaire Anne-Hébert is located in the southeast quadrant of Vancouver, where about 191 current École Élémentaire Anne-Hébert students live. Based on the proxy universe of 250 eligible children, École Élémentaire Anne-Hébert's proxy participation rate in that area about 76%, which is relatively high. Many parents from that area have access to neighbourhood schools and French immersion programmes closer to their homes. As I outline below, École Élémentaire Anne-Hébert is very crowded, and that fact might deter some parents from enrolling their children at that school. However, for most parents in this catchment area, the transportation times are not unmanageable. The École Élémentaire Anne-Hébert replacement project would not improve travel times for students or provide a closer option for parents. Thus, in my view, enrolment at École Élémentaire Anne-Hébert is likely reaching the top end of its potential. There is limited room for the participation rate to grow.

[3787] There are no examples of the CSF replacing an owned, homogeneous elementary school on the same site in an urban setting. In North Vancouver and Surrey, the CSF replaced schools and added a secondary component, which influenced their ability to attract and retain elementary students.

[3788] The closest parallel is Victoria, where an elementary/secondary school was replaced on the same site without adding new grade levels. École Victor-Brodeur re-opened in January 2007, with 272 students in Kindergarten to Grade 7. In 2014/15, it had 531 children enrolled in those grades. Its elementary enrolment grew by 259 children, or 95% in those years.

[3789] Dr. Landry found that in 2011, there were 1,075 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder parent living in the Greater Victoria region. Assuming that universe remained constant, École Victor-Brodeur's participation rate grew from 25% of elementary-age children in 2006/07 to 49% of elementary-age children in 2014/15. This represents growth in the participation rate by about 24%.

[3790] There are a few similarities between École Victor-Brodeur and École Élémentaire Anne-Hébert. They are the two oldest homogeneous minority language schools in British Columbia. Notably, though, École Victor-Brodeur appears to have been reconstructed when it had a much lower elementary participation rate than École Élémentaire Anne-Hébert had in 2014/15. Several other factors weigh toward École Victor-Brodeur experiencing higher growth than the CSF could expect in southeast Vancouver: a particularly cohesive Francophone community, and the presence of a military base. I therefore conclude that if the École Élémentaire Anne-Hébert Replacement Project went forward, the school would see less growth than École Victor-Brodeur experienced on reconstruction.

[3791] Taking into account all the circumstances, including the experience in Victoria and the stable enrolment at École Élémentaire Anne-Hébert for many years, I conclude that the number of children likely to take advantage of a CSF programme at a newly-constructed École Élémentaire Anne-Hébert on the same site would be about 215 students. This reflects about an 85% proxy participation rate: growth to the participation rate by about 10%.

[3792] With reference to the Northeast Vancouver Elementary Project, about 194 students from its catchment area currently attend École Élémentaire Anne-Hébert. Based on the proxy universe of 320 eligible children, the CSF's current proxy participation rate is about 60%. I consider this to be a moderate participation rate. Rightsholders from the area have access to neighbourhood schools and French immersion programmes closer to their homes. They must also transport their children to school by bus, when most SD39-Vancouver and SD41-Burnaby schools are close enough to student homes that bus transportation is not provided. Thus, the lack of a CSF school in the area likely deters some parents from sending their children to École Élémentaire Anne-Hébert. However, this is not as pronounced as it is in communities like Burnaby and the suburbs of Victoria, for example, because there is still a school within the municipality where the parents live.

[3793] The CSF has divided a catchment area once before in Vancouver. École Élémentaire Rose-des-Vents (Vancouver (West)) began as an annex to École Élémentaire Anne-Hébert. It opened in 1997/98 in temporary space with 21 students in Kindergarten to Grade 2. Its enrolment grew to 352 students in Kindergarten to Grade 6 in 2014/15. In the first 10 years of the programme, enrolment grew from 21 students to 303 students. Enrolment at École Élémentaire Anne-Hébert in that period remained relatively stable.

[3794] Dr. Landry's evidence provides that in 2011 there were about 600 elementary-age children of Mother-Tongue Rightsholders across the Current École Élémentaire Rose-des-Vents Catchment Area. Assuming that the universe of eligible children remained constant over time, the participation rate at École Élémentaire Rose-des-Vents grew to about 50% in the first 10 years of the programme, and to about 60% in 18 years.

[3795] The creation of École Élémentaire Rose-des-Vents is instructive. It shows that even when the CSF starts a new school to divide a catchment area, the programme tends to grow gradually, adding grades and growing cohorts over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. This is also what the CSF did when it started a new programme in Richmond, and what the CSF proposed to do when it first considered opening a programme in Burnaby: it would begin with a few grades and progressively add more. Thus, the number of children will warrant different facilities and amenities as the Northeast Vancouver Project grows.

[3796] I also consider that École Élémentaire Anne-Hébert has achieved a 76% participation rate of children living in the Southeast Vancouver Catchment Area. It has done so without a new facility. In Victoria, with a new facility, École Victor-

Brodeur was able to achieve a participation rate of about 65% from the South Victoria Catchment Area at the elementary level in the eight years following construction of a new facility, which reflects growth by about 25%. As explained above, the CSF is likely to achieve a lesser magnitude of growth with a new facility than the CSF achieved at École Victor-Brodeur.

[3797] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect 25 to 45 students to attend an elementary programme in the Northeast Vancouver Catchment Area in its first three or so years. In a newly-built, homogeneous facility, enrolment could reach up to 270 students, or about an 85% proxy participation rate.

D. Entitlement

[3798] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[3799] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[3800] In this instance, the appropriate comparator schools for École Élémentaire Anne-Hébert are all those on the east side of SD39-Vancouver, the west side of SD41-Burnaby and the west side of SD40-New Westminster that fall within the Current École Élémentaire Anne-Hébert Catchment Area. The maps show that École Élémentaire Anne-Hébert's enrolment is distributed across those areas. Thus, all those schools comprise the alternatives that parents would consider when making enrolment decisions for their children.

2. Location on the Sliding Scale

[3801] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[3802] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[3803] The plaintiffs submit that it is pedagogically and financially feasible for the CSF to operate two newly-constructed homogeneous schools in Vancouver (East). They note that 21 comparator elementary schools in the catchment area for the Northeast Vancouver Elementary Project, have enrolment below 250 students, nine of which have enrolment of fewer than 150 students. In the catchment area for the École Élémentaire Anne-Hébert Replacement Project (in the southeast quadrant of Vancouver), 14 elementary schools have enrolment below 250 students; six of those have enrolment of fewer than 150 students.

[3804] I have determined that about 215 students are likely to attend the École Élémentaire Anne-Hébert Replacement Project and about 270 students could ultimately be expected to enrol in the Northeast Vancouver Elementary Project. The evidence shows that in 2014/15, the average enrolment at comparator elementary schools on the east side of Vancouver was about 336 students. Twenty-nine of 65 schools for which data were provided had enrolment of fewer than 300 students. The Joint Fact Finder's Report suggests the average operating capacities at 42 comparator schools was 379 students. Thirteen of the 42 schools had capacity for

fewer than 300 students, although some of those schools are annexes that serve students in primary grades.

[3805] Given the comparable sizes of the CSF's two anticipated populations and the capacities at comparator schools, the number of rightsholders will ultimately fall at the high end of the sliding scale, warranting homogeneous facilities that are substantively equivalent to those afforded to the majority in Vancouver (East).

[3806] However, the number of children likely to attend the Northeast Vancouver Elementary Project will be smaller in the first years of the programme: only about 25 to 40 students. There are no comparator schools of that size. Those numbers will therefore fall at the low end of the sliding scale, warranting only minority language instruction until they grow to warrant more.

3. Northeast Vancouver Educational Experience

[3807] The plaintiffs seek the Northeast Vancouver Elementary Project to relieve overcrowding and to reduce travel times. In their submission, those two factors are so significant that École Élémentaire Anne-Hébert students in the northeast quadrant of Vancouver are not receiving a substantively equivalent global educational experience.

a) Overcrowding

[3808] The plaintiffs argue that École Élémentaire Anne-Hébert has experienced "immense" and "massive" enrolment growth in recent years. While that is true, the enrolment growth has followed a period of sustained enrolment stability and decline. It was only in 2013/14 that enrolment at École Élémentaire Anne-Hébert surpassed the school's peak enrolment of 339 students in 1997/98.

[3809] However, École Élémentaire Anne-Hébert has seen large enrolment growth in the past two years. The Kindergarten and Grade 1 cohorts that began attending École Élémentaire Anne-Hébert in 2013/14 and 2014/15 are between 67 and 76 students. Between 2012/13 and 2014/15, enrolment grew by 21%.

[3810] The Joint Fact Finder's Report does not state the operating capacity at École Élémentaire Anne-Hébert. Given that École Élémentaire Anne-Hébert has one Kindergarten classroom and 10 regular classrooms, and that its grade structure accommodates children up to Grade 6, the formula from the Area Standards that I describe in Chapter XVI, Introduction to Part 3, the Community Claims, suggests the school's operating capacity is 249 students. In 2014/15, it was operating at about 157% of its operating capacity.

[3811] The average capacity utilization at sample comparator schools in the Joint Fact Finder's Report is about 91%. Thirteen of 42 comparator schools were operating above their operating capacity in 2014/15. Three surpass their capacity by 150% or more. However, École Élémentaire Anne-Hébert is more crowded than comparator schools by a significant measure.

[3812] The overcrowding is also manifest in the amount of space that École Élémentaire Anne-Hébert has per student enrolled. Mr. Frith calculated that École Élémentaire Anne-Hébert has about 6.8 m² per student. On average, comparator schools have about 15.75 m² of space per student. Only 5% of comparator schools have less space per student than does École Élémentaire Anne-Hébert. This, too, places École Élémentaire Anne-Hébert at the low end in terms of space per student compared to other schools in the catchment area.

[3813] As a result of the enrolment growth, there are eight portables on the École Élémentaire Anne-Hébert site. Two are used for early childhood education. École Élémentaire Anne-Hébert's multipurpose room was converted into a classroom.

[3814] The overcrowding at École Élémentaire Anne-Hébert poses other problems. Ms. Asselin explained that while École Élémentaire Anne-Hébert has three play structures, they can accommodate at most 60 students. The space to accommodate the rest of the students on the school field is very small, and there are problems with fighting. With 16 divisions, there are often long lines for the washrooms at recess, so teachers encourage students to use the washroom at different times.

[3815] The gymnasium, according to Ms. Asselin, is overused. Because the school has so many divisions, students do not receive the two 45-minute blocks of gymnasium time recommended in the Ministry's curriculum. Instead, each division is allocated one block of 50 minutes and one block of 25 minutes. To meet the Ministry requirements, all divisions do exercises outside in the morning.

[3816] To instruct all the students, École Élémentaire Anne-Hébert has about 22 teachers, and a total staff of 34 to 36 persons. Its staff room accommodates about 15 people at one time. Many teachers eat in their classrooms. The staff room is also not large enough for staff meetings, which are held in the library.

[3817] Ms. Asselin explained that the parking lot is too small for École Élémentaire Anne-Hébert's size. Staff and parents share fourteen parking stalls. Most staff park on side streets.

b) Transportation Times

[3818] At École Élémentaire Anne-Hébert, nearly 90% of students take the bus to school. Bus ride times are, on average, 40 minutes. The maximum ride time is 55 minutes.

[3819] The evidence shows that students living in the catchment area for the Northeast Vancouver Elementary Project live especially far from École Élémentaire Anne-Hébert. Students in that catchment area live an average of 7 km away from École Élémentaire Anne-Hébert, and 0.7 km from the nearest majority school.

[3820] Ms. Tam, the parent of an École Élémentaire Anne-Hébert student who lives in North Burnaby, spoke to her experience with transportation times at École Élémentaire Anne-Hébert. She advised that her daughter faces a 45-minute bus ride to and from school every day. By Ms. Tam's calculation, if her daughter attended the majority school at the end of the same block as her home, she would be able to wake up one hour later each day. Despite Ms. Tam's concerns, she admitted that she had never spoken to anyone from the CSF about the length of the

bus trip. Further, Ms. Tam admitted that she would not send her daughter to the nearest school because it is not a French immersion school.

[3821] From a logistical standpoint, Ms. Asselin complained that École Élémentaire Anne-Hébert lacks a designated parking lot for buses. Instead, the fourteen buses that serve École Élémentaire Anne-Hébert drop students along Killarney Street. Some students cross the road to catch the bus, which is a safety concern.

[3822] Notably, transportation is not provided at any of the comparator schools.

c) Analysis

[3823] There is no doubt that École Élémentaire Anne-Hébert is operating significantly above its operating capacity. Only a very small proportion of comparator schools have less space per student and a higher capacity utilization than does École Élémentaire Anne-Hébert. The overcrowding has an impact on the global educational experience. The school has lost important multipurpose and schoolyard space, and struggles to accommodate the physical education needs of all students.

[3824] Additionally, students in the northeast quadrant of Vancouver face long transportation times. Some travel as long as 55 minutes to get to school. The average student in that area lives 10 times closer to the nearest majority school as they do to École Élémentaire Anne-Hébert.

[3825] The plaintiffs argue that constructing Northeast Vancouver Elementary Project would drastically reduce the distance students in its catchment area travel to attend minority language school, with a corresponding reduction in travel times. They also suggest it would relieve overcrowding at École Élémentaire Anne-Hébert.

[3826] As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities

themselves (*Mahe* at 371 to 372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment that shorter travel times were appropriate to prevent assimilation, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[3827] In this case, the CSF has determined that it is appropriate to establish a new catchment area and to accommodate students in the northeast quadrant of Vancouver at an independent, homogeneous elementary programme. The right to make that determination falls within its right to management and control. The defendants must defer to the CSF's decision in that respect.

[3828] However, this does not mean that a homogeneous school with capacity for 270 students is warranted in the early years of the programme. There is a temporal aspect to the number of children likely to take advantage of a programme. Given the small numbers that can be expected in the early years of the programme, the Province does not need to build a new homogeneous school facility for those students immediately. The defendants need only ensure that the instructional services and facilities are provided until the numbers warrant more. It is simply not practical to expect the Province to construct a new facility for 270 children before any programme has taken hold in that geographic region. Once the programme exists and the numbers grow, a new school may be warranted to ensure educational equivalence between the minority and majority.

4. Southeast Vancouver Global Educational Experience

[3829] The plaintiffs argue that the global educational experience at École Élémentaire Anne-Hébert is not equivalent to the experience in majority schools for a number of reasons in addition to overcrowding: problems with the schoolyard and site, the number of portables, issues with classrooms, a lack of multipurpose space, the heating and ventilation system, inadequate space for learning assistance and the

quality of the gymnasium. I will weigh those factors together with others relevant to the global educational experience.

a) Facility Condition

[3830] When Dr. Ardanaz first visited École Élémentaire Anne-Hébert in about 1995, he observed that the school was clean and fairly well maintained. By the time Mr. Bonnefoy arrived at the CSF in about 2004, École Élémentaire Anne-Hébert appeared older, with old millwork. In 2008, when Mr. Allison first saw the school, one wing of the building appeared older than the other. Ms. Asselin, who first visited in 2013/14, thought the entire building appeared old. She stated she was “shocked” to see the school’s condition. She observed chipped paint on the exterior, and faded doors.

[3831] There is no reliable qualitative evidence of the facility condition at comparator schools. Instead, I examine the FCI score and average age, which I conclude are correlated with a building’s state of repair.

[3832] École Élémentaire Anne-Hébert’s FCI score is 0.56. That is worse than the comparator school average of 0.38. The FCI scores of comparator schools range from 0.04 (Taylor Park Elementary) to 0.73 (Florence Nightingale Elementary). Twenty of the 74 schools for which data was available have an FCI score of 0.5 or worse.

[3833] École Élémentaire Anne-Hébert’s average age is about 37 years. The average age of comparator schools is older, at 55 years. Charles Dickens Elementary is the newest school, with an average age of 6.4 years. Sir Guy Carleton Elementary appears to be the oldest, at 100 years old. École Élémentaire Anne-Hébert is newer than all but eight of the 75 schools for which the average age was available.

b) School Site

[3834] Mr. Gosselin pointed to what he saw as École Élémentaire Anne-Hébert’s spacious schoolyard as one of its positive features. He was very involved in the

sports programme at École Élémentaire Anne-Hébert, and coached league sports and special games for students. Of course, Mr. Gosselin did this before École Élémentaire Anne-Hébert saw a sharp increase in its enrolment in the past two years.

[3835] École Élémentaire Anne-Hébert's site is about four acres. The Joint Fact Finder reported on the sites of 42 comparator schools. Among those schools, the average site size was five acres. Fifteen of 42 schools have less than or the same amount of space as École Élémentaire Anne-Hébert.

[3836] Looking at site size in comparison to enrolment, École Élémentaire Anne-Hébert's site offers 41 m² per student. Comparator schools have an average of 72 m² per student. Twelve of 72 schools have less space per student than does École Élémentaire Anne-Hébert, five of which are operating at 100% or more of their operating capacity. Two of those schools (Waverly Elementary and Collingwood Neighbourhood) have access to an adjacent municipal park.

c) Portable Classrooms

[3837] Prior to about 2010, École Élémentaire Anne-Hébert had three portables. According to Mr. Gosselin, until 2007/08 École Élémentaire Anne-Hébert used one portable as a Grade 2 classroom, and a second for split classes serving, at various times and in different configurations, Grades 4 through 6. By 2008/09, as enrolment decreased, one portable was used to teach music, one for preschool, and a third for a Strong Start.

[3838] Mr. Allison confirmed that École Élémentaire Anne-Hébert has added five portables since he became Secretary-Treasurer in 2010. In 2011, the CSF installed a fourth portable using \$180,000 of its AFG funds. In 2012, the CSF added two further portables, which had previously been located at École Élémentaire Rose-des-Vents (Vancouver (West)), at a cost of \$220,000. In the summer of 2014, the CSF installed two new portables at a cost of more than \$380,000. The CSF also

incurred time and expense associated with development and building permits, which must be renewed every one to three years.

[3839] Of the eight portables at École Élémentaire Anne-Hébert, six are older. Two of the older portables are used for early childhood programmes: a daycare and a Strong Start. They share a washroom, and one has a kitchen.

[3840] The older portables lack storage space. One has a foul odour, no washroom, and insufficient space to create education stations. Some have had problems with mice. Others had water damage to the linoleum floors, which have since been replaced. There have been complaints about the older portables becoming too hot, although they now have air conditioning.

[3841] The three new portables do not have the same issues. By Ms. Asselin's account, there are no issues with odours in these portables, and they have water access.

[3842] According to Ms. Asselin, 129 École Élémentaire Anne-Hébert students are educated in portables: almost one third of its population. Those students travel between the school and the portables at least five times each week to use the library and gymnasium, reducing instruction time.

[3843] The portables on the École Élémentaire Anne-Hébert site also take up space on the playfield. The two newest portables are in the area that formerly served as a baseball diamond.

[3844] Twelve of the 42 schools in the Joint Fact Finder's Report have portables. Some of the portables are used exclusively for early childhood education and community services. It appears as though about eight use portables for school purposes. A further two schools have modular classrooms used for regular instruction. No schools have as many portables as École Élémentaire Anne-Hébert does. Most have between one and three portables; one schools has four portables used exclusively for community space. One school has 11 modular classrooms.

[3845] The defendants argue there is no link between portables and educational outcomes, relying on Dr. Earthman's evidence. While I accept that is the case, a reasonable rightsholder parent would not be aware of this, and would believe that portables detract from the global educational experience at the school.

d) Classrooms

[3846] Ms. Asselin recounted some challenges with the some of the classrooms at École Élémentaire Anne-Hébert. The cloakrooms in many of them are separated from the classroom by a wall, making supervision difficult.

[3847] Ms. Asselin advised that the Kindergarten classroom is very large. Unfortunately, it has developed a bad smell that she could not remedy with cleaning.

[3848] The Joint Fact Finder's Report confirms the large Kindergarten classroom. École Élémentaire Anne-Hébert's Kindergarten classrooms are an average of 107 m², larger than the comparator school average of 92 m². École Élémentaire Anne-Hébert's average Kindergarten classroom size is larger than the average classroom size at all but six of the 40 comparator schools for which data was available.

[3849] Looking at average classroom size (including Kindergarten classrooms), École Élémentaire Anne-Hébert's average classroom size is 84 m², comparable to the 86 m² average at comparator schools. École Élémentaire Anne-Hébert falls in the middle of the range, with about 17 schools having smaller average classrooms and 24 having larger.

e) Multipurpose Space

[3850] École Élémentaire Anne-Hébert does not have a multipurpose room: it was converted into a Kindergarten classroom. Thirteen of 42 comparator schools likewise lack a multipurpose room. The 29 comparator schools with a multipurpose room have an average of 161 m² of multipurpose space.

f) Special Education Space

[3851] As early as 1995, Dr. Ardanaz noticed that École Élémentaire Anne-Hébert lacked some spaces for special education. That problem has worsened since enrolment at École Élémentaire Anne-Hébert surged in recent years.

[3852] In 2009/10 after the CSF implemented its laptop programme, the École Élémentaire Anne-Hébert computer lab was divided to create two rooms for specialized instruction.

[3853] Ms. Asselin advised that in 2013/14, the school grew from 14 to 16 divisions. To accommodate the new divisions, École Élémentaire Anne-Hébert converted the music portable into a classroom for a Grade 3 division, and the English portable to a Grade 3/4 split division. The former computer lab was divided further to create two smaller and one larger room. The largest is used for music. One smaller room is used by the English language arts teacher, which is challenging because of a lack of storage space and the sound of music emanating from the adjacent music room. The other small office is used for specialized services and meetings.

[3854] The renovations to the former computer lab were not complete until November 2013. At the beginning of the school year, there was a division with no classroom that was temporarily housed in the library. Pending completion of the renovation, the music teacher taught in home rooms, transporting instruments on a cart.

[3855] The renovation displaced École Élémentaire Anne-Hébert's learning assistance space. As a result, further renovations divided a small office to make two separate learning assistance classrooms. The librarian's office was also converted into space for Francisation, which is crowded when used for that purpose.

[3856] In 2014/15, École Élémentaire Anne-Hébert added a 17th division. That year, École Élémentaire Anne-Hébert added the two new portables, one of which would house the music room. This would have allowed the former music room to be used for learning assistance.

[3857] École Élémentaire Anne-Hébert administrators have accommodated specialized services in creative ways. The vice principal's office is also used as a sensory deprivation room. An exercise bike is located in the electric room so a student with special needs can take a required "exercise pause" for 15 minutes every hour.

[3858] Throughout this time, a preschool and Strong Start have continued to occupy two portables on the École Élémentaire Anne-Hébert site. Ms. Asselin did not consider asking them to vacate those portables. She thinks it is too important to keep those programmes at the school to ask them to leave. I note that CSF policy prohibits displacing early childhood programmes from CSF schools without consent.

[3859] The Joint Fact Finder's Report indicates that École Élémentaire Anne-Hébert has 114 m² of learning assistance and special education space. This is smaller than the majority school average of 191 m². Only 11 of the 38 schools for which data was provided have less space than does École Élémentaire Anne-Hébert. École Élémentaire Anne-Hébert also fares poorly when examining learning assistance space per student. École Élémentaire Anne-Hébert has about 0.29 m² of space per student for special education; comparator schools have an average of about one square metre of special education space per student. Seven of 38 schools have less administrative space per student than does École Élémentaire Anne-Hébert.

g) Gymnasium

[3860] École Élémentaire Anne-Hébert's gymnasium is 362 m², larger than the comparator school average of 323 m². Twenty-seven of 42 schools have smaller gymnasiums than does École Élémentaire Anne-Hébert. École Élémentaire Anne-Hébert also has about 0.9 m² of gymnasium space per student, which is comparable to the majority average of 1 m² of gymnasium space per student enrolled at the school.

[3861] Of course, given that École Élémentaire Anne-Hébert, like most comparator schools, has a single gymnasium, this does not mean that students receive adequate gymnasium time. Some large elementary schools also have multipurpose space that can be used as a gymnasium for younger students. École Élémentaire Anne-Hébert does not have that option.

h) Environmental Factors

[3862] When Mr. Gosselin taught at École Élémentaire Anne-Hébert, the furnaces in the older part of the building used water radiators with disruptively noisy ventilators. The only solution was to turn off the heat. In the newer part of the building, some rooms were much warmer or cooler than others. Ms. Asselin recounted that one room becomes so warm that the teacher often leaves the door open, causing safety concerns.

[3863] Over the course of the 2013/14 school year, Ms. Asselin lobbied the CSF for updates to the HVAC system. The CSF refused that request, stating there was no money to replace the system at that time.

[3864] Mr. Allison reported that the CSF did minor renovations to reduce noise from the HVAC system in 2013, but those renovations did not eliminate the problem. The Joint Fact Finder's Report confirms that the HVAC system at École Élémentaire Anne-Hébert is beyond its useful life and is due for replacement.

i) Transportation

[3865] Students in the southeast quadrant of Vancouver, like those in the Northeast Vancouver Catchment Area, tend to live closer to a majority school than to École Élémentaire Anne-Hébert. The evidence shows that students in that catchment area live, on average, about four km from École Élémentaire Anne-Hébert and about one km from the nearest majority school. As mentioned previously, transportation times are an average of 40 minutes for all École Élémentaire Anne-Hébert students, while majority schools do not provide transportation services. I infer, though, that students

living in this catchment area have shorter transportation times than those in the northeast quadrant of Vancouver.

j) Other Factors

i. Francophone Experience

[3866] Mr. Gosselin described the benefits of teaching in a homogeneous Francophone environment, with an ethnically diverse Francophone population.

[3867] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I describe in Chapter XV, Linguistic and Cultural Programming. However, on the east side of Vancouver, the availability of this service, while attractive to rightsholder parents, is tempered by the fact that École Élémentaire Anne-Hébert competes with French immersion at the elementary level.

ii. Class Sizes

[3868] Class sizes at École Élémentaire Anne-Hébert are slightly larger than or equal to those at comparator schools. École Élémentaire Anne-Hébert's average Kindergarten class size is 21 students, larger than the 19-student averages in SD39-Vancouver and SD41-Burnaby, and the 20-student average in SD40-New Westminister. Primary grades at École Élémentaire Anne-Hébert average to about 22 students per class, the same as primary classes in SD40-New Westminister, and slightly higher than the primary grade average at SD39-Vancouver and SD41-Burnaby schools (21 students). Looking to intermediate grades, École Élémentaire Anne-Hébert has an average of 27 students per class, slightly larger than the 26 students per intermediate class in SD39-Vancouver, SD40-New Westminister and SD41-Burnaby.

iii. Student to Staff ratios

[3869] The CSF generally has better student to staff ratios than the comparator districts. The CSF has 15 students to every teacher, and 4 special needs students

to every special needs teacher. The student to teacher ratios in the comparator districts range from 16 to 18 students to a teacher, while the special needs student to special needs teacher ratio ranges from 7 to 11 special needs students to special needs teachers.

iv. Graduation rates

[3870] The CSF has significantly better graduation rates than does SD39-Vancouver. The CSF's first-time graduation rate is 88%, and its six-year completion rate is 95%. In SD39-Vancouver, the first-time graduation rate is 77%, and the six-year completion rate is 87%.

v. Technology

[3871] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for students in primary grades. The laptops are decentralized and integrated into the classroom, and are replaced every three years.

[3872] The Joint Fact Finder's Report indicated that of the 21 SD39-Vancouver elementary schools for which data was available, most had between 18 and 81 desktop computers for an entire school. This is significantly fewer than what École Élémentaire Anne-Hébert offers: one laptop per intermediate student and 1 iPad for every other primary student. The data is less concrete for SD40-New Westminster and SD41-Burnaby comparator schools. However, the report suggests that computers are primarily centrally located in computer labs and a library.

[3873] I take from this that École Élémentaire Anne-Hébert's technology programme is better integrated into the classroom and more advanced than the technology programmes at comparator schools.

vi. Library

[3874] Mr. Bonnefoy commented that the library at École Élémentaire Anne-Hébert appeared to be a converted multipurpose room, not purpose built. Ms. Asselin observed that the windows do not let in much natural light.

[3875] The École Élémentaire Anne-Hébert library is larger than average. It is about 162 m²; the average comparator school library is 158 m². Comparing École Élémentaire Anne-Hébert's library to those where the size of the library is known, the library at École Élémentaire Anne-Hébert is larger than 21 libraries and smaller than 18.

vii. Administrative Space

[3876] Ms. Asselin described the principal's office. She said it is very small, as is the photocopy room. The vice principal's office has no windows, and is too small for meetings with parents. Two secretaries share space that seems designed for one person, with no storage.

[3877] When Ms. Asselin moved to École Élémentaire Anne-Hébert from École Victor-Brodeur (Victoria), she found a lack of storage for her own things. She stored her materials in her car for six weeks. Eventually, she decided to store her things in the computer server room. She was asked to remove them to avoid decreasing the life of the server, but she refused because she had no other options.

[3878] École Élémentaire Anne-Hébert has 39 m² of administrative space. It falls toward the bottom of range of comparator schools: the average at comparator school has 47 m² of administrative space; 16 of 41 schools have less administrative space than does École Élémentaire Anne-Hébert.

viii. Early Childhood Programming

[3879] École Élémentaire Anne-Hébert has both a Strong Start and a Preschool. Four comparator schools offer daycare only; 10 offer Strong Start only; two offer preschool and daycare; five offer Strong Start and either daycare or preschool; and

one offers all three services. The remaining 20 comparator schools cited in the Joint Fact Finder's Report do not offer any early childhood programming.

[3880] École Élémentaire Anne-Hébert does not offer before- and after-school care, according to the Joint Fact Finder's Report. Twenty-three comparator schools likewise do not offer that service; 19 do.

k) Analysis

[3881] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[3882] A number of factors detract from the overall educational experience at École Élémentaire Anne-Hébert. About one-third of the school population is educated in portable classrooms. About 20% of comparator schools also use portables for educational purposes; none uses as many portables as does École Élémentaire Anne-Hébert.

[3883] École Élémentaire Anne-Hébert also does not have a multipurpose room. About 31% of comparator schools likewise do not have multipurpose space. The lack of multipurpose space is compounded by the CSF's below-average amount of learning assistance space. The absence of that space is problematic for the CSF because it needs extra space to teach specialized programming, like Francisation.

[3884] There are also problematic environmental factors. École Élémentaire Anne-Hébert is in need of a new HVAC system. This is something that the CSF is responsible for addressing using its AFG funds.

[3885] I also consider that École Élémentaire Anne-Hébert students spend, on average, 40 minutes travelling to and from school by bus. Students at comparator schools do not take the bus to school.

[3886] On the positive side, École Élémentaire Anne-Hébert provides an excellent education that enculturates students into the French language and culture. A reasonable rightsholder parent would also find it very attractive that the CSF offers an advanced technology programme, and that technology is integrated into the everyday classroom environment in a way that it is not at comparator schools.

[3887] Additionally, École Élémentaire Anne-Hébert has significantly larger Kindergarten classrooms than comparator schools. Its gymnasium is larger than average; the CSF is in the top third of schools based on gymnasium size. Its gymnasium space per student enrolled at the school is comparable to the majority-school average.

[3888] The CSF also has significantly better graduation rates than does SD39-Vancouver, where most comparator schools are located. It also offers both Strong Start and Preschool. Only about half of the comparator schools offer any early childhood programming. Only 20% offer more than one early childhood education programming like École Élémentaire Anne-Hébert does.

[3889] Of lesser importance, but still relevant, is that the CSF has better student-to-staff ratios than do comparator school districts, but not significantly so with respect to student-to-teacher ratio. However, given that École Élémentaire Anne-Hébert is among the CSF's larger schools, it is not clear that the averages that apply across the CSF will apply at École Élémentaire Anne-Hébert. As such, this is a factor that must be given less weight.

[3890] Most factors are neutral. École Élémentaire Anne-Hébert has classrooms that are a comparable size to those at comparator schools. Its class sizes are also about the same as the class sizes in Competing Districts. Its library falls in the middle of the range of library sizes in the catchment area.

[3891] École Élémentaire Anne-Hébert is in a below-average state of repair based on FCI score. However, it is within the normal range for schools in the catchment area. At the same time, École Élémentaire Anne-Hébert is one of the newest schools in the district: its average age is in the top 12% of comparator schools.

[3892] In terms of site size, École Élémentaire Anne-Hébert is in the bottom 40% of schools. École Élémentaire Anne-Hébert is in the bottom 16% of schools when site size is examined on a space-per-student basis.

[3893] Of lesser importance to the global educational experience, the administrative area at École Élémentaire Anne-Hébert is in the bottom 40% of schools, and about 8 m² below average.

[3894] Overall, I find that the factors that add to and detract from the global educational experience at École Élémentaire Anne-Hébert are balanced. While the CSF falls in the bottom of the range on a number of measures, it falls near the top on others, and is never outside the norm for the catchment area.

[3895] The most severe problems at École Élémentaire Anne-Hébert relate to overcrowding and the corresponding use of portable classrooms and loss of space for special education services. Those problems would be resolved if the CSF opened a new school in the Proposed Northeast Vancouver Catchment Area. Generally, though, the amenities provided to students at École Élémentaire Anne-Hébert provide an equivalent global educational experience to that afforded at minority language schools. In my view, École Élémentaire Anne-Hébert, like the comparator schools, has a mix of positive and negative features. In the context of an imperfect education system like the one in British Columbia, the minority cannot expect to have the best of each type of amenity.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[3896] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language

education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Vancouver (East) and the dealings of the CSF, the Ministry and SD39-Vancouver in connection with it.

[3897] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Vancouver (East), I make findings that are of particular relevance to Chapter XXXV, Leases, Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

1. Capital Plan Requests

[3898] In its earliest draft capital plan, the October 1997 Capital Plan Submission for 1998/99, the CSF proposed acquiring École Élémentaire Anne-Hébert by January 1, 1998, then building the Vancouver Regional Elementary/Secondary Project in the future. In its amended final version, the December 1997 Capital Plan Submission for 1998/99, the CSF planned to continue leasing École Élémentaire Anne-Hébert and heterogeneous space at Kitsilano Secondary for two to three years pending construction of the Vancouver Regional Elementary/Secondary Project, which would serve students from Vancouver, Richmond and north and west Burnaby. That school would replace École Élémentaire Anne-Hébert, École Élémentaire Rose-des-Vents and Kitsilano Secondary.

[3899] In the same Capital Plan Submission, the FEA explained that SD39-Vancouver had refused to transfer École Élémentaire Anne-Hébert to the CSF because it might require that school in the future. SD39-Vancouver had also informed the CSF that Kitsilano Secondary was overcrowded and might have to be relocated.

[3900] The CSF continued to seek the Vancouver Regional Elementary/Secondary Project through 2001. In March 2001, the Ministry announced funding for the CSF to

acquire the Oakridge Site for that project. École Élémentaire Rose-des-Vents moved to Oakridge Elementary, while the CSF continued to lease École Élémentaire Anne-Hébert.

[3901] Then, the CSF changed its plan for the Vancouver area to a three-school configuration: two elementary schools on the east and west sides of Vancouver, feeding a regional secondary school in the centre. In January 2002 the Ministry approved that plan by allowing the CSF to develop the Oakridge Site as a regional secondary school. In the course of offering the Minister's approval, Mr. Miller encouraged the CSF to negotiate long-term tenure of École Élémentaire Anne-Hébert by way of a lease or capital acquisition.

[3902] The CSF continued to lease École Élémentaire Anne-Hébert, and did not make capital requests concerning Vancouver (East) for many years. Mr. Bonnefoy explained that the CSF felt that it had long-term stability at École Élémentaire Anne-Hébert, and had more urgent concerns to address. Despite the lack of requested projects, in 2009 the Ministry facilitated the transfer of École Élémentaire Anne-Hébert to the CSF by linking it to the approval of two SD39-Vancouver projects in the UBC area of Vancouver.

[3903] Mr. Bonnefoy thought it important for École Élémentaire Anne-Hébert to be renovated if the CSF were to acquire it. In its May 2009 Capital Plan Submission for 2009/10, the CSF sought renovations to École Élémentaire Anne-Hébert as its second-highest ranked project in the Greater Vancouver ward. The CSF also submitted a PIR supporting its request. The Province did not support the renovations.

[3904] With the CSF's June 2010 Capital Plan Submission for 2010/11, its project request for Vancouver (East) changed from a request for renovations to a request for the École Élémentaire Anne-Hébert Replacement Project. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's

direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report.

[3905] The CSF also sought three renovation projects for École Élémentaire Anne-Hébert: health and safety upgrades to the new and old portions of the school, and a mechanical/electrical upgrade to the older part of the school. According to Mr. Allison, these were meant to be read as an alternative to wholesale replacement of École Élémentaire Anne-Hébert. These projects were all said to be a second-highest priority, requiring accelerated funding in the first year of the capital plan.

[3906] In the CSF's November 2012 Capital Plan Submission for 2012/13, the CSF requested the École Élémentaire Anne-Hébert Replacement Project again, but abandoned its alternative requests for renovations.

[3907] The CSF's plan for Vancouver (East) came to reflect the current two-school configuration with its September 2013 Capital Plan Submission for 2013/14. That year, the CSF requested both the Northeast Vancouver Elementary Project and the École Élémentaire Anne-Hébert Replacement Project. Both projects were stated to be the CSF's top priority, which was not reflected in the Echo Report.

[3908] In support of its capital project requests for Vancouver (East), the CSF submitted two In-House PIRS dated November 2013. The CSF did not identify any sites in the PIR for the Northeast Vancouver Elementary Project.

[3909] In his January 2014 feedback concerning the CSF's PIRs, Mr. Cavelti explained that the École Élémentaire Anne-Hébert Replacement Project would be evaluated as a Building Condition Project and receive its threshold ranking based on its FCI score. He asked Mr. Allison to provide FCI information, and discuss how the school would impact enrolment at École Élémentaire Anne-Hébert.

[3910] Mr. Cavelti also wrote that the Northeast Vancouver Elementary Project would be ranked NPIR. Mr. Cavelti pointed to the CSF's failure to identify potential sites and discuss how the addition of the facility would impact enrolment at

neighbouring schools-- in this case École Élémentaire Anne-Hébert and the proposed future school in Burnaby.

[3911] When Mr. Allison responded to Mr. Cavelti's concerns in October 2014, he refused to provide the FCI score for École Élémentaire Anne-Hébert on the basis that the Ministry had access to it. He suggested both projects would have minimal impact on enrolment at other schools.

[3912] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF focused on the number of potentially eligible children rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

2. The CSF's Early SD39-Vancouver Leases

[3913] When the CSF was formed in 1995, École Élémentaire Anne-Hébert was a well-established homogeneous Programme Cadre. Secondary students attended a heterogeneous programme at Kitsilano Secondary. In the CSF's first year, both programmes operated in leased SD39-Vancouver space. Pursuant to the October 20, 1997, agreement for the 1997/98 school year, the CSF was charged \$3,562,843 for facilities and services associated with those programmes and École Élémentaire Rose-des-Vents.

[3914] Dr. Ardanaz explained that the CSF was not yet responsible for its own payroll, so the lease included amounts for staff salaries. Included in that amount, the CSF paid \$1,722,728 toward teaching services. The CSF also paid for support staff, principals and vice principals, as well as district-level services.

[3915] In addition to the staff salaries, the CSF paid SD39-Vancouver for the space it occupied, and fees for operations and maintenance. The CSF paid \$264,741 towards the lease and operation of space within Kitsilano Secondary (\$251,420 for space; \$13,321 for operations and maintenance). The CSF paid a further \$476,939 for the lease and operation of École Élémentaire Anne-Hébert (\$436,781 for space; \$40,158 for maintenance). The CSF additionally paid \$678,810 for student transportation.

3. Early Planning for École Élémentaire Anne-Hébert

[3916] Dr. Ardanaz recalled that the CSF identified École Élémentaire Anne-Hébert as a school it wanted to acquire in the fall of 1997. Mr. Miller confirmed the Ministry asked the CSF to undertake appraisals of the majority schools it was interested in. So, in October 1997, Dr. Ardanaz wrote to Mr. Dave Yuen, the Secretary-Treasurer for SD39-Vancouver, and requested permission to conduct that appraisal of École Élémentaire Anne-Hébert. Mr. Yuen expressed surprise, and refused.

[3917] Mr. Miller advised that Mr. Yuen contacted him about the appraisal request. He pointed to a longstanding SD39-Vancouver policy to not dispose of school sites. To Mr. Miller, Mr. Yuen also seemed to be confused, and to think that SD39-Vancouver would not be compensated for any transfer of the school. As a result of the dispute, the Ministry sent a letter to all districts where the CSF was seeking acquisitions informing them that it had asked the CSF to undertake the appraisals.

[3918] After that conversation, though, SD39-Vancouver agreed to allow the CSF to complete the appraisal. However, the SD39-Vancouver Chairperson stressed that approval did not mean SD39-Vancouver considered École Élémentaire Anne-Hébert to be surplus to its needs, or a candidate for disposal. He also confirmed that SD39-Vancouver thought it might need the school in the future to meet its own needs.

[3919] École Élémentaire Anne-Hébert was audited by British Columbia Building Corporation (“BCBC”) on behalf of the CSF in December 1997. The auditors

commented that there were signs of overcrowding and limited opportunities to accommodate increased enrolment. The auditors also recounted that the building structure was seismically deficient. Further, the HVAC system required modernization. They also pointed to a lack of room for expansion, as well as parking and bus drop-off problems. I take the appraisers' opinions not for truth, but as proof of the fact that the statements were made, and what information was available to the CSF and SD39-Vancouver concerning École Élémentaire Anne-Hébert.

[3920] Dr. Ardanaz advised that in his time at the CSF, portables were added to École Élémentaire Anne-Hébert to accommodate increased growth. However, SD39-Vancouver did not act on other issues raised in the appraisal during his time as Secretary-Treasurer.

4. Change to a Three-School Configuration for Vancouver

[3921] The CSF did not acquire École Élémentaire Anne-Hébert at that time, and continued to occupy the school pursuant to short-term leases. In light of SD39-Vancouver's policy against disposing of school sites, the CSF's capital requests focused on acquiring a site for the Vancouver Regional Elementary/Secondary Project.

[3922] Nevertheless, the CSF was also looking at other models for Vancouver. In December 1999, Dr. Ardanaz proposed a three-school arrangement to Mr. Yuen. He asked to secure a long-term lease of École Élémentaire Anne-Hébert, and to negotiate a long-term lease of Shannon Park Annex in Vancouver (West). He asked to continue leasing space at Kitsilano Secondary School for an additional two or three years until the CSF could acquire a site and build a secondary school. That proposal did not go forward.

[3923] Instead, the CSF began negotiating to acquire the Oakridge Site. In the course of those negotiations, SD39-Vancouver and the CSF discussed the CSF securing a 50-year lease of École Élémentaire Anne-Hébert. That idea did not go forward because the Ministry realized it could not fund a prepaid lease using its

Capital Envelopes. Mr. Stewart's evidence was that the Ministry also attempted to facilitate the outright transfer of École Élémentaire Anne-Hébert to the CSF as part of the negotiations. As the negotiations closed, the Ministry offered to build additions to other SD39-Vancouver schools to allow the CSF to acquire Anne-Hébert. SD39-Vancouver declined to dispose of the site.

[3924] Ultimately, the CSF acquired the Oakridge Site with the plan to develop it for the Vancouver Regional Elementary/Secondary Project, as discussed in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)). Thereafter, the CSF officially changed its strategy for Vancouver to a plan that envisioned the CSF retaining École Élémentaire Anne-Hébert, finding another site in Vancouver (West) for a second elementary school, and developing the Oakridge Site as a secondary school. Dr. Ardanaz proposed the ideal to Mr. Miller in 2011. He told Mr. Miller that as part of the plan, the CSF would "endeavour to acquire from SD39-Vancouver the facility that currently houses [École Élémentaire Anne-Hébert]." He asked the Ministry to authorize the CSF to enter into negotiations to acquire the site.

[3925] Mr. Miller approved this request. Subsequently, on October 29, 2001, Dr. Ardanaz confirmed to the Ministry that the CSF Board of Trustees had resolved to acquire École Élémentaire Anne-Hébert. Even so, Mr. Miller was not made aware of any efforts by the CSF to secure long-term tenure of École Élémentaire Anne-Hébert around this time. Neither was the Court.

5. Lease of École Élémentaire Anne-Hébert between 2004 and 2009

[3926] According to Mr. Bonnefoy, during his time as Secretary-Treasurer, lease negotiations with SD39-Vancouver took place annually, and were always hampered by delay. Usually, the CSF's lease with SD39-Vancouver would be signed three months after the Ministry's deadline for submitting lease expenses for reimbursement. Mr. Bonnefoy provided the Ministry with estimated costs, while apologizing to Ministry staff for the delay. The Ministry would usual provide the CSF

with its reimbursement based on the previous year's lease costs rather than the CSF's estimate, leaving the CSF to assume the cost of any rate increases.

[3927] While he was Secretary-Treasurer, Mr. Bonnefoy was responsible for renegotiating the annual leases of École Élémentaire Anne-Hébert and Kitsilano Secondary with SD39-Vancouver Vancouver. In the course of the 2004 negotiations, he complained to SD39-Vancouver that the CSF was being charged an administrative fee for the services of a principal and vice principal at Kitsilano Secondary School. The CSF employed its own full-time principal at that school. Mr. Bonnefoy also requested supporting documentation for a \$60,000 district administrative charge that SD39-Vancouver was charging to the CSF.

[3928] There were no changes as a result of Mr. Bonnefoy's complaints. The CSF continued to pay additional fees for school administrators, clerical staff, supplies and services, and additional supervision aides.

6. The CSF's Acquisition of École Élémentaire Anne-Hébert

[3929] In late 2004, Mr. Bonnefoy asked Ms. Brenda Ng, Secretary-Treasurer for SD39-Vancouver, for a longer-term, three-year lease of École Élémentaire Anne-Hébert. In January 2005, Ms. Ng responded that she would look into the possibility, but cautioned it would likely result in a higher lease rate. She asked for a formal letter to bring to the SD39-Vancouver Board of Trustees requesting a longer-term lease, which Mr. Bonnefoy sent in April 2005. Mr. Bonnefoy made the same request in July 2006. Having still received no response, he repeated his request in December 2006. Ms. Ng suggested that SD39-Vancouver trustees would discuss the idea in January 2007.

[3930] By February 2008, the CSF still had not obtained a response to its request for a long-term lease of École Élémentaire Anne-Hébert, so Mr. Bonnefoy made his request once again. He also noted that despite the request, the CSF's preference would be to acquire École Élémentaire Anne-Hébert, averting to his understanding that SD39-Vancouver was reviewing its facility needs.

[3931] In June 2008, as the CSF prepared its Capital Plan Submission for 2009/10, Ms. Bourgeois, Chairperson for the CSF, wrote to Minister Bond in connection with the CSF's capital requirements. That letter highlighted the situation in the greater Vancouver region. She stressed that École Élémentaire Anne-Hébert was held on a year-to-year lease from SD39-Vancouver, although it had not been used for Anglophone education for the past 25 years.

[3932] As this occurred, in the spring of 2008, Mr. Miller and Mr. Stewart saw an opportunity to persuade SD39-Vancouver to transfer École Élémentaire Anne-Hébert to the CSF by linking the transfer to the development of some SD39-Vancouver projects in the UBC area.

[3933] Mr. Stewart explained that around 2008, the Ministry was considering whether to approve a suite of SD39-Vancouver projects in the UBC area. The existing University Hill Secondary would be relocated to a renovated and expanded National Research Council building, which he confirmed was effectively being donated by UBC to SD39-Vancouver (the "NRC Secondary Project"). The existing University Hill Secondary would then be converted into a new elementary school at UBC (the "Acadia Road Project").

[3934] Mr. Miller elaborated. He confirmed that in 2008, the Ministry approved the NRC Secondary Project based on the Space Rank Formula. Thereafter, the project cost estimates escalated, leading the Ministry to look to what SD39-Vancouver could bring to the table to offset the cost.

[3935] Mr. Miller saw an opportunity for the Province to acquire École Élémentaire Anne-Hébert for the CSF. That would offset costs by ensuring that the Ministry did not face the cost associated with privately acquiring a different site in Vancouver (East) for the CSF in the future, at great expense. Ministry staff informed SD39-Vancouver that the NRC Secondary Project and the Acadia Road Project would be approved conditional on the transfer of École Élémentaire Anne-Hébert to the CSF. He encouraged Ms. Ng, Secretary-Treasurer for SD39-Vancouver, to contact Mr. Bonnefoy to arrange the transfer.

[3936] Mr. Miller confirmed that Ministry staff accounted for the arrangements by including an amount of funding in the Project Agreement that was stated to be funds arising out of the transfer. Mr. Miller confirmed that this arrangement meant that SD39-Vancouver did not actually receive any funds for the transfer of École Élémentaire Anne-Hébert. Instead, the Ministry simply included a notional amount for the transfer in the Project Agreement.

[3937] Mr. Miller's evidence was that the notional amount was largely irrelevant. The amount included in the Project Agreement could have been based on an appraisal, or could have been set at \$1, or could have been any other amount. Mr. Stewart had the same view, suggesting that the amount stated in the Project Agreement was irrelevant.

[3938] Mr. Stewart confirmed that there was no appraisal of École Élémentaire Anne-Hébert associated with the transaction. This differs from how the Ministry accounted for transfers of property to the CSF in its early years. In the late 1990s, school boards were compensated for Local Capital contributions to the appraised value of the facilities.

[3939] In the end, since there was no appraisal of École Élémentaire Anne-Hébert, the Ministry settled on \$20 million as a notional amount for the transfer of the site.

[3940] Mr. Stewart confirmed that Minister Bond wrote to SD39-Vancouver to confirm project funding for the Acadia Road Project and the NRC secondary Project to a maximum of \$38,906,061, with a further \$3,002,902 available as risk reserve. The Project Agreement provides that \$10 million of the funding for each project came from the transfer of École Élémentaire Anne-Hébert to the CSF.

[3941] École Élémentaire Anne-Hébert was transferred to the CSF by SD39-Vancouver. Mr. Bonnefoy pressed for a Building Condition Project, but it did not go forward.

**7. The CSF's Requests for Building Condition Projects for
École Élémentaire Anne-Hébert**

[3942] Mr. Bonnefoy explained that when Ms. Ng first contacted him to offer École Élémentaire Anne-Hébert to the CSF in June 2008, he responded cautiously. Mr. Bonnefoy made it clear to SD39-Vancouver and the Ministry that the CSF was only interested provided that there were renovations to the facility. Mr. Bonnefoy agreed to the transfer sometime between June and September 2008.

[3943] As the CSF moved toward acquiring École Élémentaire Anne-Hébert, the CSF commissioned a facility upgrade study for École Élémentaire Anne-Hébert. The October 2008 study identified a number of deficiencies with the school. These included non-compliance with building code in one area of the school, lack of seismic upgrades, accessibility issues, lack of washroom fixtures in Kindergarten classrooms, acoustic problems in the gymnasium, dated and inefficient lighting, substandard electrical systems, and mechanical systems that had surpassed their service life. The multitude of reported deficiencies caused Mr. Bonnefoy some concern.

[3944] The report also attempted to quantify the cost of seismic and health and safety renovations. It suggested the cost of renovating the facility was substantially similar to the cost of building a new school. The report also prioritized renovations to avoid significant upfront capital outlays, to assist the CSF to justify a three-year amortization of the renovations.

[3945] In March 2009, Mr. Bonnefoy notified Mr. Miller of the anticipated costs of upgrading École Élémentaire Anne-Hébert. Mr. Bonnefoy acknowledged the CSF's appreciation of the transfer, but stressed that the CSF expected the Ministry to agree to an upgrade plan as part of the acquisition process.

[3946] Mr. Miller recalled that Mr. Bonnefoy raised concerns about the condition of École Élémentaire Anne-Hébert, and that the CSF was seeking renovations. However, he also recalled that Dr. Ardanaz had not raised the same concerns in previous conversations about the acquisition of École Élémentaire Anne-Hébert.

Further, the Ministry's policy required school boards to request major renovations after a School or Site Acquisition Project.

[3947] The CSF began requesting renovations to École Élémentaire Anne-Hébert beginning in 2009. Mr. Stewart confirmed that in May 2009, Ministry staff would have been aware that there would be limited capital funding to pursue the project. Further, an election was held in May 2009, and no capital funding could be announced between the date that the writ was dropped and the new government formed.

[3948] In June 2009, the CSF also wrote to the Ministry about École Élémentaire Anne-Hébert's seismic condition. École Élémentaire Anne-Hébert had been excluded from the list of schools to be surveyed because the building was leased, and asked the Ministry to assess it. Later in June 2009, he wrote to Mr. Miller and asked to continue discussions about renovations to École Élémentaire Anne-Hébert.

[3949] After he sent the letter about the renovations, Mr. Bonnefoy received a telephone call from Mr. Miller. According to Mr. Bonnefoy, that telephone call stands out in his long career as a school district administrator. He was adamant in that conversation that the CSF would not sign the agreement for the transfer of École Élémentaire Anne-Hébert without a commitment from the Ministry to renovate the building. Mr. Bonnefoy recalled that Mr. Miller was very aggressive, and told him that the CSF had no option but to accept École Élémentaire Anne-Hébert in its current condition.

[3950] Mr. Miller also gave evidence about the telephone call. He explained that he contacted Mr. Bonnefoy because he was concerned about losing the opportunity to acquire the school for the CSF. He feared the costs of acquiring a site for the CSF in Vancouver (East) if the transaction did not go forward. Mr. Miller did not recall the tone of the conversation, but believed that in most instances he was collaborative rather than directive when dealing with school districts. He believed that he would have encouraged Mr. Bonnefoy to sign the agreement, but that he did not raise his voice.

[3951] Mr. Bonnefoy was unsure how to react after the telephone call. He anticipated “political furor” if the CSF did not accept the site. He reluctantly signed the agreement, and planned to continue to seek renovations after the CSF acquired the building.

[3952] The contract of purchase and sale of École Élémentaire Anne-Hébert was signed on June 9, 2009. One term of the contract stipulates that the building was being accepted on an “as is” basis.

[3953] The documentary evidence shows that in June and July of 2009, Mr. Cavelti reviewed the CSF’s request for capital renovations to École Élémentaire Anne-Hébert, including the CSF’s feasibility work. However, Mr. Stewart conceded that Ministry staff knew by that point that it would not have funds for Building Condition Projects, as there was little funding for any capital projects at that time.

[3954] On July 2, 2009, Mr. Bonnefoy received an email from Mr. Stewart related to his request for renovations to École Élémentaire Anne-Hébert. He acknowledged that the CSF had included the renovation to École Élémentaire Anne-Hébert in its Capital Plan Submission, and stated that was the appropriate action. He confirmed that the project would receive due consideration for Ministry support as the capital plan was reviewed, subject to priority ranking and availability of capital funding.

[3955] Notably, however, Mr. Stewart was making suggestions around future approval of renovations in the summer of 2009. At the same time, financial circumstances were such that the Ministry ceased funding the CSF’s leases for one year, as I highlighted in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), and explain in more detail in Chapter XXXV, Leases. In fact, no new funding was made available for any capital projects in 2009. Mr. Stewart confirmed that the Ministry was not in a position to contemplate renovations to École Élémentaire Anne-Hébert. He nevertheless encouraged the CSF because he thought it appropriate for districts and the Capital Branch to carry on planning regardless of funding availability.

[3956] Since that time, the CSF has continued to seek Building Condition Projects for École Élémentaire Anne-Hébert. However, the CSF has not received any capital project approvals related to École Élémentaire Anne-Hébert since the transfer. Mr. Miller advised that throughout that period, Treasury Board did not provide the Ministry with a Capital Envelope for Building Condition Project, whether for the CSF or for any other school districts. Treasury Board directions in those years were focused on seismic projects and some accelerated Expansion Projects as economic stimulus.

8. CSF-funded Renovations

[3957] Mr. Allison explained that since he became Secretary-Treasurer of the CSF in 2010, the CSF spent about \$1.3 million on renovations and portable additions at École Élémentaire Anne-Hébert.

[3958] In 2010, the CSF removed carpets from classrooms in one wing of École Élémentaire Anne-Hébert and renovated an older portable, which had a bad smell. The CSF also fixed some fans and added a ramp.

[3959] In 2012, the CSF repaired the roof to École Élémentaire Anne-Hébert at a cost of about one quarter of the CSF's AFG allocation in that year. Mr. Allison also considered adding sprinkler systems at École Élémentaire Anne-Hébert, but the CSF did not proceed due to the cost and competing needs.

[3960] When Ms. Asselin joined École Élémentaire Anne-Hébert in 2013, she and the outgoing principal discussed some further needed renovations. The heating system was in need of repairs, some tiles were due for replacement, and some construction work was needed to improve accessibility for a student with a disability. Ms. Asselin was told the renovations were scheduled for the summer of 2013; however, some aspects of the repairs waited until 2014.

[3961] In the summer of 2013, the CSF subdivided a classroom in the school to maximize space at a cost of \$9,000 to \$10,000. The CSF also renovated the HVAC

system at a cost of about \$19,000. Mr. Allison considered replacing a boiler or the entire HVAC system, but did not do so because of the cost.

[3962] In January 2014, the CSF requested \$146,500 to replace a boiler at École Élémentaire Anne-Hébert through the Ministry's Carbon Neutral Capital Program, which provides all school districts with capital funding to achieve environmental efficiencies. Every district will receive capital approvals equivalent to its district-paid carbon offsets, on a rolling basis. The CSF's application was not approved, so the boiler was not replaced.

[3963] Although Mr. Palmer did not assess the CSF's application, he explained some of the considerations that would have led the Ministry to refuse the CSF's application. His view was that the application might not have compared well to other applications in that year. Examining the application, he noted that if the CSF were to undertake the project, it would take 549 months to generate savings equal to the cost of the project. That is a lengthy timeline. He also observed that the project would reduce emissions by 10%, which is not a high level of reduction.

[3964] However, Mr. Palmer stressed that the CSF's lack of a successful application in 2014 assured project approval for the CSF in some other year. He confirmed that the CSF, like all other districts, would eventually receive Carbon Neutral Capital Project funding for some project equivalent to or greater than the CSF's carbon offset costs within a five-year cycle.

9. Conclusions

[3965] From the beginning, the CSF treated its need for space in Vancouver among its highest priorities. The CSF's earliest plans involved consolidating all of its Vancouver programmes at a single school, although the idea of having multiple schools feed a regional secondary school was within some officials' contemplation.

[3966] An appraisal was done of École Élémentaire Anne-Hébert in about 1997. The appraisal indicated there were problems with overcrowding, there were seismic concerns and issues with the HVAC system. Dr. Ardanaz's evidence was that

neither SD39-Vancouver nor the Ministry took action to resolve those problems during his tenure with the CSF except to the extent that portables were added to relieve overcrowding.

[3967] The CSF also had in mind acquiring École Élémentaire Anne-Hébert from SD39-Vancouver as early as 1997. SD39-Vancouver resisted that arrangement even though École Élémentaire Anne-Hébert had operated as a homogeneous minority language school for many years. It is common ground that SD39-Vancouver has a longstanding policy of not disposing of any school sites.

[3968] By March 2001, the Ministry had announced support for the CSF to acquire the Oakridge Site and build a regional elementary/secondary school there, consolidating École Élémentaire Rose-des-Vents, École Élémentaire Anne-Hébert and the CSF's secondary programme at a newly-built homogeneous school. Thereafter, the CSF changed its plans and requested a three-school configuration. The Oakridge Site would be developed as a regional secondary school. The CSF was to enter into negotiations to secure École Élémentaire Anne-Hébert on a long-term basis to serve students from Vancouver (East), and find a new site to replace École Élémentaire Rose-des-Vents in Vancouver (West).

[3969] The CSF secured approval from the Ministry to enter into negotiations to acquire École Élémentaire Anne-Hébert from SD39-Vancouver. There is no evidence that the CSF actually did try to negotiate the transfer at that time. Between 2001 and 2009, the CSF did not make any capital requests concerning École Élémentaire Anne-Hébert. It did not seek to acquire the school; it continued to lease it from SD39-Vancouver.

[3970] The evidence establishes that SD39-Vancouver insisted on year-to-year leases of École Élémentaire Anne-Hébert even after the CSF asked for longer-term leases. SD39-Vancouver suggested higher fees in exchange for a longer-term lease, but in the end simply did not respond to the CSF's request. In addition to costs for space and operations, the CSF was charged for a portion of the cost of school administration at the heterogeneous Kitsilano Secondary -- about \$60,000

per annum-- even though the CSF had its own principal and administration at the school.

[3971] In 2008 and 2009, the Ministry facilitated the transfer of École Élémentaire Anne-Hébert to the CSF by linking it to the approval of two SD39-Vancouver projects in the UBC area of Vancouver. It did so even though the CSF had not requested the transfer. However, as recently as June 2008, the CSF had written to the Minister and highlighted the problems that arose out of the fact that École Élémentaire Anne-Hébert was held on a year-to-year lease from SD39-Vancouver. Given that communication, and that the Ministry and the CSF had previously agreed that the CSF needed long-term security at École Élémentaire Anne-Hébert for its three-school configuration, it was reasonable for the Ministry to take that step.

[3972] The arrangement that led to the transfer of École Élémentaire Anne-Hébert from SD39-Vancouver to the CSF suggested that about \$20 million of the funding for SD39-Vancouver's projects near UBC was being provided as consideration for the transfer of École Élémentaire Anne-Hébert to the CSF. This was not based on the appraised value of École Élémentaire Anne-Hébert, which is different from how districts were compensated for other transfers by capital approval. For example, in Chilliwack and Victoria, districts were compensated in capital approvals equivalent to the Local Capital contribution to the appraised value of the project. However, since the projects would have gone forward regardless, the defendants' view is that the \$20 million was a notional amount and was largely irrelevant.

[3973] I agree with the defendants. SD39-Vancouver would have received funding for its two projects at UBC regardless of whether École Élémentaire Anne-Hébert was transferred to the CSF. While earlier project approvals were tied to appraised values, they also often included approvals for projects that the Ministry would not have otherwise supported. In this particular instance, the amount included in the Project Agreements for the transfer of École Élémentaire Anne-Hébert was truly notional.

[3974] The CSF agreed to the transfer of École Élémentaire Anne-Hébert, but insisted that École Élémentaire Anne-Hébert would require renovations if the CSF were to acquire it. The CSF provided the Ministry with feasibility work, which Ministry staff considered in June and July of 2009. Ministry staff foresaw they could not fund the Building Condition Projects because of a lack of capital funding generally, and for Building Condition Projects specifically. When it was made clear to Mr. Bonnefoy that renovations would not be linked to the acquisition, he accepted the school and planned to continue to seek renovations to the school in a future capital plan, as Mr. Stewart encouraged him to do.

[3975] After the CSF acquired École Élémentaire Anne-Hébert, it began requesting Building Condition Projects for that area. In 2009, it requested a renovation to the school as a relatively low-priority project. With the start of the litigation, the CSF began requesting the École Élémentaire Anne-Hébert Replacement Project as a number #1 priority project, with accelerated funding. The CSF also requested renovations to the school as a lower-priority project, but as an alternative to full replacement.

[3976] These projects were not approved. Mr. Miller advised that the Ministry did not support the CSF's requests for renovations and a replacement to École Élémentaire Anne-Hébert because the Ministry did not receive any Capital Envelopes for Building Condition Projects. Instead, the Province was focused on Seismic and Expansion Projects starting in 2011.

[3977] In the interim, the CSF has taken some steps to improve the building condition of École Élémentaire Anne-Hébert. Since 2010, the CSF has spent about \$1.3 million on renovations and portable additions at École Élémentaire Anne-Hébert. The renovations have ranged from repairing the roof, to removing carpets, to renovating the HVAC system, to dividing rooms to create special education spaces.

[3978] The CSF only began requesting a second school for Vancouver (East) that would split the catchment area in September 2013. This was at the start of the first

of two years where the CSF saw rapid enrolment growth; the CSF did not plan in advance for that rapid enrolment growth. As I mention in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), the CSF also refused space that was offered to it by SD39-Vancouver in Vancouver (East), which it could have used to relieve its problems with overcrowding at École Élémentaire Anne-Hébert. Overall, the lack of additional space on the in Vancouver (East) stems from the CSF's failure to plan appropriately and seek new space in Vancouver (East). Adding space in Northeast Vancouver has simply not been a priority for the CSF. Given that the Ministry was not aware of the CSF's needs in the area until 2013, the Ministry's policies and practices did not materially contribute to the lack of additional space.

[3979] The facility condition, though, arises out of the fact that the CSF acquired a surplus majority school and that the Minister did not fund renovations at the time of the transfer. It therefore arises out of two aspects of the Ministry's capital funding system: the policy whereby School Acquisition Projects proceed in two phases (a transfer followed by renovations) and the lack of funding for Building Condition Projects since about 2005.

F. Justification

[3980] There are two elements of the claimed breach for Vancouver (East).

[3981] The first issue is the quality of the facilities at École Élémentaire Anne-Hébert. I conclude that École Élémentaire Anne-Hébert is able to offer a substantively equivalent global educational experience to that offered to the majority in Vancouver (East). The current situation arises out of the two-phase School Acquisition framework and the lack of funding for Building Condition Projects since 2005. If I had found that the framework resulted in a substandard elementary educational experience, then it would have been open to the Ministry to justify that breach pursuant to s. 1 of the *Charter*. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed the justification question. Since I

set out the framework for crafting remedies in Chapter X, Remedies, I do not find it necessary to address what remedy would have been appropriate to respond to the circumstances surrounding elementary education in Southeast Vancouver.

[3982] The other alleged breach relates to the lack of space to accommodate students in the northeast quadrant of Vancouver. I find that rightsholders in that area are not receiving the space for 25 to 40 students that the numbers currently warrant.

[3983] As I outline in Chapter IX, Justification, the section 1 justification test focuses on whether the “infringing measure” can be justified. In this instance, the “infringing measure” seems to be the CSF’s failure to plan for a school and accept leased space in the area. There was no argument that the CSF’s decisions ought to justify any rights breach. In light of that, I cannot say whether any breach in the Proposed Northeast Vancouver Catchment Area is justified.

G. Remedy

[3984] The plaintiffs submit that the appropriate and just remedy for the deficient facilities at École Élémentaire Anne-Hébert is the construction of the École Élémentaire Anne-Hébert Replacement Project. To address overcrowding and transportation issues, they also argue that an appropriate remedy is to order the immediate construction of the Northeast Vancouver Elementary Project.

[3985] As I outline in Chapter X, Remedies, the most appropriate and just remedy for the plaintiffs’ Community Claims will typically be a declaration of the positive rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches. With respect to Vancouver (East), the Ministry could remedy the situation in a number of ways. It could certainly meet its obligations by building the Northeast Vancouver Elementary Project. It could also fund a long-term lease or acquisition of an appropriately-sized

SD39-Vancouver facility. Or it could fund a replacement of École Élémentaire Anne-Hébert with higher capacity.

[3986] Moreover, in my view, given that the CSF is responsible for the breach in Northeast Vancouver, no orders should issue against the defendants for the situation there.

[3987] As a result, I find that an appropriate declaration is one that confirms the CSF's ability to act within its jurisdiction to remedy the situation. I declare as follows:

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

[3988] The CSF and the Ministry will need to work together to achieve that objective. As I develop further in Chapter XXXV, Leases, the Ministry must fund the CSF's reasonable lease costs for that programme provided that the CSF complies with the valid provincial conditions for securing that funding.

[3989] As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[3990] Further, given that several *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and a Capital Envelope for the CSF.

H. Summary

[3991] I conclude that the number of children likely to take advantage of a CSF programme at a newly-constructed École Élémentaire Anne-Hébert on the same site would be about 215 students. That number falls at the high end of the sliding scale, warranting homogeneous facilities that are substantively equivalent to those afforded to the majority on the east side of Vancouver.

[3992] In the northeast quadrant of Vancouver, I consider that the CSF can reasonably expect 25 to 45 students to attend an elementary programme in its first three or so years. Looking into the future, in the best possible circumstances enrolment could grow to about 270 students, or about an 85% participation rate. Thus, the numbers will initially fall at the low end of the sliding scale, warranting instruction, and then grow to the high end of the sliding scale, warranting substantively equivalent facilities.

[3993] Overall, I find that École Élémentaire Anne-Hébert offers an equivalent global educational experience to that afforded at minority language schools, particularly if the CSF opens a new programme in the northeast quadrant of Vancouver. However, given long transportation times and overcrowding at École Élémentaire Anne-Hébert, students living in the northeast quadrant of Vancouver are not receiving the minority language educational facilities that they are entitled to; it is within the CSF's jurisdiction to remedy that breach.

[3994] The facility condition issues at École Élémentaire Anne-Hébert arise from the fact that the CSF acquired an older school and that the Ministry did not fund renovations at the time of the transfer. The lack of funding for renovations related to two aspects of the Ministry's capital funding system: the fact that School Acquisition Projects proceed in two phases (a transfer followed by renovations) and that the Province has not devoted funds to Building Condition Projects since about 2005. However, since the facilities are generally equivalent to those afforded to the majority, there is no breach of the *Charter* in connection with that aspect of the funding system.

[3995] With reference to the overcrowding at École Élémentaire Anne-Hébert and the lack of space in northeast Vancouver, I find that the breach is caused by the CSF's failure to plan appropriately and to accept space that was offered to it in Vancouver (East). The CSF does not argue that breach is justified. I find that the most appropriate remedy is a declaration confirming the CSF's jurisdiction to act within its jurisdiction to pursue a programme in Vancouver (East).

XXVI. ÉCOLE ÉLÉMENTAIRE ÉCOLE VICTOR-BRODEUR (VICTORIA)

[3996] Victoria, the capital city, is located to the southeast of Vancouver Island. There, the CSF operates École Victor-Brodeur, a homogeneous, French-language Kindergarten to Grade 12 school. École Victor-Brodeur is British Columbia's longest-running Francophone elementary/secondary programme. It has operated on the site of the former Harbourview Elementary since about the mid-1980s. The Province acquired École Victor-Brodeur for the CSF from SD61-Greater Victoria in about 1998. It was rebuilt as a Building Condition Project in the early 2000s, and opened again in about 2007.

[3997] The CSF also operates two leased homogeneous schools in the greater Victoria region. Since 2012, the CSF has leased the former Lampson Elementary from SD61-Greater Victoria, which it uses as additional secondary school space (the "Lampson Annex"). Since 2014, it has also leased the former Sundance Elementary from SD61-Greater Victoria, which it uses as a homogeneous primary school serving children from the east side of the Greater Victoria region (the "Sundance Annex").

[3998] In 2014/15, 714 students were enrolled in the CSF's three Victoria schools. There is no evidence dividing enrolment between those schools.

[3999] The CSF proposes to acquire four sites and build two schools in the Victoria area, and divide the current École Victor-Brodeur catchment area into four catchment areas. The CSF proposes to build a new K-7 school on the east side of the catchment area (the "East Victoria Elementary Project"), which would serve students living in an area bordered to the north by Cordova Bay Road and Royal

Oak Drive, to the west by the Patricia Bay Highway, Tillicum Road, to the east by the Gorge Waterway and to the south by the Juan de Fuca Strait (“East Victoria Catchment Area”). In 2014, the CSF estimated that project would cost more than \$14 million, excluding the cost of acquiring a site and preparing it for construction.

[4000] The CSF also plans to build a new K-7 school on the west side of the catchment area (the “West Victoria Elementary Project”), which would serve a catchment area bordered to the north by Lubbe Lake, to the west by Anderson Road, to the east by Highland Road and Price Road, and to the south by the Juan de Fuca Strait (the “West Victoria Catchment Area”). In 2014, the CSF estimated that project would cost more than \$14 million, excluding the cost of acquiring a site and preparing it for construction.

[4001] To the north of the current catchment area, the CSF proposes to acquire a site for the eventual construction of a new school once the numbers so warrant (the “North Victoria Site Project”). That school would serve the catchment area to the north of École Victor-Brodeur bordered to the north by Lands’ End Road, to the east by Haro Strait, to the west by Saanich Inlet and to the south by Royal Oak Road (the “North Victoria Catchment Area”).

[4002] The CSF also proposes to acquire Lampson Elementary (the “Lampson Elementary Project”) and retain École Victor-Brodeur to serve as a secondary school for students from all elementary schools, and to serve elementary students in the south-central area of Victoria, serving a catchment area bounded to the North by Royal Oak Road, to the South by the Juan de Fuca Strait, to the east by the Patricia Bay Highway and to the West by Highland Road and Price Road (the “Central Victoria Catchment Area”).

A. Evidence

[4003] École Victor-Brodeur was described by Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison. Mr. Miller, Mr. Palmer and Mr. Stewart also provided evidence about their dealings with the CSF in Victoria.

[4004] Additionally, the Court heard evidence from several educators who worked at École Victor-Brodeur. Ms. Asselin, the current principal at École Élémentaire Anne-Hébert (Vancouver (East)), was involved in the creation of the Francophone preschool at École Victor-Brodeur and taught there for 27 years, beginning in the late 1980s or early 1990s. Ms. Chagnon, the current principal at École Élémentaire Rose-des-Vents (Vancouver (West)), taught at École Victor-Brodeur from 1990 to 1996.

[4005] Ms. Bernier is the current principal at École Victor-Brodeur. Ms. Bernier moved to Victoria with her family in 2006 or 2007, and began teaching learning assistance and in the secondary programme at École Victor-Brodeur in the 2007/08 school year. She became the principal at École Victor-Brodeur in 2014/15.

[4006] The Joint Fact Finder's Report also provides evidence concerning École Victor-Brodeur and comparator schools. Members of the Fact-Finding Team relied on Ministry and District data, and visited a total of 12 schools. They used a regional mapping programme to determine site sizes and to show the location of portable classrooms. I find this source of evidence to be highly reliable.

B. History and Context

1. The CSF's Victoria Catchment Area

[4007] According to Dr. Kenny, French was widely spoken in Victoria's early days, and Francophones were active in the city's economic and cultural life. In the 1800s, Francophones in the city had an independent school, a newspaper, a choir, and a benevolent society with a French-language hospital. The 1900s saw the creation of a local chapter of an Alliance Française, and a French-language social club that was instrumental in the creation of a French-language Catholic parish in 1957. The parish contributed to Victoria's Francophone community life, leading to another social club, a new Francophone choir, a folkloric dance troupe, a Francophone theatre company, a café and a French-language book store.

[4008] With respect to education, Dr. Kenny observed that Catholic missionaries in Victoria taught in French during the colonial period, but that the schools rapidly transitioned to English as the Province's demographics changed. By the 1970s, all education in Victoria was in English with the sole exception of a French immersion programme.

[4009] In response to requests from French-speaking military families, the Department of National Defence allowed the Canadian Armed Forces Base in Esquimalt to start its own French-language school in 1973 or 1974. The school was named for Admiral Victor-Gabriel École Victor-Brodeur, and was initially housed in his former residence. Ten years later, École Victor-Brodeur outgrew its building and moved into the former Harbour View Elementary on Head Street in Victoria.

[4010] Meanwhile, non-military families lobbied for a Programme Cadre, which opened at Uplands School one year after Province announced the programme.

[4011] In 1985, Dr. Kenny explained, École Victor-Brodeur and the Programme Cadre amalgamated into British Columbia's second and largest homogeneous French-language school, with 207 students. Over the next two years, it also became the first to offer secondary programming to students in the eighth and ninth grades, and to all grades by 1995. The Ministry funded housing costs for secondary students from other areas of the province to live with host families and attend École Victor-Brodeur.

[4012] Ms. Asselin also gave evidence about the Programme Cadre in Victoria in the mid-1980s. When she began teaching there, the facility was homogeneous, except for an annex that was used by an Anglophone Montessori preschool. The school had three vacant classrooms, which were used by a Francophone daycare and preschool.

[4013] As a Programme Cadre, École Victor-Brodeur operated under the auspices of SD61-Victoria. Ms. Chagnon explained that SD61-Victoria wanted to support École Victor-Brodeur, but did not always understand its special needs. For example,

École Victor-Brodeur staff had to justify programmes like Francisation. Further, in the early days, École Victor-Brodeur did not receive enough funding to offer a full complement of secondary course for its small cohorts of secondary students.

[4014] According to Ms. Chagnon, when she first arrived at École Victor-Brodeur, a majority-language independent school operated in one wing of the building. École Victor-Brodeur asked for separate recess blocks because Francophone students were speaking English during recess. The resulting dispute garnered some media attention. The dispute was eventually resolved by way of a successful mediation between École Victor-Brodeur and the independent school.

[4015] Ms. Chagnon also confirmed that in the pre-CSF days, the Francophone community used some space at École Victor-Brodeur. She explained that the school was so large that many Francophone organizations could use the school without hindering or disrupting class activities.

[4016] In the 1990s, Ms. Chagnon explained, École Victor-Brodeur served students from Victoria and all of its surrounding areas. About 20 or 30 percent of École Victor-Brodeur's population came from the military base in Esquimalt. Cohorts saw a small drop in enrolment between Grades 3 and 4 (the move from primary to intermediate grades) and Grades 7 and 8 (the move from intermediate to secondary grades).

[4017] Today, the CSF owns and operates École Victor-Brodeur as a homogeneous minority language elementary/secondary (K-12) school, as well as the Lampson Annex and the Sundance Annex which operate in space leased from SD61-Greater Victoria. École Victor-Brodeur has offered a French-language preschool since 1989/90, and a French-language daycare since 1990/91.

[4018] The CSF's Victoria catchment area includes the entire greater Victoria region. It includes a number of suburban communities that form part of Greater Victoria. To the north, it includes Highlands, Saanich, Central Saanich, North Saanich and Sidney. In the south-central area of the catchment area one finds View

Royal, Esquimalt and Victoria proper. Sooke, East Sooke, Metchosin, Langford and Colwood are located to the west, and Oak Bay is located to the east. Its territory thus consists of the entire territory of SD61-Greater Victoria, SD62-Sooke and SD63-Saanich (the “Current École Victor-Brodeur Catchment Area”).

[4019] SD61-Greater Victoria operates 28 elementary schools, 10 middle schools and seven secondary schools. It has nine French immersion programmes at the elementary level and 10 at the secondary level.

[4020] SD62-Sooke operates 17 elementary schools, three middle schools and three secondary schools. It offers French immersion programmes at three elementary and two secondary schools.

[4021] SD63-Saanich operates nine elementary schools, three middle schools and three secondary schools. Its French immersion programmes are offered in two elementary and two secondary schools.

2. Conclusions

[4022] When analyzing the Victoria claim, I will take into account the catchment area’s urban make-up, as well as the suburban communities that École Victor-Brodeur also serves. I will also take into account the historic, strong Francophone minority presence in the region, and the need for remediation. It is also relevant that Victoria has a longstanding tradition of Francophone minority education dating back much farther than in many other communities in the province. École Victor-Brodeur also competes with a number of French immersion programmes and the wide array of programming available at majority schools.

[4023] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for

attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[4024] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[4025] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[4026] The evidence concerning the universe of eligible students is broken down by catchment area for the CSF's proposed new schools.

[4027] With connection to the East Victoria Elementary Project, Dr. Landry estimated that in 2011 there were 372 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder parent living in the proposed catchment area. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 424 such children living in the catchment area, which is growth by about 14%. I do not find Dr. Landry's counts of 2,150 children of non-Francophones in the Knowledge category, and 200 in the Regular Home Use Category, to be a reliable proxy for the number of Education or Sibling Rightsholders in the East Victoria Catchment Area.

[4028] Turning to the West Victoria Elementary Project, Dr. Landry estimated that in 2011 there were 332 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area, which Mr. McRae forecasted would grow to 460 by 2023. Thus, Mr. McRae forecasted growth by nearly 40% in the area. I do not find Dr. Landry's counts of 595 children in the

Knowledge Category, and 170 in the Regular Home Use Category, to be a reliable proxy for the number of Education or Sibling Rightsholders in the West Victoria Catchment Area.

[4029] The census data concerning the North and Central Victoria Catchment Areas was reported by Dr. Landry's research officer, Ms. Josée Guinard Noël. She counted 135 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder Parent living in the North Victoria Catchment Area in 2011. She found an additional 236 such children living in the Central Victoria Catchment Area. I do not find her counts of children of non-Francophones in the Knowledge Category (645 children in the north, 465 in the central zone) or the Regular Home Use Category (130 children in the north, 110 in the central zone), to be helpful evidence.

[4030] Mr. McRae's work does not distinguish between the two catchment areas. He projected that the population in the two catchment areas, combined, will grow from 371 children of Mother-tongue Rightsholders in 2011 to 410 children by 2023. Assuming that the growth is split proportionately, the forecasted universe in the North Victoria Catchment Area would be about 149 children, while the universe in the Central Victoria Catchment Area would be 261 children.

[4031] Finally, concerning the total universe of secondary students in the Current École Victor-Brodeur Catchment Area, Dr. Landry estimated that in 2011 there were 493 secondary-age children (age 14-17) with a Mother-Tongue Rightsholder Parent living in the proposed catchment area. Mr. McRae forecasted that by 2023 there would be 525 such children living in the catchment area. I do not find Dr. Landry's counts of 2,242 children of non-Francophones with knowledge of French, and 209 who spoke French regularly at home, to be a reliable proxy for the number of Education or Sibling Rightsholders in the Current École Victor-Brodeur Catchment Area.

[4032] To summarize, I find that a reasonable proxy for the total universe of rightsholders in the Current École Victor-Brodeur Catchment Area is about 1,294 elementary-age children: 424 in the East Victoria Catchment Area, 460 in the West

Victoria Catchment Area, 261 in the Central Victoria Catchment Area and 149 in the North Victoria Catchment Area. At the secondary level across all four catchment areas, the proxy universe is about 525 students age 14-17. I consider these numbers to be a proxy because they likely omit some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[4033] École Victor-Brodeur and its two annexes serve students in Kindergarten through Grade 12. Enrolment at École Victor-Brodeur has grown from 333 students in the 1996/97 school year, to 714 in the 2014/15 school year.

[4034] The data show that enrolment at École Victor-Brodeur was relatively stable from 1997/98 until about 2004/05, when enrolment was consistently within five or six students of 350 in every year except 2001/02 and 2003/04, when there were 372 students. Beginning with the 2005/06 school year, enrolment has increased every year by an average of 7.2%. As a result, enrolment has more than doubled since the CSF took jurisdiction in Victoria.

[4035] Notably, the period of enrolment growth coincides with the announcement of the replacement of the old École Victor-Brodeur School with a new school in 2004, its construction, and its opening in January 2007. The CSF saw its largest annual increase in enrolment, growth by 16.2%, in 2008/09, shortly after École Victor-Brodeur occupied the new building.

[4036] Enrolment growth appears to have slowed in the past two years. Enrolment grew by 47 students in 2013/14. The evidence shows that between April 2013 and December 2014, 12 students were admitted to École Victor-Brodeur pursuant to the Francophile and Ancestry clauses of the CSF's Expanded Admissions Policy. When those students are removed from the 2013/14 enrolment growth, enrolment grew by about 5.3%. In 2014/15, enrolment grew by only 1.7%. Of course, it cannot be said

whether this represents the start of a long-term trend, or whether the lack of growth is related to the fact that the schools were reaching capacity and were deterring students from enrolling at École Victor-Brodeur.

[4037] Usually, I would remove the 12 children of non-rightsholders from the calculation of the known demand. However, since they make up less than 2% of the CSF's Victoria population, I will not do so in this instance.

[4038] The plaintiffs also provide evidence dividing current enrolment between its four proposed catchment areas. It suggests that 147 current École Victor-Brodeur elementary students (K-6) live in the East Victoria Catchment Area. One hundred and thirty-five live in the proposed West Victoria catchment area, 174 in the central Victoria catchment area, and 17 in the North Victoria Catchment Area.

[4039] Unfortunately, the enrolment data broken down by catchment area concerns the number of children in Kindergarten through Grade 6. The CSF plans for its Victoria elementary schools to serve children in Kindergarten through Grade 7. Dr. Landry likewise reports a universe of students that corresponds with children in Grade 7. Thus, I consider all these numbers to slightly underreport current demand for each of the proposed programmes.

[4040] At the secondary level, the current École Victor-Brodeur Catchment Area, demand for Grade 8-12 instruction is 183 students.

3. The Uptake Rate

[4041] When determining the number of children likely to take advantage of a programme, I will consider the potential for growth, with regard to the size and concentration of the minority language community, other educational programmes in the community and the historic uptake rate in the community, as well as the experience in surrounding communities with similar characteristics.

[4042] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that

the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[4043] The plaintiffs say that the CSF wants to build the East and West Victoria Elementary Projects, each with nominal capacity for 360 students or operating capacity for 336 students (and room for 15 divisions), and room for a future addition for secondary space to prevent a surge of secondary students from overwhelming École Victor-Brodeur. Together with the Lampson Annex and École Victor-Brodeur, they would have four schools, which they argue are warranted. In the plaintiffs' submission, that request would give the CSF capacity falling between the "known demand" and the total universe of persons. They submit that in light of the numbers, there are many more than 17 K-7 students that would be likely to attend a school in the North Victoria Catchment Area, warranting a site in there for a future school.

[4044] The defendants suggest those requests are unreasonable by focusing on participation rate. They note that, based on the total capacity sought in greater Victoria (1,572 students), the CSF would need to achieve a participation rate of 83% by 2023, roughly double the CSF's current enrolment.

[4045] I agree with the defendants. It is very unlikely that the CSF will double its enrolment by 2023 and fill all of its proposed schools. As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, the CSF's enrolment projections must be treated with extreme caution. In my view, their requests are not realistic.

[4046] I address the potential enrolment for the East and West Victoria Elementary Projects, the Lampson Acquisition Project and the North Victoria Site Project separately.

[4047] Currently, 147 elementary (K-6) students in the East Victoria Catchment Area attend École Victor-Brodeur. Based on the proxy universe of 424 eligible children age 5-13, the proxy participation rate of students from the Proposed East Victoria Catchment Area is more than 35% (given Grade 7 students are missing from the total demand). With connection to the West Victoria Catchment area, the 135 (K-6) students in the area make up more than 29% of the 460-children proxy universe. In the North Victoria Catchment Rate the proxy participation rate is lower, with the 17-student enrolment reflecting more than 11% of the 149-student proxy universe.

[4048] The current proxy participation rates in the East and West Victoria Catchment Areas is moderate to low, at around 30% from each catchment area. The proxy participation rate from the North Victoria Catchment Area is considerably lower, with just 11% of children choosing to participate. Parents from all three proposed catchment areas have access to neighbourhood schools and French immersion programmes in the communities where they reside. They must also transport children to school by bus. As I outline below, travel times from the communities on the north, east and west boundaries of the Current École Victor-Brodeur Catchment Area can be quite long. Thus, the lack of a CSF school in the communities surrounding Victoria proper likely deters some parents from sending their children to École Victor-Brodeur. On the other hand, students also had access to a brand new, state-of-the-art facility, which might have enticed some parents from those catchment areas.

[4049] The CSF has opened a new programme to divide a catchment area and provide a local option in a suburban community once before, in Richmond. Rightsholders' children from Richmond attended École Élémentaire Anne-Hébert (Vancouver (East)). Following demand from Richmond parents, École Élémentaire

des Navigateurs opened in leased, heterogeneous space at Diefenbaker Elementary in Richmond with 10 students in Kindergarten and Grade 1 in 2001/02. In 2003/04, with 34 students in Kindergarten to Grade 4, it moved to a leased homogeneous facility at Kilgour Elementary. By 2007/08, it offered Kindergarten through Grade 6, and served 90 children. Its 2014/15 enrolment was 127 children in Kindergarten to Grade 7.

[4050] As I explain in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), the proxy universe of rightsholders in Richmond is about 300 elementary-age children. Assuming the universe remained constant, the participation rate in Richmond grew to about 33% of the proxy universe in Kindergarten to Grade 6 in the programme's first 10 years. By 2014/15, the proxy participation rate of Richmond rightsholders at École Élémentaire des Navigateurs reached about 42%, in leased, homogeneous space that is generally equivalent to that of the majority subject to long travel times. I find that with construction of a new, homogeneous school facility, its enrolment could be expected to increase to about 55%.

[4051] The situation in Richmond is instructive. It shows that even where a new programme is being created to give a local community on the outskirts of a metropolitan centre a closer homogeneous school, the programme tends to grow gradually over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. This is also what the CSF proposed to do when it first considered opening a programme in Burnaby: it would begin with a few grades and progressively add more. Thus, the number of children will warrant different facilities and amenities as the proposed Victoria projects grow.

[4052] I believe that the East and West Victoria Projects will grow in a similar pattern to the growth at École Élémentaire des Navigateurs. However, the absolute number of students attending those programmes will differ. Victoria has a greater number of rightsholders and a stronger Francophone community than does Richmond. This weighs toward the CSF programmes in greater Victoria achieving a higher participation rate than École Élémentaire des Navigateurs.

[4053] Notably, with a new facility, École Victor-Brodeur was able to achieve a participation rate of about 65% from the Central Victoria Catchment Area at the elementary level in the eight years following construction of a state-of-the-art new facility. In my view, it is likely that the CSF's proposed new programmes in the area would see a similar result.

[4054] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect 30 to 50 students to attend an elementary programme in each of the East and West Victoria Catchment Areas in the first three years of those programmes. In the North Victoria Catchment Area, the number in the first few years would be smaller, at about 10 to 15 students.

[4055] From there, enrolment will grow. I project that, with a newly-built, homogeneous facility, the East Victoria Elementary Project could grow up to about 275 students in its first 10 years. The West Victoria Elementary Project could likewise grow to about 299 students. The North Victoria Elementary Project would likely achieve about 98 students. With those numbers, the CSF would achieve about a 65% proxy participation rate for each community: similar to what École Victor-Brodeur achieved of students from the Central Victoria Catchment Area, and more growth than École Élémentaire des Navigateurs achieved in a similar timeframe.

[4056] That leaves the question of enrolment in École Victor-Brodeur's and Lampson Annex's elementary and secondary programmes.

[4057] About 174 elementary students (K-6) from the Proposed Central Victoria Catchment Area attend École Victor-Brodeur. Based on the proxy universe of 261 eligible children age 5-13, the proxy participation rate for students from the Proposed South Victoria Catchment Area is more than 67% (given that Grade 7 students are missing from the total demand). At the secondary level, École Victor-Brodeur has 183 students and a total proxy universe of 525 students, giving it a proxy participation rate of about 35%.

[4058] As I see it, at the elementary level, the 65% proxy participation rate is strong. The amenities at École Victor-Brodeur are excellent. The only anticipated change to the programme is that the building would become less crowded. In my view, there is limited room for further growth of that participation rate; the participation rate is near its peak. I project that enrolment is likely to grow to about 182 students, or to about a 70% participation rate. When the current students from the North Victoria Catchment Area are included in that number, the enrolment can be expect to remain at about 200 students.

[4059] At the secondary level, the proxy participation rate from across the Current École Victor-Brodeur Catchment Area is just 35%. As I detail below, the CSF has chosen to accommodate École Victor-Brodeur secondary students at Lampson Annex, an elementary school. With construction of the East and West Victoria Projects, there would be relief for that overcrowding, allowing those students to retain their space at École Victor-Brodeur. In that case, the participation rate might increase slightly. However, many students will still face long travel times to and from the Proposed East Victoria, West Victoria and North Victoria catchment areas. Further, the CSF will always see significant attrition as students reach secondary grades. As a result, the proxy participation rate will not increase by much. As I see it, enrolment is likely to grow to about 210 students, or about 40% of the proxy participation rate.

D. Entitlement

[4060] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[4061] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[4062] In this case, the appropriate comparator schools for École Victor-Brodeur and the proposed Victoria programmes are all those in SD61-Greater Victoria, SD62-Sooke and SD63-Saanich. The maps show that there are a number of rightsholder parents sending their children to École Victor-Brodeur from across those three majority districts. Thus, all those schools are the local alternatives that parents would consider when making enrolment decisions for their children.

2. Location on the Sliding Scale

[4063] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[4064] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[4065] The plaintiffs argue that the numbers in Victoria fall at the high end of the sliding scale, which the defendants seem prepared to admit.

[4066] Schools in the East Victoria Catchment Area have been built to an average operating capacity of 357 students. Four of 19 schools have operating capacity for less than 300 students, and another seven have operating capacity for fewer than 350 students. Six of 19 schools have enrolment of fewer than 275 students. Another five have enrolment less than 350 students. Average enrolment is 330 students.

[4067] In the West Victoria Catchment Area, elementary schools have been built to an average operating capacity of 294 students. Ten of 17 schools have operating capacity for less than 300 students. Average enrolment in those schools is about 259 students. Twelve of 17 comparator schools have fewer than 300 students enrolled.

[4068] I have determined that about 30 to 50 students are likely to attend each of the East Victoria and West Victoria Elementary Projects in the near-term future. In the best possible circumstances, enrolment could grow to about 275 students in the East Victoria Catchment Area and 299 students in the West Victoria Catchment Area. Taking into account enrolment and capacity at comparator schools, I find that when those two programmes start, they will be entitled only to instruction in a series of classrooms with access to facilities required for an elementary education: at the lower end of the sliding scale. As enrolment grows, the numbers will be similar to the enrolment and capacity at comparator schools, and come to warrant facilities at the high end of the sliding scale: distinct, homogeneous facilities that offer an educational experience equivalent to what is available at majority schools.

[4069] In the Central Victoria Catchment Area, the CSF can anticipate enrolment of about 182 students. For the foreseeable future, the CSF also plans to accommodate students from the North Victoria Catchment Area at École Victor-Brodeur, bringing total anticipated enrolment to about 200 students. At the nine comparator schools in the Central Victoria Catchment area, the average operating

capacity is about 316 students, and the average enrolment is about 271 students. Two schools have an operating capacity and enrolment of fewer than 250 students. Given that there are a few schools that will be of a similar size to École Victor-Brodeur's elementary programme, I conclude that the numbers once again fall at the highest end of the sliding scale, warranting homogeneous, substantively equivalent facilities.

[4070] Finally, the plaintiffs seek a site in the North Victoria Catchment Area. I conclude that only 10 to 15 students from that catchment area are likely to attend a CSF programme in the North Victoria Catchment area in its first few years. Then, enrolment might grow with time to about 98 students. Of the eight schools in the North Victoria Catchment Area, the average operating capacity was 340 students and the average 2014/15 enrolment was 314 students. The smallest school was built to a capacity of 199 students and had 2014/15 enrolment of 154 students. In light of the differences between the sizes of comparator schools and the number of children that could be expected to enrol in a programme in the North Victoria Catchment Area, I conclude that the number of children will only reach the middle of the sliding scale: warranting instruction in a series of classrooms with access to facilities proportionate to those afforded to the majority.

[4071] Turning to the secondary component, no secondary or middle schools in the Current Victoria Catchment Area have been built to an operating capacity of fewer than 400 students. The average operating capacity at comparator schools is 706 students, and average enrolment was 668 students. Two middle schools had fewer than 300 students enrolled in 2014/15. École Victor-Brodeur's anticipated secondary programme falls short of warranting a homogeneous secondary school equivalent to those afforded to the majority. Of course, that is not what the CSF seeks. Given the comparable numbers between École Victor-Brodeur's anticipated enrolment and Rockheights Middle, I conclude that the number of secondary students in Victoria falls at the middle to high range of the sliding scale, warranting homogeneous French-language instruction and access to facilities proportionate to those at smaller middle schools in the Greater Victoria region.

3. Global Educational Experience

[4072] The plaintiffs submit that in Victoria, the issue is whether the numbers warrant at least four educational facilities (including the Lampson Annex) for elementary instruction, and one centralized secondary school, or whether the numbers warrant only more concentrated facilities. The plaintiffs say the schools they seek are warranted due to long transportation times and overcrowding at École Victor-Brodeur. The plaintiffs do not otherwise challenge the global educational experience at École Victor-Brodeur.

a) Transportation Times

[4073] The plaintiffs argue that long bus ride times in Victoria have an assimilative effect. They point out a correlation between longer ride times and lower participation rates in its proposed North, East and West Victoria Catchment Areas.

[4074] The highest participation rate in Victoria is in the Central Victoria Catchment Area, where students have the shortest travel times to school. The participation rates in the North, East and West Victoria Catchment Areas are lower, corresponding with longer bus ride times.

[4075] École Victor-Brodeur students live farther from École Victor-Brodeur than the closest majority school. Students in the Central Victoria Catchment Area are in the closest range, averaging 3.3 km from their primary address to École Victor-Brodeur, and 2 km from their homes to the nearest majority school. Students in the East Victoria Catchment area live an average of 6.4 km from École Victor-Brodeur, and 1.5 km from the closest majority school.

[4076] The disparity is much greater for students in the North and West Victoria Catchment Area. Students in the North Victoria Catchment Area live an average of 15.4 km from École Victor-Brodeur, and 2.8 km from the closest majority school. Students in the West Victoria Catchment Area live an average of 17.3 km from École Victor-Brodeur, and 3.4 km from the nearest majority school.

[4077] In 2012/13, 72% of École Victor-Brodeur's population (473 of 655 students) took the bus to school. Seventy-four elementary students and fifty-two secondary students lived within École Victor-Brodeur's walk limits.

[4078] By comparison, no SD61-Greater Victoria schools provide bus transportation services. Seven schools in SD62-Sooke and five in SD63-Saanich bus students to school. On average, 32% of the students at those schools took the bus to school; the highest busing rate was at Journey Middle in SD62-Sooke, where 49% of students took the bus to school.

[4079] The average bus ride time for École Victor-Brodeur students in 2012/13 was 49 minutes. The average ride time to the 12 majority schools that transport students was 27 minutes. Two schools in SD63-Saanich (Dunsmuir Middle and Journey Middle) and one in SD62-Sooke (Belmont Secondary) have an average ride time of 40 minutes.

[4080] The plaintiffs argue that many students attending École Victor-Brodeur have unreasonably long bus times. In 2012/13, 22% of students bussed to school (105 of 473) had ride times of 45 minutes or longer, excluding the time spent walking to a central pick-up point and waiting for the bus. Ms. Bernier advised that her children have 40-minute bus ride times despite living about three kilometres from school.

[4081] Broken down by area, 51% (69 of 134) of those students that travelled to school by bus from the East Victoria Catchment Area travelled for 30 minutes or longer. Twenty-four of those students were in elementary grades, and would experience shorter bus times if the East Victoria Elementary Project went forward. In the West Victoria Catchment Area, 69% (107 of 154) of those students that travelled to school by bus had ride times of 30 minutes or more; 56 of those students were in elementary school. Finally, in the proposed North Victoria Catchment Area, 75% (24 of 32) students that travelled to school by bus had ride times longer than 30 minutes; all of those students attended elementary school.

[4082] Ms. Bernier has received many complaints about bus travel times. Some parents have complained about lengthy walks to central pick-up points. Ms. Bernier was unable to address those complaints. There have also been behavioural issues with children on buses.

[4083] CSF district-level administrators have also received complaints from parents about bus travel times. In January 2013, the CSF received a letter from the École Victor-Brodeur APÉ complaining about the length of bus routes. In response, Mr. Allison placed blame for the long travel times firmly on a lack of funding.

[4084] According to Mr. Allison, the CSF attempted to address the parents' complaints by splitting an 80-minute bus route between École Victor-Brodeur and Sooke, a community to the far East of the Current École Victor-Brodeur Catchment Area, which transported 68 students. According to Mr. Allison, despite that change, the bus route is still too long. In Mr. Allison's view, the only way to address long bus rides times is by starting a new school.

[4085] Despite the CSF's actions, the CSF continued to receive complaints from the École Victor-Brodeur APÉ, which accused the CSF of not increasing its transportation spending at the same rate as enrolment has grown at École Victor-Brodeur. Mr. Allison acknowledged that the CSF has not increased its transportation spending commensurate with its enrolment growth; however, he attributed that decision to a lack of an increase in the funding that he believes is directed toward transportation.

b) Overcrowding

[4086] The plaintiffs take the position that École Victor-Brodeur is overcrowded. The plaintiffs submit that, given that SD61-Greater Victoria used about 72.5% of its secondary capacity, SD61-Greater Victoria secondary students do not face the same space-related challenges that secondary students at École Victor-Brodeur do. The defendants counter that École Victor-Brodeur and the Lampson Annex,

combined, have operating capacity for 781 students. Thus, they say that École Victor-Brodeur can more than accommodate its 714-student enrolment.

[4087] According to the Joint Fact Finder's Report, École Victor-Brodeur has operating capacity for 517 students: 38 Kindergarten, 289 elementary and 200 secondary students. Given its 714-student enrolment, École Victor-Brodeur is operating with 197 students more than its capacity, or at 138% of its operating capacity.

[4088] Of course, this does not take into account the space that the CSF now leases at the Lampson and Sundance Annexes.

[4089] The CSF began leasing part of Lampson Elementary in the 2012/13 school year, and took over the entire building in 2015/16, the same year it began leasing Sundance Elementary. According to the Joint Fact Finder's Report, Lampson Elementary has operating capacity for 264 elementary students. The CSF uses the Lampson Annex to accommodate secondary students rather than elementary students. However, the increase in secondary capacity at Lampson Annex causes a corresponding increase in elementary capacity at École Victor-Brodeur. Accordingly, for convenience, I will treat Lampson Elementary as though it adds elementary capacity rather than secondary capacity.

[4090] Sundance Elementary is smaller. According to the Joint Fact Finder's Report, Sundance Elementary has operating capacity for 69 elementary students.

[4091] Taken together, the three schools have operating capacity for 860 students: 660 elementary students and 200 secondary students.

[4092] Unfortunately, the Court does not have evidence of the CSF's enrolment for the 2015/16 school year, when the CSF began using the entirety of Lampson Elementary and Sundance Elementary. Notably, however, for the CSF to fill its 860-student capacity in Victoria, its enrolment for 2015/16 would have had to increase by 146 students, or by about 20%. Given that peak enrolment growth at École Victor-

Brodeur was 69 students, or 16.5%, shortly after the opening of a brand new school, it is very unlikely that the CSF's enrolment grew by 146 students in 2015/16. I therefore infer that the CSF likely has some excess capacity in the Victoria area.

[4093] Using the CSF's 2014/15 enrolment and 2015/16 capacities, the CSF would have been operating at about 91.5% capacity (183/200) at the secondary level and at about 80% capacity (531/660) at the elementary level. Overall, it would have been operating at 83% of its total operating capacity.

[4094] Comparator secondary and middle schools operate at an average of 94% of their operating capacity. Sixteen of 27 secondary and middle schools operate at more than 90% capacity utilization. One-third operate at 100% capacity utilization or more. At the elementary level, schools operate at an average of 89% of their operating capacity. Twenty-seven of 53 operate at more than 90% capacity. Eighteen operate at 100% capacity utilization or more.

[4095] I do not take into account space per student because Mr. Frith did not make that calculation for the Lampson or Sundance Annexes.

c) Secondary Global Educational Experience

[4096] The plaintiffs argue that due to École Victor-Brodeur's enrolment growth, the CSF has had to reconfigure École Victor-Brodeur's core secondary school facilities. Because secondary students take some courses at Lampson Annex, the plaintiffs say that secondary students do not have amenities that are analogous to those at comparator secondary schools.

[4097] Lampson Annex is an elementary school. It does not have a music room or any specialized classrooms for secondary enrichment courses.

[4098] Lampson Annex has a small playfield. However, according to Ms. Bernier, it cannot be used because it is rocky and uneven. There are no play structures.

[4099] There are four large classrooms on the main floor of Lampson Annex, and several more on the upper floor. One of the classrooms is used by École Virtuel,

and one for supplementary teaching rather than regular coursework. At least one classroom has a traditional chalk board rather than a white board. However, the classrooms are nice with ample natural light.

[4100] On the main floor of Lampson Annex, École Victor-Brodeur has access to rooms for storage, a study room for students to work independently or with learning assistance. The orientation counsellor meets students in a large, comfortable office, and another room is used for teaching assistance. There are two small rooms with no windows that some teachers use for preparation. On the upper floor, one classroom has been divided into three smaller spaces for learning assistance.

[4101] Lampson Annex also has a gymnasium with a stage. According to Ms. Bernier, the gymnasium is smaller, and is designed for elementary rather than secondary students. Noises in the gymnasium tend to echo, and the noise carries into the adjacent classrooms. As a result, École Victor-Brodeur uses the gymnasium for quiet activities like yoga and “circus practices”.

[4102] Although the CSF had yet to use it when Ms. Bernier gave her evidence in September 2014, Ms. Bernier described the basement of the Lampson Annex. She explained that it was designed and set up as a daycare, with a small kitchen. There are no windows. Several rooms are used for storage.

[4103] Ms. Asselin explained that when the CSF secured the Lampson Annex for the 2012/13 school year, the CSF decided to use it for secondary academic courses. Secondary students travel between Lampson Annex and École Victor-Brodeur, where they take their enrichment courses in the science lab, art room, music room, gymnasium and the performance stage.

[4104] According to Ms. Bernier, Lampson Annex is about a three to five minute walk from École Victor-Brodeur for students in Grades 8 through 12. Buses drop secondary students at École Victor-Brodeur, so they travel to Lampson Elementary for some courses, and back to École Victor-Brodeur to catch the bus at the end of the day. She advised that there are only four minutes between periods, so students

must hurry to travel between the two school sites. The short break between periods poses particular challenges for students travelling to and from their physical education courses, as students have little time to change into their physical education clothing. As a result, courses following physical education often start late.

[4105] Secondary students also take their lunch at École Victor-Brodeur, necessitating another round of travel. Ms. Bernier explained that this is because there is no lunch room at Lampson Elementary. Moreover, it is important to École Victor-Brodeur culture for older students to mentor younger students at lunch by hosting clubs and helping younger students with their meals.

[4106] I note that when the CSF took the decision to accommodate secondary students at Lampson Annex, its recent capital requests for Victoria had been to add an elementary school annex to École Victor-Brodeur. It is puzzling that the CSF chose not to use Lampson Annex to fulfill that need. According to Ms. Asselin, it was considered to be unsafe for elementary students to travel back and forth between Lampson Elementary and École Victor-Brodeur. It also would have been difficult to move the elementary students' play structure to the Lampson Annex. However, elementary students do not have the same need for specialty classrooms as secondary students, and therefore would not need to travel between schools. The problem with the play structure was by no means insurmountable.

d) Other Aspects

[4107] Other than the issues with travel times, crowding and secondary facilities, by all accounts, École Victor-Brodeur is an exceptional facility.

[4108] École Victor-Brodeur is located in Esquimalt, in a predominantly residential neighbourhood. Ms. Bernier explained that although the neighbourhood has many houses, there are also some commercial services near the school, including a corner store, a pharmacy and some fast food restaurants.

[4109] According to Ms. Asselin, the exterior of École Victor-Brodeur is attractive, with prominent signage and large windows. There is a large parking lot for students,

and a designated lot for school bus transportation. To the opposite side of the building, a second parking lot is used by parents attending the daycare.

[4110] There is a large playfield adjacent to the school, which belongs to the City of Esquimalt. École Victor-Brodeur students have access to the field on weekdays. They also have reduced rates at an Esquimalt recreation centre, a 15-30 minute walk from École Victor-Brodeur. Kindergarten students use the centre for swimming lessons.

[4111] École Victor-Brodeur has three floors. There is a large atrium at the entrance where one can look up to all three floors. Just off the atrium, there is an exit to a large exterior gathering space for community events.

[4112] Ms. Asselin described how the building was organized to serve both elementary and secondary populations. The lowest floor was built for children in Kindergarten and Grade 1. The second floor was used for intermediate students, and the top floor for the secondary programme. This arrangement ensured designated space for students in all age groups, and facilitated collaboration by teachers instructing similar age groups.

[4113] Contrasting the classrooms in the new facility to those in the former École Victor-Brodeur, Ms. Asselin stated that there was “no comparison”. The classrooms in the new building have large cloak rooms, windows, and bulletin boards for visual tools. Unlike the old facility, every classroom also has a sink and water access.

[4114] The new building includes three classrooms for the preschool and daycare, with a separate entrance. The programmes also have their own kitchen, bathroom, washing machine and dryer. They are completely independent in their own area.

[4115] École Victor-Brodeur was constructed to have three classrooms for learning assistance. Additional space was designed for instructing students with special needs. There was a computer lab for younger students, and a ceramics studio, workshop and student lounge for older students. There was also a large kitchen

students in a career preparation programme used to prepare hot lunches for École Victor-Brodeur students. Secondary programme staff had their own staff lounge to do collaborative work.

[4116] École Victor-Brodeur also has two spaces for physical education. A smaller multipurpose room with a carpeted floor is used for students up to Grade 2. Students in Grade 3 and higher take physical education in a large gymnasium.

[4117] The École Victor-Brodeur library is well lit, with big windows and a long counter. There are separate areas for students in primary and secondary grades, with a mezzanine in the centre where students can work.

[4118] The art room, by Ms. Bernier's account, is the most beautiful room in the school, facing the ocean and the mountains. It can easily accommodate 30 students.

[4119] Secondary students also have access to a science lab. The room can be used as either a regular classroom or as a laboratory. It, too, has a view of the ocean.

[4120] Ms. Asselin explained that the Francophone community uses École Victor-Brodeur as a gathering space. The theatre is used by a dance troupe; scouts use the multipurpose room; the gymnasium is used by the community. In addition to the preschool and daycare, École Victor-Brodeur serves as a home for a playgroup for Francophone parents and children.

e) Analysis

[4121] The CSF has struggled with overcrowding at École Victor-Brodeur. However, with the addition of the Lampson Annex and the Sundance Annex, the CSF is no longer operating above its capacity. Its capacity utilization is slightly lower than average at both the elementary and the secondary levels. It has room to accommodate modest enrolment growth.

[4122] The bigger problem with the CSF's current arrangement is that it has chosen to use Lampson Annex to accommodate secondary rather than elementary students. Secondary students do not have access to specialty classrooms at that school; they therefore must travel back and forth to École Victor-Brodeur, which poses logistical challenges.

[4123] The decision not to accommodate elementary students at the Lampson Annex is a strange one. At the time the CSF acquired its leasehold interest in the Lampson Annex, its capital project request was for an elementary annex to École Victor-Brodeur. That is just what it received with the Lampson Annex. Lampson Annex is a purpose-built elementary school. Elementary students would not have to travel back and forth to École Victor-Brodeur if they were accommodated there. They would have access to a small gymnasium appropriately-sized to their needs, and a small field. Issues with an echo in the gymnasium could be remedied by the use of sound-boards, as was done in the foyer of École L'Anse-au-Sable (Kelowna). The CSF could have moved or built new elementary play structures. While the CSF is hesitant to apply its AFG to leased facilities, given that it receives AFG funding for every student in its leased facilities, it ought to spend its AFG on its leased schools. As I see it, if the CSF had accommodated elementary students at Lampson Annex-- the most obvious solution-- it would not have the problems that it has at École Victor-Brodeur today.

[4124] Overall, after taking into account all the evidence, including the Joint Fact Finder's Report, the global educational experience offered at École Victor-Brodeur is equivalent to what is offered at comparator schools. The CSF no longer faces problems with overcrowding. While secondary students now have to travel back and forth to École Victor-Brodeur, the associated problems arise entirely out of the CSF's decision to accommodate secondary students in a building that would be better suited to École Victor-Brodeur's elementary population.

[4125] However, transportation times in Victoria are very long. Students travelling from the North, East and West Victoria Catchment Areas face especially long travel

times. The distance from those catchment areas to École Victor-Brodeur does appear to deter some parents from enrolling their children at École Victor-Brodeur. The participation rate at École Victor-Brodeur is lower in the proposed catchment areas at some distance from École Victor-Brodeur.

[4126] The plaintiffs argue that the best way of addressing those long travel times is to construct the East and West Victoria Elementary Projects, and to plan for the eventual opening of a programme in the North Victoria Catchment Area.

[4127] As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities themselves (*Mahe* at 371 to 372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment that shorter travel times were appropriate to prevent assimilation, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[4128] In this case, the CSF has determined that it is appropriate to establish at least two new catchment areas: the East and West Victoria Catchment Areas. They also propose to prepare to build a school in the North Victoria Catchment Area at some point in the future. The right to make that determination falls within its right to management and control. The defendants must defer to the CSF's decision in that respect.

[4129] However, this does not mean that the Province is obliged to fund homogeneous facilities in those catchment areas in the early years of the programmes. There is a temporal aspect to the number of children likely to take advantage of a programme. Given the small numbers that can be expected in the early years of the programme, the Province does not need to build a new

homogeneous school facility for those students immediately. The defendants need only ensure that the instructional services and facilities are provided until the numbers warrant more. It is simply not practical to expect the Province to construct new facilities with space for 250-300 students before any programme has taken hold in that geographic region. Once the programme exists and the numbers grow, a new school may be warranted to ensure educational equivalence between the minority and majority.

[4130] In the North Victoria Catchment area, I find that the numbers will not grow to warrant a homogeneous school. However, it is open to the CSF to reduce travel times by opening a heterogeneous school.

[4131] I also note that if all of the CSF's proposed new facilities were built, the CSF's total enrolment in the Current Victoria Catchment Area could grow as high as 774 elementary students. Only 200 of those elementary students would live in the North and Central Victoria Catchment Areas. École Victor-Brodeur was built with capacity for 327 elementary students. Thus, if the CSF wants to build the East and West Victoria Elementary Projects, École Victor-Brodeur would be only about 60% full at the elementary level. Secondary enrolment is unlikely to grow so significantly that it will fill the excess space.

[4132] The CSF's planning in Victoria for many years focused on operating a single regional elementary school. While the CSF's enrolment could grow to warrant space for up to 744 elementary students across greater Victoria, it must find a way to use or dispose of its elementary capacity at École Victor-Brodeur. The CSF will have to make the hard decisions about where and how much space to add in the East and West Victoria Catchment Areas to reduce travel times while making effective use of its regional school.

[4133] École Victor-Brodeur has capacity for 200 secondary students. In 2014/15, there were 183 students enrolled at École Victor-Brodeur between Grades 8 through 12. I anticipate that if all of the CSF's proposed schools were built, the CSF could expect an increase in secondary enrolment to about 210 students between Grades 8

through 12. Since schools in British Columbia are not usually built to accommodate peak enrolment, I conclude that École Victor-Brodeur has appropriate facilities to meet its present and reasonably foreseeable need for space.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[4134] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Victoria and the dealings of the CSF, the Ministry and local majority school boards in connection with it.

[4135] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Victoria, I make findings that are of particular relevance to Chapter XXXV, Leases; Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

1. History of Capital Requests

[4136] When the CSF took jurisdiction in Victoria, SD61-Greater Victoria operated École Victor-Brodeur operated as a homogeneous, K-12 Programme Cadre, and SD63-Saanich operated an elementary Programme Cadre at Keating Elementary.

[4137] In its October 1997 Draft Capital Plan Submission for 1998/99 and its December 1997 Capital Plan Submission for 1998/99, the CSF proposed to acquire École Victor-Brodeur so it could continue as a Kindergarten-Grade 12 regional school serving students from Victoria, Esquimalt, Sooke, Langford, Colwood, Metchosin, Highland and View Royal. The CSF also proposed to complete major renovations to the school. The CSF continued to request those projects in its 1998 Capital Plan Submission for 1999/00.

[4138] Initially, SD61-Greater Victoria preferred a leasing arrangement. In the summer of 1998, Mr. Connolly, Director of the Capital Branch, wrote to the Secretary-Treasurer of SD61-Greater Victoria, and rejected a leasing arrangement because of École Victor-Brodeur's history as a minority language school.

[4139] The Ministry offered SD61-Greater Victoria compensation of \$3.3 million for transferring the school to the CSF. That amount represented 50% of the appraised value, commensurate with SD61-Greater Victoria's 50% local contribution to the project. Through negotiation, that amount was increased to about \$3.8 million. \$800,000 of that was deposited to SD61-Greater Victoria's Local Capital Reserve, and the Ministry funded the remaining \$3 million by way of project approvals in regular Capital Planning Cycles. Additionally, SD61-Greater Victoria was provided with \$200,000 in minor capital project approvals as compensation for equipment at École Victor-Brodeur.

[4140] Once the CSF acquired École Victor-Brodeur, its focus shifted to Building Condition Projects. In the CSF's June 1999 Capital Plan Submission for 2000/01, the CSF requested a major renovation to extend École Victor-Brodeur's economic life as its fifth-highest priority project, at an estimated costs of \$3.6 million over three years. Mr. Miller advised that the Ministry approved the renovations as proposed by April of 2000.

[4141] In the CSF's June 2000 Capital Plan Submission for 2001/02, it requested the second phase of its major renovation to École Victor-Brodeur as its fourth-highest priority project, and the third phase as its tenth-highest ranked project. However, the CSF was also preparing feasibility work, which suggested a full replacement would be the most cost-effective option.

[4142] The CSF told the Ministry that its plans had shifted to a replacement around the end of 2000. Mr. Miller advised that since Treasury Board had approved renovations, the CSF was expected to request the replacement in a future capital plan. However, since École Victor-Brodeur was experiencing some air quality

issues, the Ministry allowed the CSF to retain some of the funds to complete health and safety renovations.

[4143] The CSF officially shifted to a request for a replacement with its June 2001 Capital Plan Submission for 2002/03. That year, the CSF requested the replacement of École Victor-Brodeur on the same site (the “École Victor-Brodeur Replacement Project”) as its second-highest priority project.

[4144] The École Victor-Brodeur Replacement Project was not approved in the 2002/03 Capital Planning Cycle. 2002/03 was the first years of a new government, which was implementing major changes to the capital planning system. As a result, the Province did not support any new capital projects in that budget year.

[4145] The CSF continued to seek the École Victor-Brodeur Replacement Project in its 2002 and 2003 Capital Plan Submissions, first as its second-highest priority, then as its top priority.

[4146] Dr. Ardanaz stated that around the time it submitted its October 2003 Capital Plan Submission for 2004/05, the Ministry suggested funding for the École Victor-Brodeur Replacement Project was forthcoming. The Minister announced support for the École Victor-Brodeur Replacement Project in June 2004 at a cost of about \$8.8 million, with an additional \$3 million for community space from the Federal Government. As an exception to the ordinary course, the Minister accelerated funding, making it available in the first year of the capital plan. As the project went forward, the budget increased due to significant cost escalation in the construction industry.

[4147] École Victor-Brodeur opened as a new school in about January 2007. The CSF did not make capital requests for Victoria again until 2009/10, when enrolment surpassed capacity. In its May 2009 Capital Plan Submission for 2009/10, when it used a ward-based capital planning approach, the CSF requested a new primary school annex to École Victor-Brodeur as its only project request in the Southern Vancouver Island ward.

[4148] With the June 2010 Capital Plan Submission for 2010/11, the CSF requested the East and West Victoria Elementary Projects for the first time. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, these were said to be the CSF's #1 priority. The CSF sought accelerated funding for them in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report. The CSF made the same requests with the same priority in its November 2012 Capital Plan Submission for 2012/13.

[4149] With its September 2013 Capital Plan Submission for 2013/14, the CSF expanded its requests for Victoria again by adding a request for the North Victoria Site Project, and a request to acquire Lampson Elementary (the "Lampson Elementary Acquisition Project"). All were said to be the CSF's highest priority and to require accelerated funding.

[4150] The CSF submitted In-House PIRs in support of each of those projects, which were submitted over the course of the fall of 2013. All four were ranked NPIR in the Echo Report for that year.

[4151] In his feedback to the CSF concerning its In-House PIRs, Mr. Cavelti expressed concern that the CSF had not explained what effect its East and West Victoria Elementary Projects and the North Victoria Site Project would have on enrolment at École Victor-Brodeur. With reference to the East Victoria Elementary Project, Mr. Cavelti asked the CSF to evaluate the cost of different options for responding to its need, like acquiring and renovating a surplus school. With connection to the North Victoria Site Project, Mr. Cavelti sought more information about the planned use for the site, and a project budget.

[4152] In its 2014 revised In-House PIRs for those projects, the CSF partially responded to those concerns. Rather than performing a detailed analysis, the CSF suggested that the East and West Victoria Elementary Projects would partly relieve enrolment pressures at École Victor-Brodeur and provide new space for

rightsholders. With reference to its planned East Victoria Elementary Project, the CSF stated that it preferred a specific site where it would construct a new school, and therefore refused to expend resources reviewing the feasibility of renovating other schools.

[4153] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, because they focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[4154] As of the time the evidence at trial concluded in August 2015, the Province had not announced support for any additional capital projects for the CSF in the Greater Victoria area.

2. The CSF's Early Leases of École Victor-Brodeur

[4155] Dr. Ardanaz explained that the CSF took jurisdiction over École Victor-Brodeur when it was already a very successful Programme Cadre. He reported that the school served a large Francophone population, predominantly from the Esquimalt military base. At the time, it was British Columbia's only elementary/secondary minority language school.

[4156] The CSF also took jurisdiction over SD63-Saanich's Programme Cadre at Keating Elementary in Saanich, a very small programme in a heterogeneous, triple-track (English/French/French immersion) school. According to Dr. Ardanaz, there was limited space for the programme due to increasing French Immersion enrolment. In January 2000, the CSF decided to amalgamate that programme with

École Victor-Brodeur. That allowed the CSF to reduce split classes in Saanich and reduce its deficit.

[4157] The CSF initially leased École Victor-Brodeur from SD61-Greater Victoria. It was required to pay for all costs associated with the programme, including teaching staff, support staff, school services, facilities, transportation, and an additional amount to offset provincial budget reductions. Dr. Ardanaz explained that the CSF continued to pay for teaching and support staff until it finalized its own collective agreements. The CSF paid transportation costs until it assumed responsibility for that service itself, and for maintenance of the building until it began contracting with BCBC to perform those services.

3. Acquisition and Replacement of École Victor-Brodeur

[4158] According to Dr. Ardanaz, in the CSF/FEA's first years, École Victor-Brodeur was always one of its top priority capital projects. Although SD61-Greater Victoria initially tried to maintain a leasing arrangement, at the Ministry's insistence, École Victor-Brodeur was transferred to the CSF in about 1998.

[4159] Dr. Ardanaz noted that once the CSF acquired École Victor-Brodeur, it identified necessary upgrades to the building and began requesting renovations to extend the building's economic and operational life. The CSF's top priority was to address health and safety issues, particularly air quality. The CSF also identified needed repairs to the heating and mechanical systems. BCBC identified lead in the water. According to Dr. Ardanaz, the Ministry funded the necessary repairs.

[4160] Eventually, though, feasibility work suggested that a wholesale replacement would be the most cost-effective way of responding to the CSF's needs in the long term. The CSF asked to change the scope of its capital project requests in December 2000 or January 2001. On April 19, 2001, Mr. Rory Munro, the CSF's Planning Officer at the time, told Dr. Ardanaz that request would need to be made in a subsequent capital plan.

[4161] Mr. Miller confirmed that the CSF was asked to resubmit its project because there was insufficient funding in the Capital Envelope to accommodate the increased cost of the project. The project budget had increased by more than \$6 million. Further, Mr. Miller verified that due to the significant change in the scope of the project, the Ministry thought that having the CSF resubmit the project would lead to more equitable ranking of the project as against other requested projects. The Ministry had also received the CSF's feasibility work too late in the Capital Planning Cycle to include it in the Consolidated Capital Plan and submission to Treasury Board.

[4162] Disappointed, Ms. Nicole Hennessey, President of the CSF, wrote to Deputy Minister Ungerleider and stressed problems with the condition of École Victor-Brodeur. She strongly requested that the Ministry allow the CSF to begin planning for the replacement of the school expeditiously. Parents also complained to the Minister. The Minister reassured the CSF that the École Victor-Brodeur Replacement Project was a high priority for the Ministry. The Province also supported capital projects amounting to \$207,000 for the CSF to undertake air quality work pending approval of the École Victor-Brodeur Replacement Project.

[4163] In the 2002/03 budget year, the Province did not support any capital projects because it was reviewing the capital funding system. The Ministry began to move forward with the École Victor-Brodeur Replacement Project in the summer of 2003. At that point, the Province supported \$50,000 for the CSF to perform feasibility work for the École Victor-Brodeur Replacement Project, and another \$50,000 for minor health and safety upgrades to École Victor-Brodeur.

[4164] Mr. Miller confirmed that by August 2003, SD61-Victoria had closed several schools. The evidence shows that in or about the 2002/03 school year, SD61-Greater Victoria closed Blanshard Elementary, Fairburn Elementary, Uplands Elementary, Hampton Elementary, Richmond Elementary and Burnside Community. In light of those changed circumstances, the Ministry was reconsidering its initial position that École Victor-Brodeur should be replaced. Ministry staff directed the

CSF to evaluate other options, including acquiring and replacing a surplus school from SD61-Greater Victoria.

[4165] The CSF engaged its consultant, Trillium, to perform the feasibility work. As part of the study, Trillium evaluated the costs of renovating or replacing École Victor-Brodeur School as compared to the cost of acquiring and renovating two surplus schools. The report concluded that the best option would be to replace École Victor-Brodeur on the existing site. Dr. Ardanaz explained that the CSF brought the report and its conclusions to the Ministry's attention in January 2004. He wrote that the CSF strongly believed that it needed to proceed with replacement of École Victor-Brodeur on an urgent basis.

[4166] In March 2004, Ministry staff prepared a Briefing Note to Minister Tom Christensen, advising that Province had declined to support the École Victor-Brodeur Replacement Project in the 2003/04 capital plan because of the availability of SD61-Greater Victoria schools. Staff also advised that the CSF's study concluded it would be more cost-effective to replace École Victor-Brodeur on the same site over the life cycle of the school.

[4167] Mr. Miller confirmed that based on that information, the Minister approved the École Victor-Brodeur Replacement Project within a few months. On June 15, 2004, Mr. Miller confirmed that the Province would support the project based on CSF's proposed \$8.8 million budget. The federal government would provide an additional \$3 million. The nominal capacity of the school was set at 80K, 300 Grade 1-7 and 150 secondary students. As an exception to the ordinary course at the time, the Province accelerated funding, making it available in the first year of the capital budget. According to Mr. Miller, the Ministry accelerated the funding because it had already been recognized as a high priority and the CSF had expressed disappointment in a lack of approval several years earlier.

[4168] Mr. Miller recalled that the CSF moved quickly. The École Victor-Brodeur Replacement Project was approved in June 2004, and the Project Agreement was complete within six months. The school was under construction six months after

that. The facility opened in January 2007. In Mr. Miller's experience, this is about as fast as any school can be built.

[4169] When Mr. Bonnefoy arrived at the CSF in June 2004, the planning for the construction of the École Victor-Brodeur Replacement Project was underway. He explained that the project faced some complications because the building was located on several parcels of land with different ownership, and different use restrictions. Due to the nature of the land and zoning restrictions, the CSF was not able to recycle the design it used for École Gabrielle-Roy (Surrey) as it had first intended.

[4170] As a result of this and other factors, the project cost escalated. Architectural designs estimated a total project budget of about \$17 million, \$3 million of which would come from the Federal Government. That budget formed the basis of the Project Agreement.

[4171] When the CSF invited tenders for the project, each of them was a further \$2 million above that budget. As a result, the Minister approved a further \$2 million increase to the Province's contribution to allow the CSF to immediately proceed with the award of the construction project.

[4172] Mr. Bonnefoy explained that while the new École Victor-Brodeur was under construction, its students were housed in two leased facilities: Uplands Secondary and Richmond Elementary. The Province funded those leases, which cost about \$235,000 each, as part of the Project Agreement. After some negotiation, the Ministry also agreed to fund extra costs associated with transporting students to the leased facilities.

[4173] Mr. Bonnefoy confirmed that the Federal Government also contributed its \$3 million share. Those funds were used to build community space: a daycare, theatre, and possibly some other community spaces.

[4174] On January 10, 2007, the CSF issued a press release confirming that École Victor-Brodeur students had occupied their new building.

4. Crowding at École Victor-Brodeur

[4175] Mr. Bonnefoy explained that by May 2009, École Victor-Brodeur was the CSF's "success story". The school had reached capacity. However, because adjacent land was owned by the Township of Esquimalt, there was no space for the CSF to add portables.

[4176] The enrolment growth caused space pressure at École Victor-Brodeur. When the CSF first occupied the new École Victor-Brodeur, it had three vacant classrooms. Ms. Asselin noted that this began to change as enrolment increased. When École Victor-Brodeur opened, there were two Kindergarten and two Grade 1 divisions. By 2012/13, all four of those classrooms were used for Kindergarten.

[4177] Amenities designed for the secondary programme were slowly converted into other spaces. The secondary school computer lab became a Grade 6 classroom. The secondary student lounge was converted into a Grade 7 classroom. Secondary students began using their workshops and studio as their lounge. By the 2012/13 school year, the entire third floor of the school-- originally designed for use by secondary students-- was required for elementary instruction. There were issues with noise disrupting class work because secondary students and students in Grade 6 and 7 took recess at different times.

[4178] The secondary teachers also lost their space. Ms. Bernier explained that in 2008/09, the space designed to be used as a teacher lounge for the secondary programme was converted to a classroom for students in Grade 7. Secondary teachers began sharing a staff room with elementary teachers. This made it more difficult for secondary teachers to work collaboratively.

[4179] The three rooms that were initially designated for special education services were taken over. Two classes were joined together to become a classroom. Specialized services in turn took over several office spaces in the library.

Ms. Bernier explained that in 2011/12, as space grew tight, some desks were placed in the mezzanine of the library for teachers to do preparatory work.

[4180] École Victor-Brodeur was also built to include space for use by visiting CSF Board Office staff and the Francophone community. Eventually, the community lost those offices to Francisation, counselling, and École Virtuel. École Virtuel moved to the Lampson Annex in 2014/15, and its space was taken over for Francisation and counselling.

[4181] With space for specialized services at a premium, more assistants began delivering those services in the hallways. The noise became so disruptive that the school purchased protective sound equipment. Secondary students wore headphones to block out the noise.

[4182] École Victor-Brodeur originally used one classroom as a computer lab for primary students. In about 2007, the computers were removed so that the room could be used for learning assistance. Without a computer lab, teachers wanting to work with computers had to move carts through busy hallways to the classrooms.

[4183] By 2011/12, use of the gymnasiums had also become problematic. The small gymnasium was used at full capacity for primary grades, except for one free block on Friday afternoons. The room was too small to be shared.

[4184] Scheduling of the large gymnasium also posed challenges. Secondary students had very limited gymnasium access on weekday mornings, and many divisions had only one block of time for physical education each week. To remedy the problem, some students took physical education classes at the Esquimalt recreation centre or in the school playfield.

5. The CSF's Efforts to find space in the West Victoria Catchment Area

[4185] When École Victor-Brodeur reached its capacity in about 2009, the CSF requested a new primary annex in the Victoria Area. The CSF's demographic analysis suggested that a primary school in the West Victoria Catchment Area was

best suited to relieving pressure at École Victor-Brodeur. In particular, the CSF was hopeful it could find appropriate space in Langford.

[4186] During Mr. Bonnefoy's time, the CSF visited one potential school, Glen Lake Elementary, which would have provided a closer option for students living in Sooke. Mr. Allison visited Glen Lake Elementary in about February 2010. That school was not available because the majority anticipated needing it in the future. The CSF also learned the school had some seismic vulnerability, which made it less appealing.

[4187] Mr. Allison explained that later, in 2011, he learned of a potential site on Jacklin Road in Langford (the "Jacklin Site"). After visiting the site, Mr. Allison thought it was in a good location for a school in the West Victoria Catchment Area. Mr. Allison did not prepare a PIR because he thought there was little he could do beyond identifying a site.

[4188] In March 2011, Mr. Ouimet, President of the CSF, wrote to Minister Abbott and asked for a meeting to discuss the Jacklin Site, and for funding to prepare a PIR if one would be required. Mr. Ouimet wrote to Minister Abbott again one week later, updating him on a reduced price for the Jacklin Site.

[4189] The CSF subsequently learned that someone else had made a conditional offer on the Jacklin Site, and it had been accepted. The CSF made its own offer, subject to ministerial approval, which the seller accepted as a back-up offer. Mr. Ouimet informed Minister Abbott of this fact by way of a Positioning Letter. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[4190] The Minister responded in a June 6, 2011, letter. He averted to the ranking of the CSF's West Victoria Elementary Project that had been assigned in the Echo Report-- a 19th priority-- and stated the Province could not commit to funding the project in time for the CSF to meet the terms and conditions in the contract of purchase and sale. Mr. Miller confirmed that the Ministry was aware that the stated 19th priority did not reflect the CSF's priorities for its projects. Mr. Stewart advised

that Ministry staff had the sense based on other communication that the acquisition of the Jacklin Site was not as urgent a priority as some of the CSF's other requested projects, like its request for a new site and school for École Élémentaire Rose-des-Vents (Vancouver (West)).

[4191] On August 9, 2011, Mr. Ouimet wrote to Minister Abbott again, stressing that the West Victoria Elementary Project was one of the CSF's highest-priority projects, not its 19th priority. He also informed Minister Abbott that the CSF had negotiated an extension of its offer to September 29, 2011. In a September 13, 2011, letter, Minister Abbott made it clear that the Province would not consider the CSF's lack of sequential rankings. He suggested that the CSF provide a fresh ranking if one would better reflect its priorities.

[4192] The CSF did not change its rankings and wrote to Minister Abbott, reiterating its position on the ranking of the West Victoria Project. With no positive response from the Ministry, on September 29, 2011, the CSF ceased pursuing the Jacklin Site.

6. The CSF's Efforts to find space in the Central Victoria Catchment Area

[4193] By the summer of 2011, Mr. Allison was looking for temporary space to relieve overcrowding at École Victor-Brodeur in the Central Victoria Catchment Area, near École Victor-Brodeur. Mr. Allison considered using two commercial spaces, but one had tenants and the other could not be zoned for a school. Mr. Allison also considered some spaces in churches, but decided not to use them because of the nature of the rooms and their distance from École Victor-Brodeur. Mr. Allison also looked at a room at the Esquimalt recreation centre, but chose not to use it because of distance and because the room was not designed as a classroom.

[4194] Without an off-site solution, in March 2012 Mr. Allison began considering adding portables to École Victor-Brodeur, something he said he saw as a last resort. He learned that due to the site conditions, the only space for portables was the parking lot, which was in regular use.

[4195] Mr. Allison enquired about potential surplus space in SD61-Greater Victoria in 2012, and expressed interest in leasing Richmond Elementary (which would only be available for one year). Mr. George Ambeault, Secretary-Treasurer of SD61-Greater Victoria, asked Mr. Allison to make an offer. In his April 2012 response, Mr. Allison pointed to the CSF's lease of the Kilgour Elementary in Richmond, noting that the CSF paid \$240,000 per year, as well as amounts for utilities and custodial services.

[4196] Mr. Stewart testified that the Ministry became involved in the negotiations in the spring of 2012, several years after it learned of the issue with overcrowding at École Victor-Brodeur. Mr. Stewart emphasized that the Ministry did not become involved sooner because it relies on the CSF to find ways to accommodate its excess enrolment.

[4197] Mr. Stewart invited Mr. Allison to a meeting at the SD61-Greater Victoria school board offices to discuss lease opportunities in the area. At the April 2012 meeting, Mr. Allison explained the CSF's need for temporary space to relieve overcrowding at École Victor-Brodeur until it could build the East and West Victoria Projects. SD61-Greater Victoria drew Mr. Allison's attention to six schools in SD61-Greater Victoria with surplus space. Most of the schools on offer were not desirable to Mr. Allison.

[4198] One of the schools SD61-Greater Victoria raised was Lampson Elementary. SD61-Greater Victoria officials told Mr. Allison that the building was older, but had been seismically upgraded. At that time, it was being held on a year-to-year lease by the Ministry of National Defence, but SD61-Greater Victoria was willing to lease the building to the CSF instead.

[4199] After the meeting, Mr. Allison and Mr. Stewart toured several of the schools with Mr. Cavelti. On May 6, 2012, Mr. Allison wrote to Mr. Stewart and Mr. Cavelti and informed them that the CSF wanted to rent Lampson Elementary. Mr. Allison mentioned that SD61-Greater Victoria wanted the CSF to pay more rent than the Ministry of National Defence. Mr. Allison also asked for the lease to last for two to

three years, until the CSF had a permanent solution for the area. Mr. Stewart confirmed in his evidence that he was prepared to recommend that the Minister fund the lease. He also saw the lease as a temporary option pending the construction of a new school to serve Victoria.

[4200] Mr. Stewart, Mr. Allison and officials from SD61-Greater Victoria held a telephone conference call to discuss the lease of Lampson Elementary. Mr. Allison characterized that meeting as a negotiation led by Mr. Stewart. Mr. Stewart's evidence was that he had already negotiated the terms with SD61-Greater Victoria, and he acted as a facilitator on the conference call. However, internal Ministry communication on May 8, 2012, reveals that Mr. Stewart was anticipating the conference call that day, and was planning what position he would take on lease cost increases. If anything turns on it, the conference call was more likely than not a negotiation.

[4201] Mr. Stewart's initial bargaining position was that the CSF should not pay any increase in lease costs over what the Department of National Defence had previously been paying. He was open, however, to a maximum 5% increase. As the negotiations proceeded, he agreed to a 5% increase because it was not an unreasonable amount for SD61-Greater Victoria to have expected on a re-negotiation with the Department of National Defence, and because the Ministry was interested in closing the deal. Mr. Stewart felt he always had bargaining room, as it was open to the Ministry and the CSF to walk away.

[4202] The negotiations resulted in a three-year lease of two of the three floors of Lampson Elementary, beginning September 1, 2012, at an annual rate of \$336,000. The Department of National Defence would retain the bottom floor of the school as a daycare. SD61-Greater Victoria would receive the proceeds as operating revenue.

[4203] According to Mr. Stewart, the conference call resulted in general agreement of the parameters for the CSF's lease of Lampson. Once that was concluded, he left it to the CSF and SD61-Greater Victoria to work out the finer details concerning the CSF's occupation of the building.

7. The CSF's Efforts to find space in the North Victoria Catchment Area

[4204] The CSF's efforts in the North Victoria Catchment Area have centred on McTavish Elementary, which was owned by SD63-Saanich.

[4205] According to Mr. Stewart, the Minister approved SD63-Saanich's disposal of McTavish Elementary in April 2013 after considering the CSF's interest. Ministry staff did not think it was an appropriate school for the CSF because the school was remote and rural for Victoria, was away from the CSF student population, and was very small. Moreover, the Ministry had just assisted the CSF to lease Lampson Elementary. Mr. Allison admitted that before the litigation, the CSF had told the Ministry where the CSF's enrolment for École Victor-Brodeur was located. Indeed, the maps of CSF students and schools that were tendered as exhibits in trial show that very few École Victor-Brodeur students live on the Saanich peninsula.

[4206] On November 26, 2013, Mr. Allison sent a Positioning Letter to Mr. Stewart and asked for immediate approval of capital funding for the CSF to acquire McTavish Elementary (the "McTavish Positioning Letter"). For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[4207] Mr. Stewart took the view that nothing before this letter indicated to the Ministry that the CSF might be interested in acquiring McTavish Elementary. Indeed, the CSF requested a project for the North Victoria Catchment Area for the first time with its September 2013 Capital Plan Submission for 2013/14. The CSF completed its first In-House PIR for the North Victoria Site Project in November 2013. The CSF identified McTavish Elementary in that PIR, and explained that it preferred that site due to its size and location in the proposed catchment area.

[4208] In the McTavish Positioning Letter, Mr. Allison stated that McTavish Elementary could easily solve some of the CSF's needs at an attractive capital cost. While under cross-examination, Mr. Allison explained that he did not actually think that acquiring McTavish Elementary would relieve enrolment pressure at École

Victor-Brodeur. He likewise agreed that he had never visited McTavish Elementary, and did not know if the CSF actually wanted to acquire the school. However, he made the request so that capital funding would be available for the CSF to acquire any site when it found a suitable one. Mr. Allison strenuously maintained that funds should be made available before the CSF had determined what it actually wanted. When it was suggested that would leave capital funds sitting idle while other districts' needs went unmet, Mr. Allison stated, "We have been waiting for a long time, too. It is their turn to wait."

[4209] Mr. Stewart responded to Mr. Allison by way of a December 23, 2013, letter. He suggested a discussion about the CSF's needs on the Saanich Peninsula and how it might resolve the Victoria Community Claim. He also averted to the possibility that the acquisition would reduce the CSF's capacity utilization and region-wide space needs, which appears intended to hint to Mr. Allison that acquiring a site in the North Victoria Catchment Area would make it harder to justify the East and West Victoria Projects.

[4210] Mr. Allison admitted that the CSF went ahead and made an offer to purchase McTavish Elementary, sight unseen, and without Ministry support.

[4211] Mr. Allison did not visit McTavish Elementary until January 2014. Mr. Allison observed that the building was old and in poor condition. He decided the CSF was not interested in the school unless the Province agreed to replace it as a Building Condition Project. In March 2014, Mr. Allison revoked the CSF's offer to acquire McTavish Elementary because he was afraid the school posed some seismic risk. Mr. Allison admitted while under cross examination that those concerns paint a different picture than the "great opportunity" the CSF had portrayed in its Positioning Letter to the Ministry, and had chastised the Ministry for not bringing to the CSF's attention.

[4212] Mr. Allison, however, refused to admit that it would have been a mistake if the Minister had provided funding for the CSF to acquire McTavish Elementary. He ventured that if the funding had been made available, the CSF could have used it to

acquire a different site: a truly cynical view, and a manipulation of the capital planning process.

[4213] According to Mr. Stewart, he first learned that the CSF was no longer interested in McTavish Elementary during Mr. Allison's testimony in this case. Even though Mr. Allison revoked the CSF's offer, he did not inform the Ministry of the CSF's change in plans. He did not revoke the CSF's October 2014 PIR, which added reference to McTavish Elementary as a suitable site. He refused to admit that given this experience, the Ministry might have some right to be cautious of accepting the CSF's PIRs and letters on their face.

8. The CSF's Efforts to find space in the East Victoria Catchment Area

[4214] The CSF's efforts to find a site in the East Victoria Catchment Area started later than the rest, and appear to have been spurred by Mr. Allison learning that SD61-Greater Victoria had disposed of Blanshard Elementary.

[4215] In the McTavish Positioning Letter, Mr. Allison wrote that Mr. Palmer had informed him that the Ministry had approved the division and sale of a portion of SD61-Greater Victoria's Blanshard Elementary. Mr. Allison expressed the CSF's disappointment because the CSF had repeatedly expressed need for additional school infrastructure in Victoria. Mr. Allison also complained that the CSF was not given advance notice of property disposals.

[4216] Mr. Palmer testified that the McTavish Positioning Letter was atypical from the communication that Ministry receives from districts, as it was "couched in terms that are more legal than [the Ministry] would expect".

[4217] Mr. Palmer suggested that Mr. Allison misrepresented the communication between the two of them about Blanshard Elementary. Mr. Allison's letter represented that Mr. Palmer had informed Mr. Allison of the approval of the subdivision and disposal of Blanshard Elementary. To Mr. Palmer's recollection, he had explained to Mr. Allison that the site had been divided by SD61-Greater Victoria

in 2005 and had been disposed of at that time through two 99-year leases. At that time, school boards could dispose of schools without ministerial approval. I also note that the CSF was replacing the old École Victor-Brodeur at the time, had not wanted to consider other school sites and had no other capital requests for Victoria.

[4218] In 2013, sometime later, SD61-Greater Victoria had sought approval to dispose of its residual interest in one 3-acre parcel. Mr. Palmer had explained to Mr. Allison that the school was only 3-acres, smaller than the 5-acre site the CSF had requested. The property would be transferred to a health authority, not a private developer. This was what Mr. Palmer explained to Mr. Allison on the telephone call.

[4219] The McTavish Positioning Letter made Mr. Palmer's working relationship with the CSF challenging. He became reluctant to speak with Mr. Allison because he was concerned that anything he said might be misrepresented in a litigious letter. While the Ministry usually tries to resolve issues through conversation, Mr. Palmer has had very few conversations with Mr. Allison since the McTavish Positioning Letter.

[4220] After this incident, Mr. Palmer decided he would bring any potentially legitimate site opportunities he encountered to the CSF's attention. In 2014, he learned that a former correctional facility in the East Victoria Catchment Area would be marketed for sale, and told Mr. Allison about it. He advised the Court that he had not considered whether the correctional facility site was appropriate for the CSF. He had never visited it. But given Mr. Allison's reaction to the disposal of Blanshard Elementary, he thought it best to advise Mr. Allison of its availability. After visiting the site, Mr. Allison decided it would not be practical or cost-effective to convert it to a school.

9. Sundance Annex and the Lampson Annex

[4221] According to Mr. Palmer, in the summer of 2014, Mr. Seamus Howley, facilities director for SD61-Victoria, informed him that the basement of the Lampson Annex would become available for lease. SD61-Greater Victoria had also closed a

school in the East Victoria Catchment Area, Sundance Elementary. Mr. Palmer suggested Mr. Howley speak to the CSF about whether it wanted to extend its lease to include the basement of Lampson Elementary or lease Sundance Elementary.

[4222] Mr. Allison advised that Mr. Palmer also contacted him and told him about Sundance Elementary. At Mr. Palmer's suggestion, Mr. Allison followed up with Mr. Howley and went to see the school. Mr. Allison saw that the school was very small, with only four classrooms and a portable, and was in need of cosmetic renovations. The school did not have white boards, only green chalkboards. On the other hand, Mr. Allison observed that the site was large, with a play structure, and seemed to him to be in good condition.

[4223] The CSF expressed interest in leasing Sundance Elementary and the balance of the Lampson Annex beginning in 2015/16. In the fall of 2014, Mr. Howley in turn wrote to Mr. Palmer and asked if the Ministry would secure those spaces for the CSF. Mr. Palmer replied that he had yet to receive a request directly from the CSF, and that since the Ministry had not planned for those leases, the CSF would have to pay those leases from its Operating Block.

[4224] As I develop in some detail in Chapter XXXV, Leases, prior to this the Ministry had asked the CSF to provide it with advance notice before entering into new leases. Without pre-approval, staff could not be sure that there would be space in the budget to fund them.

[4225] The CSF's official request came later, by way of an October 6, 2014, Positioning Letter seeking urgent funding to acquire Sundance Elementary, or for immediate lease funding. For the reasons that I give in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[4226] In the meantime, Mr. Allison continued negotiating with SD61-Greater Victoria. Mr. Allison agreed to lease Sundance Elementary for \$100,000 per year for a term of five years less a day, on the condition that the Ministry fund the lease. In

November 2014, Mr. Allison also negotiated the lease of the balance of Lampson Elementary. The CSF would pay \$360,000 to rent the entire facility for a term of five years less one day. Both leases were set to begin in September 2015.

[4227] Ultimately, Mr. Allison advised, the Ministry refused to fund the leases. The CSF nevertheless paid a deposit to lease the two schools, and planned to pay the leases using its Operating Block. While he was under cross-examination, Mr. Allison admitted it was also open to the CSF to use its accumulated operating surplus to fund this lease. Eventually, the CSF would also like to acquire Sundance Elementary to build its East Victoria Elementary Project.

10. Conclusions

[4228] In the CSF's earliest capital plans, it proposed acquiring the former Harbour View Elementary, the homogeneous facility that housed École Victor-Brodeur. The Province funded that acquisition in about 1998. SD61-Greater Victoria raised issue with its loss of lease revenue from the CSF, and the resulting hardship it anticipated would grow out of the loss of those funds. The Ministry exerted light pressure on SD61-Greater Victoria to transfer the property to the CSF rather than continuing a leasing arrangement. As compensation, SD61-Greater Victoria received \$3 million in major capital project approvals that year, while \$800,000 went to SD61-Greater Victoria's Local Capital Reserve. SD61-Greater Victoria received an additional \$200,000 in capital approvals in exchange for equipment at École Victor-Brodeur.

[4229] Once the CSF acquired École Victor-Brodeur, it sought major renovations and upgrades to the facility to extend its economic and operational life at a cost of \$3.6 million over three years. The Ministry approved those renovations in the spring of 2000. The most important health and safety renovations took place, particularly those concerning air quality.

[4230] The CSF requested the second and third phases of its proposed renovations in the spring of 2000. However, by December 2000 or January 2001, the CSF decided that it would be better to replace École Victor-Brodeur. The Ministry told the

CSF that since it had approved renovations instead of a replacement, it would have to make a new capital request. The primary reason for that decision was that the cost of the project had increased, and there was no room in the Capital Envelope to fund the project at that time.

[4231] Beginning in 2001, the CSF began requesting the École Victor-Brodeur Replacement Project at a cost of about \$8.67 million. From then through 2003, the École Victor-Brodeur replacement project was the CSF's first- or second-highest priority project. The CSF tried to exert pressure on the Ministry to move forward with the project expeditiously. Although the Ministry supported the replacement in principle as early as 2001, due to restrictions in capital funding envelopes, the Building Condition Project did not go forward until 2004.

[4232] In the spring of 2004, after the CSF completed feasibility work that evaluated the relative cost of acquiring and renovating an SD61-Greater Victoria school, the Ministry approved the École Victor-Brodeur replacement project at a cost of \$8.81 million. The Federal Government would provide an additional \$3 million for community spaces. The Ministry also accelerated funding to make it available in the first year of the capital plan because the CSF had been requesting the project for many years. As the CSF learned more about site conditions and construction costs escalated across the Province, the project budget increased significantly. As part of the Project Agreement, the Ministry also funded the lease of swing space for École Victor-Brodeur students and extra transportation costs arising out of the use of leased facilities.

[4233] The new École Victor-Brodeur opened in January 2007. After that, the CSF made no capital requests for Victoria until 2009. It did not make any capital requests even though enrolment was increasing across all grade levels. Due to increased enrolment, many special education and staff spaces were converted into classrooms. It was only once enrolment reached capacity in 2009, the CSF requested a new primary school annex in the area.

[4234] As I see it, many of the problems at École Victor-Brodeur and its overcrowding arise out of poor planning in the CSF's early days. This is not meant to imply any negligence or lack of attention by CSF planners. Enrolment projections for the CSF have always been challenging. With limited experience as a new district, the CSF underestimated the extent to which enrolment at École Victor-Brodeur would grow.

[4235] When enrolment began to grow, the CSF did not plan in advance to find new space. Of course, given that the Ministry did not approve any new Expansion Projects between 2005 and 2011, the CSF would not have received a new space project in Victoria in any event.

[4236] In 2010, with the start of this litigation, the CSF began requesting the East Victoria and West Victoria Elementary Projects among its priority projects. It did so again in 2012. In 2013, it requested those projects as well as the North Victoria Site project and the Lampson Elementary Acquisition Project.

[4237] In 2011, the CSF began looking for additional space in the Central Victoria Catchment Area, near École Victor-Brodeur, to temporarily relieve overcrowding. However, the CSF focused exclusively on private sites until the spring of 2012, when Mr. Allison asked SD61-Greater Victoria district administrators about surplus space. The CSF was not willing to relieve overcrowding in a heterogeneous environment, even temporarily, and even in a French immersion school. SD61-Greater Victoria was very forthcoming: they pointed to six schools with surplus space. SD61-Greater Victoria was willing to evict the tenant at Lampson Elementary to make room for the CSF.

[4238] The Ministry assisted Mr. Allison to negotiate the lease of Lampson Annex from SD61-Greater Victoria. The Ministry saw the lease as a temporary measure pending the construction of a new school in Victoria. Mr. Stewart led the negotiation, and negotiated a 5% increase over and above the lease costs paid by the former tenants of Lampson elementary. The negotiations resulted in a three-year lease of two of the three floors of Lampson Elementary, beginning September 1, 2012, at an

annual rate of \$336,000. SD61-Greater Victoria receives that amount as operating revenue.

[4239] While the CSF requested projects in both East and West Victoria beginning in 2010, the CSF's earliest site searches and planning focused entirely on the Proposed West Victoria Catchment Area. The CSF does not appear to have ever considered leasing heterogeneous space in the area.

[4240] In 2010 and 2011 CSF looked at a private site, the Jacklin Site, as well as an SD62-Sooke school. Although the Province supported some Expansion Projects in 2011, the acquisition of the Jacklin Site was not among them because the Space Rank Formula suggested there was greater need in other areas of the Province. Further, the Ministry did not have funds for emergent needs, and the CSF had only requested the West Victoria Elementary Project quite recently. The Ministry also considered that the CSF had other, higher-priority needs elsewhere in the Province, and approved the Southeast False Creek Project in Vancouver (West).

[4241] The CSF began requesting a site in the Proposed North Victoria Catchment Area in September 2013, and tendered a PIR for that project in November 2013. In November 2013, the CSF also sought immediate funding to acquire McTavish Elementary. The Minister had approved the disposal of that property in April 2013, before the CSF had made a capital request related to the North Victoria Catchment Area. In the Positioning Letter related to that acquisition, Mr. Allison misrepresented that the facility was one that could solve the overcrowding at École Victor-Brodeur, when Mr. Allison did not believe that was the case. Upon visiting McTavish Elementary several months later, Mr. Allison realized the CSF was not actually interested in the school. The CSF chastised the Ministry for not drawing the CSF's attention to the school. However, given that the CSF was not actually interested in the school, had 17 students enrolled at École Victor-Brodeur from that area, and had not requested a school in the proposed North Victoria Catchment Area, the Ministry was fully justified in not drawing the CSF's attention to the school.

[4242] Although the CSF first began requesting a project in East Victoria in 2010, the CSF did not perform a site search in the East Victoria Catchment Area until much later than it began looking for sites in the West, North and Central Victoria Catchment Areas: in about 2013. As I see it, the CSF has never truly prioritized a project in East Victoria. Its interest is primarily in reducing travel times and assisting students from West Victoria. Indeed, its participation rate in East Victoria is stronger than it is in West Victoria.

[4243] Before the CSF had engaged in any thorough site searches in the area, the CSF chastised the Ministry in a Positioning Letter for not bringing to the CSF's attention the approved disposal of Blanshard Elementary. That letter was rife with misrepresentations, and was designed to craft evidence that could be put before the Court to assist the CSF in this case. It damaged the relationship between the Ministry and the CSF, and caused a reduction in the level of co-operative conversations that have been held between the Ministry and the CSF.

[4244] Otherwise in East Victoria, the Ministry informed Mr. Allison that the former Sundance Elementary might be available for lease in East Victoria, which led to the CSF's lease of Sundance Annex. The CSF began negotiating the lease of the entire Lampson Annex and the Sundance Annex in the late summer of 2014. The CSF did not tell the Ministry of its plans until October 2014, after the Ministry had already heard of the plan from SD61-Greater Victoria staff. This occurred in a period where the Ministry had asked to be notified before the CSF entered into any new leases so that it could ensure that funding would be available.

[4245] The CSF entered into the lease of Sundance Elementary and Lampson Elementary in November 2014, without prior approval from the Ministry. Ultimately, the Ministry refused to fund those leases, so the CSF pays the lease costs out of its operating funding. The lease of Sundance Elementary costs the CSF \$100,000 per year, while the lease of Lampson Elementary costs the CSF \$360,000 per year. Of course, the Ministry continues to fund the portion of the Lampson Lease that it funded previously, about \$336,000, so the additional cost to the CSF of that lease is

about \$24,000 per year. These additional costs to the CSF arise out of the Ministry's current policy on CSF leases, which freezes lease funding at 2013/14 levels, which I discuss in detail in Chapter XXXV, Leases.

[4246] I find that the current situation in Victoria arises out of the fact that École Victor-Brodeur was underbuilt. The CSF may therefore ultimately come to require space for a total of 774 elementary students across the Central Victoria, East Victoria and West Victoria catchment areas, which exceeds its elementary capacity at École Victor-Brodeur, Lampson Annex and Sundance Annex. Since then, the need has gone unaddressed because the Ministry has been funding only a very limited number of Expansion Projects. Thus, that lack of funding has materially contributed to the lack of space in East and West Victoria.

F. Justification

[4247] I conclude that the numbers in Victoria will eventually come to warrant space for a total of 774 students across the Current École Victor-Brodeur Catchment Area, which exceeds the capacity at École Victor-Brodeur, Sundance Annex and Lampson Annex. One aspect of the Ministry's funding regime materially contributed to the lack of space in East and West Victoria: the fact that the Ministry has only funded very limited Expansion Projects since École Victor-Brodeur approached full capacity in 2009. The remaining question is whether the breach is justified.

[4248] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". As I see it, the particular infringing measure that did not fund Expansion Projects during a period of declining enrolment is likewise intended to further the fair and rational allocation of public funds.

[4249] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I find that there is a rational connection between fairly and rationally expending public funds and deciding not to build any new spaces for students between 2005 and 2011, and only very few thereafter. Given that the Province constructed tens of thousands of new spaces for students between the 1990s and 2005, it was rational to decide not to devote further public funds to that purpose when enrolment across the Province was declining.

[4250] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[4251] In my view, the lack of funding for Expansion Projects for the CSF between 2005 and 2011, then only one project for the CSF in 2011, to the detriment of the position of rightsholders in Victoria, minimally impaired the position of rightsholders in Victoria. Although the Ministry implemented a blanket prohibition of new Expansion Projects in that period, it took steps to ensure that the CSF had access to additional space in Victoria. The Ministry had just funded the construction of a new school for the CSF in Victoria, which opened in 2007. Enrolment reached capacity in about 2009. Thereafter, the Ministry negotiated and funded the lease of Lampson Annex, which allowed École Victor-Brodeur to accommodate more students. This allowed the Ministry to achieve its goal of fairly and rationally allocating public funds while still ensuring that Victoria rightsholders' needs were being met.

[4252] The final stage considers the proportionality of the effects of the infringing measure. It goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[4253] With reference to the situation in Victoria, the salutary effects of the Expansion Project freeze are primarily cost savings: the savings the Ministry was able to generate by not funding the CSF's project requests for Victoria, or other Expansion Projects across the Province. In 2014, the CSF estimated that its East and West Victoria Elementary Projects alone would cost some \$28 million, not including the cost of site acquisitions.

[4254] The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[4255] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[4256] The deleterious effects, at the local level, concern the inferior educational experience afforded to the minority in East Victoria and West Victoria. Those students-- particularly those from West Victoria-- face long travel times, which have a slight deterrent effect. Of course, those long travel times are offset in many respects by the exceptional facilities at École Victor-Brodeur.

[4257] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[4258] However, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. This is particularly so in Victoria, where the community has access to an exceptional regional facility that serves as an important community centre for Francophones in Greater Victoria. Thus, the cost of the infringement is very low.

[4259] Weighing those effects together, I find that the salutary effects outweigh the deleterious effects. While the Ministry has yet to fund the East and West Victoria Elementary Projects, it has funded additional leased space to accommodate École Victor-Brodeur's increasing enrolment. Mr. Allison's evidence is that with the addition of the Lampson Annex and Sundance Annex, it is no longer dealing with the overcrowding it dealt with previously. The relative impact on rightsholders-- longer travel times to attend an exceptional regional facility-- is worth the cost. I therefore conclude that the deleterious and salutary effects are balanced, and that the breach passes the proportionality test.

[4260] I note, however, that the Ministry has frozen the CSF's lease funding. As a result of that, it is not funding the lease of the balance of Lampson Annex or Sundance Annex. I address the constitutionality of the funding freeze in Chapter XXXV, Leases.

G. Remedy

[4261] If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Since I conclude that the breach in Victoria is justified, I do not find it necessary to address what remedy would be appropriate to respond to the situation in Victoria.

H. Summary

[4262] I conclude that the best estimate of the number of children likely to take advantage of new CSF elementary schools in each of East and West Victoria is 30 to 50 students in the programmes' first three years. In the North Victoria Catchment Area, the number in the first few years would be smaller, at about 10 to 15 students. I project that the Proposed East Victoria Programme could grow to about 275 students in its first 10 years. The West Victoria Programme will likewise grow to about 299 students. In the North Victoria Catchment Area, a new programme could attract about 98 students.

[4263] I find that when the CSF's programmes in the East and West Victoria Catchment Areas first start, the numbers will fall at the lower end of the sliding scale, warranting instruction in a series of classrooms with access to facilities required for an elementary education. After a period of time, the numbers in those catchment areas will reach the high end of the sliding scale, and come to warrant facilities equivalent to those afforded to the majority. In the proposed North Victoria Catchment Area, I anticipate that the numbers will only grow to warrant instruction in a series of classrooms with access to facilities proportionate to those afforded to the majority, near the middle of the sliding scale. The CSF could ultimately be entitled to space for about 774 elementary-age students across the entire Current École Victor-

Brodeur Catchment Area. It will have to make the hard decisions about where to add schools to accommodate that enrolment while still making use of its capacity at École Victor-Brodeur. I also note that its need for additional space is not immediate given that it can accommodate all its enrolment between École Victor-Brodeur, Lampson Annex and Sundance Annex.

[4264] I conclude that the global educational experience at École Victor-Brodeur is equivalent to the educational experience at comparator schools. However, transportation times in Victoria are very long. Students travelling from the North-Central, East Victoria and West Victoria Catchment Areas face particularly long travel times. The distance from those catchment areas to École Victor-Brodeur deter some parents from sending their children to École Victor-Brodeur.

[4265] I find that the situation at École Victor-Brodeur was primarily caused by poor planning of the École Victor-Brodeur Replacement Project. Since then, the lack of capital funding for Expansion Projects materially contributed to the situation in Victoria. However, I find that the Ministry's breach is justified.

XXVII. ÉCOLE L'ANSE-AU-SABLE (KELOWNA)

[4266] Kelowna is located in the Okanagan region of British Columbia. There, the CSF operates École L'Anse-au-Sable, a homogeneous, French-language elementary/secondary school serving children in Kindergarten to Grade 12. École L'Anse-au-Sable is housed in a former independent school, the former Central Okanagan Academy. The Province acquired Central Okanagan Academy for the CSF in about 2005. In 2014/15, 193 students were enrolled at École L'Anse-au-Sable.

[4267] The CSF proposes to divide the École L'Anse-au-Sable catchment area and build two new schools on two new sites. The CSF plans to construct an elementary school in West Kelowna (the "West Kelowna Elementary Project") to serve children living on the west side of Lake Okanagan. In 2014, the CSF estimated that project

would cost nearly \$9 million, excluding the cost of acquiring a site and preparing it for construction.

[4268] Additionally, the CSF plans to construct a new elementary/secondary school in Kelowna on a new site to serve elementary students living east of Lake Okanagan and secondary students from both catchment areas (the “École L’Anse-au-Sable Replacement Project”). In 2014, the CSF estimated that project would cost about \$23.8 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[4269] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all described their experiences with minority language education in Kelowna. Mr. Stewart and Mr. Miller also spoke to their dealings with the CSF and SD23-Central Okanagan in Kelowna.

[4270] The Court also heard from two educators who worked at École L’Anse-au-Sable. Ms. Daragahi, the current principal at École Élémentaire Entre-lacs (Penticton) described the Central Okanagan Academy site from when École L’Anse-au-Sable first occupied it until she left at the end of 2007/08.

[4271] Mr. Blais is the current principal at École L’Anse-au-Sable. Mr. Blais was the principal at École Élémentaire Entre-lacs between 2006/07 and 2010/11. He became the principal of École L’Anse-au-Sable in 2011/12. He also oversees the CSF Leadership Academy, a mentorship and training programme for new administrators with the CSF. While Mr. Blais was generally credible, he demonstrated a tendency to exaggerate his evidence. For example, he testified that it took upwards of 45 to 55 minutes for students to travel to a playfield across the street from École L’Anse-au-Sable.

[4272] The Joint Fact Finder's Report also describes École L’Anse-au-Sable and comparator schools. The Fact-Finding Team relied on District and Ministry Data, as well as data in architectural and mechanical construction drawings. Additionally, a member of the Fact-Finding Team visited 10 of the 41 comparator schools, and made two visits to École L’Anse-au-Sable. The Fact-Finding Team took outdoor

measurements using the Regional District of Central Okanagan Geographic Information System. Overall, I find this to be a highly reliable source of evidence.

B. History and Context

1. The CSF's Kelowna Catchment Area

[4273] Dr. Kenny traces Kelowna's history to a Francophone mission founded in 1859. Dr. Kenny also explained that a number of Francophone families were prominent in the early community, and vital to the first agricultural endeavours in the area. French speakers were also present on the eastern shore of Lake Okanagan, and continued to settle in Kelowna throughout the twentieth century.

[4274] Dr. Kenny advised that the mission on which Kelowna was founded included a school, where lessons were taught in French. It remained in operation until 1866. After that school closed, no formal education facilities existed in the region until the community's first public school began operations in English in the mid-1870s.

[4275] Kelowna's Programme Cadre began in 1979. Dr. Kenny reported that Francophone volunteers also taught French courses on weekends to assist students to acquire the French skills necessary to join the Programme Cadre.

[4276] In the 1990s, Mr. Miller recounted, Kelowna's Programme Cadre entered a challenging period with decreasing enrolment, increasing referrals to the French immersion programme, and SD23-Central Okanagan's refusal to extend the Programme Cadre to the secondary level. The secondary programme was eventually allowed to exist as a subset of the French immersion programme, with "pullout" sessions for the Programme Cadre students.

[4277] The evidence shows that today, Kelowna has an active Francophone community, with a Francophone cultural organization, the Centre Culturel Francophone de l'Okanagan ("CCFO").

[4278] Today in Kelowna, the CSF operates École L'Anse-au-Sable as a homogeneous, minority language elementary/secondary (K-12) school. École

L'Anse-au-Sable also offers a preschool programme. It does not offer Strong Start or daycare.

[4279] The catchment area for École L'Anse-au-Sable consists of the entire territory of SD23-Central Okanagan (the "Current École L'Anse-au-Sable Catchment Area"). It therefore includes the urban centres in Kelowna and West Kelowna, as well as smaller rural, agricultural communities, like Peachland to the southwest and Winfield and Oyama to the northeast. In that territory, SD23-Central Okanagan operates 30 elementary schools, six middle schools and five secondary schools. SD23-Central Okanagan offers French immersion instruction at six elementary schools, one middle school and one secondary school.

2. Conclusions

[4280] When analyzing the Kelowna claim, I will take into account that the catchment area of École L'Anse-au-Sable is predominantly urban, although it also serves a few smaller, rural communities. As a result, École L'Anse-au-Sable competes with a large number of schools, including many French immersion programmes at all grade levels. At the elementary level in particular, many of those programmes are closer to the homes of CSF students than is École L'Anse-au-Sable. I will also take into account that it has deeper Francophone roots than many other communities in British Columbia, with a strong Francophone community that has demonstrated its commitment to minority language education.

[4281] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[4282] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[4283] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[4284] The evidence concerning the universe of eligible students is broken down by catchment area for the CSF's proposed new schools.

[4285] With reference to the catchment area for the West Kelowna Elementary Project, Dr. Landry estimated that in 2011 there were 106 elementary-age children (age 5-12) in the catchment area with a Mother Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 137 such children in the catchment area: growth of about 30%.

[4286] In connection with elementary-age children living in the catchment area for the École L'Anse-au-Sable Replacement Project, Dr. Landry counted 327 children with a Mother Tongue Rightsholder parent. Mr. McRae forecasted that universe of children to grow to 410 children: growth of about 25%.

[4287] I note that Dr. Landry also counted 210 elementary-age children of non-Francophones living in the catchment area for the West Kelowna Elementary Project in the Knowledge Category, and 55 in the Regular Home Use Category. In the École L'Anse-au-Sable Replacement Project catchment area, he counted 925 children in the Knowledge Category and 235 in the Regular Home Use Category. I do not find those numbers to be a reliable proxy for the number of children of

Education or Sibling Rightsholders in the Current École L'Anse-au-Sable Catchment Area.

[4288] In connection with secondary-age children (age 13-17) across the Current École L'Anse-au-Sable Catchment Area, Dr. Landry counted 305 children with a Mother-Tongue Rightsholder parent. Mr. McRae forecasted slight growth of this number to 315 children. I do not consider Dr. Landry's counts of 1,035 secondary-age children in the Knowledge Category, or 95 in the Regular Home Use Category, to be helpful evidence.

[4289] I find that a reasonable proxy for the total universe of rightsholders children in the Current École L'Anse-au-Sable Catchment Area is 865 children: 140 elementary-age children in the catchment area for the West Kelowna Elementary Project, and 410 elementary-age children in the catchment area for the École L'Anse-au-Sable Replacement project, and 315 secondary-age children across the Current École L'Anse-au-Sable Catchment area. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[4290] The evidence shows that enrolment at the CSF's Kelowna programmes has grown from 70 children in 1998/99 to 193 in the 2014/15 school year. The enrolment trend for École L'Anse-au-Sable shows that overall enrolment in Kelowna saw steady increases through its early years, peaking at 220 students in 2009/10. Enrolment then decreased to 175 children by 2012/13, before growing back to 193 children in 2014/15. Two children of non-rightsholders were admitted pursuant to the CSF's Expanded Admissions Policy when it was in force, which is negligible.

[4291] Since the CSF has operated as a full K-12 school, the evidence shows that elementary enrolment has decreased. In 2007/08 through 2009/10, the CSF had

between 150 and 165 students in Kindergarten through Grade 6. Since then, elementary enrolment has decreased to about 120 to 135 students in Kindergarten to Grade 6 in most years. Enrolment in Grades 7 through 12 since 2008/09 has been relatively constant, hovering between 55 and 65 children in most years.

[4292] The plaintiffs also provided evidence dividing current elementary enrolment by catchment area. That evidence suggests that 19 current École L'Anse-au-Sable elementary students live in the catchment area for the West Kelowna Elementary Project. A further 114 current École L'Anse-au-Sable elementary students live in the catchment area for the École L'Anse-au-Sable Replacement Project. There are 60 secondary students in Grades 7 through 12 at École L'Anse-au-Sable living in the Current École L'Anse-au-Sable Catchment Area.

3. The Uptake Rate

[4293] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[4294] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[4295] The plaintiffs say that the CSF seeks two new schools in the area. First, it seeks the West Kelowna Elementary Project, with nominal capacity for 140 students, or operating capacity for 130 students. That would give it six elementary classrooms. The CSF also seeks the École L'Anse-au-Sable Replacement Project, with nominal capacity for 390 students or operating capacity for 365 students. In other words, it asks for operating capacity for 38 Kindergarten students, 202 elementary students and 125 secondary students. That would give it 11 elementary classrooms and five secondary classrooms. In support of the request, the plaintiffs point to enrolment increases between 1998/99 and 2014/15, and suggest that travel times from West Kelowna and facility problems at École L'Anse-au-Sable deter parents from enrolling their children in minority language education.

[4296] The defendants ground their submission in participation rate. They submit that the CSF would require a 102% participation rate to fill the West Kelowna school by 2023, and a 54% participation rate in East Kelowna by 2023. They suggest it is not realistic to expect that the CSF's Kelowna programmes will see that much growth.

[4297] Currently, 114 elementary students live in the catchment area for the École L'Anse-au-Sable Replacement Project. Taking into account the 410-child proxy universe, the proxy participation rate of children in that area is 28%. The number of children attending that programme has been relatively stable for several years. While there is room for the proxy participation rate to grow, given the high rate of assimilation and low rate of transmission in British Columbia, as well as the long history of minority language education in Kelowna and the school's location in the centre of the Proposed East Kelowna Catchment area, the growth at the elementary level is unlikely to be substantial.

[4298] The CSF has replaced an existing owned, homogeneous elementary/secondary school once, in Victoria, although it did so on the same site. École Victor-Brodeur re-opened in January 2007, with 272 students in Kindergarten

to Grade 7. In 2014/15, it had 531 children enrolled in those grades. Its elementary enrolment grew by 259 children, or 95% in those years.

[4299] Dr. Landry found that in 2011, there were 1,075 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder parent living in the Greater Victoria region. Assuming that universe remained constant, École Victor-Brodeur's participation rate grew from 25% of elementary-age children in 2006/07 to 49% of elementary-age children in 2014/15. This represents growth in the participation rate by about 24%.

[4300] There are some parallels between École Victor-Brodeur and École L'Anse-au-Sable. Both are elementary/secondary schools that are owned by the CSF. Both exist in predominantly urban areas while serving some communities from outlying areas. There are strong Francophone communities in both communities.

[4301] However, there are also some differences. École Victor-Brodeur was in worse condition when it was replaced than École L'Anse-au-Sable is in now. Mr. Wood related the strong participation and enrolment growth in Victoria to the presence of a military base with a Francophone population in Esquimalt. Without that influence, and given École L'Anse-au-Sable's facilities are already better than those at the old École Victor-Brodeur facility, enrolment growth at École L'Anse-au-Sable might be lower than the growth at École Victor-Brodeur.

[4302] On the other hand, École Victor-Brodeur saw that growth while serving students from the outskirts of Greater Victoria, who face longer travel times and are less likely to attend École Victor-Brodeur. The participation rate at École Victor-Brodeur might have been higher if the universe and enrolment only included children proximate to École Victor-Brodeur. Since the CSF proposes to divide the catchment area for École L'Anse-au-Sable, the participation rate for the École L'Anse-au-Sable Replacement Project could prove to be higher than at École Victor-Brodeur.

[4303] Taking into account all the surrounding circumstances, I find that the CSF can reasonably expect about 200 children in Kindergarten to Grade 6 to attend the

elementary component of the École L'Anse-au-Sable Replacement Project. This represents about a 50% participation rate, which is consistent with the participation rate achieved in the elementary component of a newly-built elementary/secondary school in Victoria.

[4304] Turning to the West Kelowna Elementary Project, 19 elementary-age children of the 140-child proxy-universe attend École L'Anse-au-Sable. That reflects a 14% participation rate, leaving considerable room for the participation rate to grow. Parents in that area have access to neighbourhood schools and at least one French immersion school at the elementary level. Thus, the lack of a CSF school West of Lake Okanagan and the distance between West Kelowna and École L'Anse-au-Sable likely deter some parents from choosing minority language education. If the CSF constructed the West Kelowna Elementary Project, the participation rate would likely grow.

[4305] The CSF opened a new programme to divide a catchment area and provide a local option in suburban community once, in Richmond. Rightsholders' children from Richmond attended École Élémentaire Anne-Hébert (Vancouver (East)). Following demand from parents in Richmond, École Élémentaire des Navigateurs opened in leased, heterogeneous space at Diefenbaker Elementary in Richmond with 10 students in Kindergarten and Grade 1 in 2001/02. In 2003/04, with 34 students in Kindergarten to Grade 4, it moved to a leased homogeneous facility at Kilgour Elementary. By 2007/08, it offered Kindergarten through Grade 6, and served 90 children. Its 2014/15 enrolment was 127 children in Kindergarten to Grade 7.

[4306] As I explain in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), the proxy universe of rightsholders in Richmond is about 300 elementary-age children. Assuming that remained constant, the participation rate in Richmond grew to about 33% of the proxy universe in grades Kindergarten to Grade 6 in the programme's first 10 years. By 2014/15, the proxy participation rate of Richmond rightsholders at École Élémentaire des Navigateurs reached about 42%,

in leased, homogeneous space that is generally equivalent to that of the majority subject to long travel times. I find that with construction of a new, homogeneous school facility, its enrolment could be expected to increase to about 55%.

[4307] The situation in Richmond is instructive. It shows that even where a new programme is being created to give a local community on the outskirts of a metropolitan centre a closer homogeneous school, the programme tends to grow gradually over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. This is also what the CSF proposed to do when it first considered opening a programme in Burnaby: it would begin with a few grades and progressively add more. Thus, the number of children will warrant different facilities and amenities as the West Kelowna Elementary Project grows.

[4308] While I find that the growth pattern at the West Kelowna Elementary Project is likely to follow a similar pattern to the growth pattern at École Élémentaire des Navigateurs, the absolute number of students will likely differ. The catchment area for the West Kelowna Elementary Project has about half the number of Mother-Tongue Rightsholders' children as Richmond. Further, in Richmond, there was clear demand from parents for a local elementary programme, which is not present with connection to West Kelowna. On the other hand, West Kelowna appears to have deeper Francophone roots than does Richmond, which weighs toward a higher participation rate.

[4309] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect 10 to 20 students to attend the West Kelowna Elementary Project in its first three or so years. Looking into the future, enrolment could grow as high as 50 students, which reflects a 36% participation rate of the

proxy universe. This is slightly higher than the elementary-level participation rate the CSF has achieved in the current École L'Anse-au-Sable Catchment Area, reflecting the impact that a new school would have on enrolment. It is also proximate to the participation rate that the CSF achieved in École Élémentaire des Navigateurs' first 10 years.

[4310] Enrolment at the West-Side Vancouver Elementary Project might grow or shrink after that. As I explained in Chapter VII, The Number of Children, the evidence of population forecasting only extends to 2023, and that forecasting grows less reliable over time. Given a lack of an evidentiary basis, I cannot draw any conclusions about the anticipated future growth more than 10 years into the future, as that growth is not reasonably foreseeable.

[4311] The final question is the number of children from the Current École L'Anse-au-Sable Catchment Area likely to attend the secondary component of the École L'Anse-au-Sable Replacement Project. With secondary enrolment of 60 students and a 315-student universe, the current secondary participation rate at École L'Anse-au-Sable is 19%. The CSF has achieved that participation rate with relatively limited secondary facilities. It offers specialty classrooms in portables for shop and music instruction, and also has a classroom for home economics. If École L'Anse-au-Sable were reconstructed with some better specialty classrooms, it would likely see an increase to its enrolment and participation rate.

[4312] École Victor-Brodeur, too, was rebuilt with better secondary amenities than were previously available. Its enrolment in Grades 8 through 12 was 123 students when the new school opened in 2006/07. Its enrolment in those grades grew to 183 by 2014/15. That reflects growth of about 60 students, or by nearly 50%.

[4313] Dr. Landry provided evidence about the potential number of secondary-age rightsholders living in the Greater Victoria area. His evidence is that there are a total of 503 secondary-age children in the catchment area with a Mother-Tongue Rightsholder parent. Assuming that the total universe of secondary-age rightsholders remained stable over time, the participation rate grew from about 24%

in 2006/07 to 36% in 2014/15. In other words, the participation rate at the secondary level grew by 12%.

[4314] As mentioned previously, the presence of the military base in Victoria that is not present in Kelowna suggests that École L'Anse-au-Sable will not see as much growth to its secondary programme as occurred in Victoria. On the other hand, École Victor-Brodeur has become overcrowded and secondary students now take many of their courses in an elementary school, Lampson Annex.

[4315] Taking into account the experience in Victoria as well as the similarities and differences between the circumstances in Kelowna and Victoria, I consider that the CSF can reasonably expect about 80 children to participate in the secondary component of a combined elementary/secondary programme in a newly-built École L'Anse-au-Sable. That reflects a participation rate of about 25%, which is similar to, but less than, what the CSF was able to achieve in Victoria.

D. Entitlement

[4316] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[4317] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be those within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[4318] In this case, the appropriate comparator schools for École L'Anse-au-Sable are all those in SD23-Central Okanagan. The maps show there are a number of rightsholder parents sending their children to École L'Anse-au-Sable from across the school district. Thus, all those schools are the local alternatives that parents would consider when making enrolment decisions for their children.

2. Location on the Sliding Scale

[4319] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[4320] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[4321] The evidence shows that the average operating capacity at comparator elementary schools is 341 students. The only schools built for operating capacity for fewer than 200 students are Oyama Traditional School (97-student capacity), which serves a small community north of Kelowna, and Anne McClymont Primary (135-student capacity), an annex serving children in Kindergarten through Grade 2. The next smallest school is Ellison Elementary, which was built to accommodate 249 students.

[4322] With connection to enrolment, comparator elementary schools had average enrolment of about 337 students in 2014/15. The smallest of them is Oyama Traditional School, which had 101 students enrolled that year. (Anne McClymont Primary appears to have been closed in 2014/15). Otherwise, no other schools had fewer than 200 students in Kindergarten to Grade 6. Eight had enrolment of fewer than 250 students.

[4323] Comparator secondary and middle schools are much larger. The average operating capacity of those schools is about 900 students, ranging from 425

students (Rutland Middle) to 1,600 students (Kelowna Secondary). Enrolment is large, too: average enrolment at those schools was 922 students in 2014/15, ranging from 443 students (Springvalley Middle) to 1,804 students (Kelowna Secondary).

[4324] I find that about 200 elementary-age children are likely to take part in the elementary component of the École L'Anse-au-Sable Replacement Project from its new proposed catchment area. There are several schools that have elementary enrolment and capacity just higher than the number of students that would be likely to enrol in a newly constructed homogeneous school. Given that sometimes the minority warrants services different from what would be appropriate for the majority, and the deference owed to the CSF's determination on the point, I am satisfied that 200 students falls at the high end of the sliding scale, warranting homogeneous facilities and a global educational experience equivalent to what is provided to the majority in the Kelowna area.

[4325] However, comparator middle and secondary school are often more than 10 times the size of the 80 students I anticipate would enrol in the secondary component of the École L'Anse-au-Sable Replacement Project. In light of the different sizes of the programmes, it would not be pedagogically appropriate or cost-effective for a homogeneous, stand-alone secondary school to be built for the minority language secondary population in Kelowna.

[4326] Of course, the CSF proposes to build a combined elementary/secondary school. The CSF is entitled to some deference in its determination that model is pedagogically and financially appropriate for Kelowna's linguistic minority. However, given the small size of the École L'Anse-au-Sable Replacement Project's projected population as compared to that at comparator secondary schools, it is not practical in terms of cost and pedagogy for École L'Anse-au-Sable to offer equivalent secondary programming and services to those at SD23-Central Okanagan secondary schools. In light of the very small number of secondary school students, the number of secondary students falls to low end of the sliding scale, warranting

Francophone secondary instruction and proportionate access to core secondary-school instructional facilities.

[4327] The situation is different for the West Kelowna Elementary Project. I have determined that in the near-term future, in the first three or so years of the new programme, somewhere between 10 and 20 children can be expected to attend a new CSF elementary programme in West Kelowna. Thereafter, I find that its enrolment may grow to about 50 students. Generally, the Province does not build new schools in SD23-Central Okanagan or elsewhere with operating capacity for 10 to 50 children. There are no schools with similar enrolment in the proposed catchment area. I find that the numbers therefore fall to the low end of the sliding scale, warranting minority language instruction in a series of classrooms.

3. Global Educational Experience at École L'Anse-au-Sable

[4328] To understand some of the plaintiffs' complaints, it is necessary to appreciate the nature of the École L'Anse-au-Sable site. École L'Anse-au-Sable operates as a campus. The main school building is made up of a collection of modular structures that are connected to one another to form a single building. It is mostly used for elementary school instruction. The gymnasium is in a separate building, and has some adjacent classrooms that are used for secondary instruction. Additionally, there are several portables on the campus: some are used for secondary instruction, one is used to teach music, and another is used by a Francophone preschool.

[4329] The plaintiffs argue that the elementary educational experience at École L'Anse-au-Sable is substandard due to a number of factors: constraints related to its site; an unappealing main entrance and main office; a lack of a functional multipurpose space; small classrooms; an inadequate library; its gymnasium; a lack of learning assistance space; acoustic factors; and lengthy travel times. I weigh those factors together with others that are relevant to the global educational experience.

a) Site Constraints

[4330] École L'Anse-au-Sable's playing fields have concerned the Ministry and the CSF since the CSF first expressed interest in acquiring Central Okanagan Academy.

[4331] The Joint Fact Finder's Report does not state the overall size of the École L'Anse-au-Sable site. The size of all the playfields together is 3,252 metres, or about 17 m² per student. The overall site size at comparator secondary schools is about 69 m² per student. At elementary schools, the average site size is more than 100 m² per student. No other schools have less than 30 m² per student for their site. Of course, the École L'Anse-au-Sable site is actually larger than the sum of its playfields. Nevertheless, I am satisfied based on all the evidence, including the discussions between the CSF and the Ministry giving rise to the CSF's acquisition of Central Okanagan Academy, that the site is very small, particularly for secondary students.

[4332] This was confirmed by both Mr. Blais and Ms. Daragahi. According to Mr. Blais, the schoolyard is set up for students in primary grades. Ms. Daragahi's evidence was that the placement of the elementary play structures impedes students' ability to play sports like soccer.

[4333] However, École L'Anse-au-Sable is located across the street from the Capital News Centre, a multi-use recreation area including outdoor and indoor soccer fields, a swimming pool, hockey rinks and other facilities. As I develop below, when the CSF lobbied to acquire Central Okanagan Academy, it relied on a plan to use those facilities to accommodate secondary students.

[4334] Mr. Bonnefoy explained that throughout his tenure, École L'Anse-au-Sable had an agreement to use the Capital News Centre facilities. Ms. Daragahi confirmed that when she worked there, École L'Anse-au-Sable used those fields for physical education instruction in the spring months.

[4335] However, this seems to have changed. Mr. Blais described very limited use of the Capital News Centre. According to him, elementary students attend

swimming lessons at the Capital News Centre. Students use the ice rinks two or three times each year, and the school rents the indoor and outdoor soccer fields once every two years to host a festival for CSF schools in the interior of BC.

[4336] According to Mr. Blais, École L'Anse-au-Sable does not make greater use of the Capital News Centre's fields because it can take upwards of 45 to 55 minutes to travel across the street to use the fields. In my view, having examined the maps and the distances, this was an exaggeration, as were the other time estimates he gave for travelling to and from the sportsfields. The greater concern, in his view, is that the trip to the centre is considered a field trip, and requires extra supervision and parental permission. He conceded that it would be possible to ask parents for blanket consent for the entire year, but he has not tried this approach. Regardless of the consent issue, he finds it problematic that students must cross a busy road to visit the site, and that the crossing light is too short for all students to pass across the street at the same time. As I see it, he finds it inconvenient to use the playfields.

b) Main Entrance and Office Space

[4337] On entering École L'Anse-au-Sable, there is a large foyer with space for performances and social activities. It is also used as a lunch room, and for teaching assistants to work with students. École L'Anse-au-Sable also has an administrative space with a reception, secretarial space, a principal's office and vice principal's office. Mr. Blais and Ms. Daragahi testified that the offices are not soundproofed.

[4338] The Joint Fact Finder's Report does not state the size of the main entrance or administrative space at École L'Anse-au-Sable. The plaintiffs rely on the parent comparison affidavits to argue that École L'Anse-au-Sable's foyer and main office are less welcoming and functional than those at comparator schools. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I do not give these statements any weight.

c) Multipurpose Space

[4339] There is no multipurpose room at École L'Anse-au-Sable. Instead, École L'Anse-au-Sable's large foyer is used as a multipurpose room. Because the space is open and unstructured, it is not suitable for some purposes, as noise from the area might disturb surrounding classrooms.

[4340] The foyer is quite large, measuring about 268 m². It is larger than the average multipurpose space at SD23-Central Okanagan comparator secondary schools, which have an average of 228 m² of multipurpose space for much larger populations. It is more than double the size of average multipurpose space at elementary comparator schools, which is only 126 m². Five comparator schools have atriums that serve as multipurpose rooms just as École L'Anse-au-Sable does.

d) Classrooms

[4341] According to Mr. Blais, in 2014/15, École L'Anse-au-Sable's 193-student enrolment was split between six elementary and three secondary divisions. Most of the divisions are split classes. There are at least eight classrooms in the main school complex, which are used predominantly for elementary students. An additional three classrooms adjacent to the gymnasium are used for the secondary programme.

[4342] The main complex of classrooms at École L'Anse-au-Sable is a collection of modular structures. According to Ms. Daragahi, the classrooms are small. Mr. Allison confirmed he had the same first impression of École L'Anse-au-Sable's classrooms. In Ms. Daragahi's experience, the size of the classrooms made it challenging to organize furniture.

[4343] The classrooms at École L'Anse-au-Sable are, indeed, very small. On average, the classrooms are about 63 m². At comparator schools, average elementary classroom size is about 78 m², while the average secondary classroom size is about 75 m². No elementary or secondary schools have an average classroom size smaller than 70 m².

e) Special Education Space

[4344] According to Ms. Daragahi, when she taught at École L'Anse-au-Sable, there was a classroom adjacent to the gymnasium that was used for learning assistance. It seems as though that room is now used for secondary instruction. Learning assistance is also sometimes delivered in the atrium.

[4345] The Joint Fact Finder's Report indicates that, not including the atrium, École L'Anse-au-Sable has about 58 m² of learning assistance space. That works out to about 0.3 m² per student enrolled at the school.

[4346] The average amount of special education space at comparator elementary schools is 113 m², or 0.4 m² of space per student enrolled at the school. Eight of 31 comparator elementary schools have less absolute special education space than does École L'Anse-au-Sable.

[4347] Comparator secondary schools have an average of 286 m² total learning assistance space, or 0.3 m² per student. Only Rutland Middle has an amount of special education space comparable to that at École L'Anse-au-Sable, with about 62 m² of space.

f) Library

[4348] When Ms. Daragahi worked at École L'Anse-au-Sable, the library was located in a small classroom. Her evidence was that the library was too small to hold the breadth of books necessary for students in Kindergarten through Grade 12. As a result, books for the secondary programme were stored in the secondary classrooms.

[4349] According to Ms. Daragahi, the library was so small that there were only a few round tables for students to work. There was insufficient space for students to work on their laptops in the library.

[4350] In Mr. Blais's view, the École L'Anse-au-Sable library is functional for students in primary grades. However, he affirmed that the École L'Anse-au-Sable

library is small, particularly for the secondary programme. He observed that the library is too small for secondary students to do research, and lacks a secondary reading area. According to him, while secondary students use the library at lunch, they otherwise make very limited use of that space.

[4351] École L'Anse-au-Sable's library is 58 m², smaller than an average classroom at the school. It offers about 4 m² per student in an average-sized class, or 0.3 m² per student enrolled in the school. At comparator elementary schools, the average library is nearly 100 m² larger, at 154 m².

[4352] No elementary schools have a library as small as that of École L'Anse-au-Sable. Comparator elementary schools offer, on average, about 6.6 m² per student in an average class and about 0.5 m² per student, more than what is available at École L'Anse-au-Sable.

[4353] The difference is even more pronounced at the secondary level, where the average library is about 300 m². They offer about 0.4 m² per student enrolled at the school, which is comparable to the space at École L'Anse-au-Sable. However, they offer 13 m² per student in a class: more than double the space per student more than is available at École L'Anse-au-Sable.

g) Gymnasium

[4354] Mr. Bonnefoy's evidence was that the gymnasium at École L'Anse-au-Sable was large and of excellent quality, and was one of the points that attracted the CSF to the Central Okanagan Academy site. It is rented out to local community organizations, allowing the school to generate some modest income. For-profit organizations pay \$60 per hour, and not-for-profit organizations pay \$40 per hour.

[4355] The principals described things differently. Mr. Blais explained that the gymnasium is adequate for students in Kindergarten to Grade 8. However, with no bleachers and limited storage, he found the gymnasium less suitable for secondary students. He also voiced disapproval that the gymnasium is separate from the elementary school instructional area, and that students must walk to the gymnasium

in inclement weather. I note, though, that the gymnasium can be accessed by a covered walkway.

[4356] The Joint Fact Finder's Report does not state the size of the École L'Anse-au-Sable gymnasium. However, based on Mr. Bonnefoy's evidence, I am satisfied that the gymnasium is a large one and is generally suitable for elementary and secondary instruction. The only problem with the gymnasium is its lack of bleachers.

h) Acoustics

[4357] The Court heard considerable evidence about the acoustics at École L'Anse-au-Sable.

[4358] Ms. Daragahi explained that the École L'Anse-au-Sable atrium is very loud, with a bad echo. Mr. Allison likewise noticed the echo in the foyer.

[4359] Mr. Blais confirmed that when he arrived at École L'Anse-au-Sable, the atrium had an echo. To control the sound, he installed stoplights to warn students about the noise levels. That was not particularly effective, so soundboards were installed on the ceiling. By Mr. Blais's account, this has muffled some of the sound.

[4360] The hallways likewise have a bad echo. Ms. Daragahi explained that the echo was so loud that she chose to keep the door to her classroom closed to avoid distraction.

[4361] According to Mr. Blais, the École L'Anse-au-Sable administrative area is another victim of the persistent echo. He is able to hear conversations in the vice principal's office, causing problems for confidentiality. Ms. Daragahi had the same experience.

[4362] Ms. Daragahi's evidence was that the classrooms in the main building are not soundproof, so occasionally noise from one class disturbs students in other classrooms. Both Ms. Daragahi and Mr. Allison noted that noise is an issue in one small classroom adjacent to the gymnasium.

[4363] Further, Mr. Blais pointed to a persistent echo in the gymnasium, which he attributed to the high ceilings. Mr. Blais conceded that one organization, Kelowna Sports, rents the gymnasium because of its high ceiling. He also agreed that a high ceiling is generally a positive feature of the gymnasium, and confirmed that no renters have complained about noise. As I see it, Mr. Blais was likely exaggerating the import of the echo in the gymnasium.

[4364] Mr. Blais suggested that the sound issues could be remedied with soundboards, which he has seen in other secondary schools. He has asked for funding for those renovations, but the CSF maintenance department has yet to perform the renovations.

i) Transportation

[4365] École L'Anse-au-Sable students travel to school by school bus. In 2012/13, 96% (168 of 175) École L'Anse-au-Sable students were transported to school by bus. No comparator elementary or secondary schools transport such a high percentage of their populations to school. However, all but one middle and secondary school transport a higher absolute number of students to school by bus than does École L'Anse-au-Sable. Six elementary schools transport more than 100 students to school by bus.

[4366] At École L'Anse-au-Sable, the maximum bus ride time was 70 minutes, while the average bus ride time was 51 minutes. More than half of the École L'Anse-au-Sable students have ride times of 30 minutes or longer. About a quarter have ride times longer than 45 minutes.

[4367] At the comparator schools that offer transportation, the average maximum elementary school bus ride time was 32 minutes, while the average maximum bus ride time for secondary students was 65 minutes. The average bus ride time was 18 minutes at both the elementary and secondary level.

j) Secondary School Programme

[4368] Mr. Blais gave evidence about the secondary enrichment courses on offer at École L'Anse-au-Sable. Students in Grades 7 through 9 can choose from courses in music, Japanese, cooking, carpentry, visual arts and robotics. Students in Grades 10 through 12 can additionally choose from courses in technology and design, music, and an advanced physical education course.

[4369] Ms. Daragahi and Mr. Blais described the secondary student space at École L'Anse-au-Sable. Most secondary classes take place in the classrooms adjacent to the school gymnasium. Secondary students are also taught in portables and in the elementary school building.

[4370] Two classrooms adjacent to the gymnasium are used for teaching secondary-level academic classes. Ms. Daragahi taught in that room, and found it to be noisy due to its proximity to the gymnasium. Further, according to Ms. Daragahi, that classroom is near a busy street, so the blinds are always closed to block out noise and visual distraction.

[4371] Another classroom adjacent to the gymnasium is used for teaching home economics. That classroom has sewing machines and kitchen supplies.

[4372] The secondary programme also makes use of two portables. One portable is used for academic courses, and one for carpentry and visual arts. Secondary students also share a music portable with elementary students.

[4373] In the elementary school building, secondary students use the science lab. Mr. Blais explained that the science lab is a regular classroom, with counter space on both sides. It also has two sinks, and gas for experiments. The lab also has a small storage room for supplies. He noted that teachers are limited from doing some experiments in the room because of the ventilation system.

[4374] The secondary student lounge and secondary student lockers are also in the elementary school building. When Mr. Blais became principal, he rearranged some

classrooms to group the secondary student lounge and lockers together, so secondary students had less interaction with younger students and a more dedicated area in the elementary building.

[4375] Ms. Daragahi observed that the secondary area does not look like a proper school; she suggested that it does not have the spirit of a secondary school. Overall, Mr. Blais disagreed with the CSF's statement to the Ministry that the school presented the CSF with the opportunity to "immediately offer a full complement of K-12 programming for students," which I describe below.

[4376] According to Mr. Blais, École L'Anse-au-Sable sees drops in enrolment after Grades 6 and 9. Mr. Blais conceded that this is typical in his experience with minority language schools.

[4377] Mr. Blais has made some efforts to retain more students through secondary years, such as developing more sports teams and arranging for École L'Anse-au-Sable to participate in SD23-Central Okanagan sports leagues. To increase course offerings, he developed a programme allowing some École L'Anse-au-Sable students in Grades 11 and 12 to take some options at Mission Secondary. He discontinued the programme due to its cost.

[4378] Mr. Blais also started some new traditions for secondary students to assist with student retention. He started an offsite welcome camp for students in Grade 7 hosted by students in Grade 12. He began offering a secondary class trip to Vancouver for students in Grades 7 to 12 every other year. In the years with no trip, there is a school festival. He has also started a tradition of making a film every quarter showing what students have done together; École L'Anse-au-Sable will present a collated version to secondary students upon their graduation.

[4379] SD23-Central Okanagan schools offer a much wider variety of specialty classrooms for secondary instruction than students can access at École L'Anse-au-Sable. Many of them offer dedicated spaces for drama, metal working, mechanics,

drafting and film, for example. With few exceptions, those facilities form part of the school, and are not located in portable classrooms.

k) Other Factors

i. Facility Condition and Appearance

[4380] Mr. Blais's first impression of École L'Anse-au-Sable was that the school grounds, paint and gymnasium were all of a higher quality than they were at École Élémentaire Entre-lacs in Penticton. He finds the building and its surroundings appealing, with attractive landscaping and play structures. Mr. Bonnefoy and Mr. Allison expressed a similar sentiment.

[4381] École L'Anse-au-Sable is in very good condition compared to comparator schools. Its FCI score is 0.16. The average FCI score at comparator schools is 0.29 at the elementary level and 0.28 at the secondary level.

ii. Francophone Experience

[4382] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I describe in Chapter XV, Linguistic and Cultural Programming. Of course, since École L'Anse-au-Sable competes with French immersion at the elementary level, this factor might not be enough to persuade parents to choose minority language education.

[4383] Mr. Blais has tried to increase the Francophone sense of community at École L'Anse-au-Sable. In addition to the traditions he has implemented for secondary students, he has facilitated the development of a logo for the sports programme. He has also done some work developing school values and student leadership.

iii. Class Sizes

[4384] There is a pronounced difference between École L'Anse-au-Sable's class sizes and the average class sizes at comparator majority schools. École L'Anse-au-

Sable's average Kindergarten class has 16 students; SD23-Central Okanagan has an average of 20 students in each Kindergarten class. Similarly, at the primary level, École L'Anse-au-Sable has 20 students to a class while comparator majority schools have 23. The difference is more pronounced at the intermediate level, where École L'Anse-au-Sable has 15 students to a class as compared to the majority's 25. At the secondary level, École L'Anse-au-Sable has only 11 students to a class, while the majority average has 26.

iv. Student to Staff Ratios

[4385] The CSF's student to teacher ratio is 15 students to one teacher. That is better than the student-to-teacher ratio for SD23-Central Okanagan, which has 18 students to every teacher. The CSF also outperforms SD23-Central Okanagan on the special needs student-to-special needs-teacher ratio, with four special needs student to each special needs teacher. SD23-Central Okanagan has eight such students to such teachers.

v. Graduation Rates

[4386] There is only a marginal difference between the graduation rates from the CSF and SD23-Central Okanagan.

vi. Technology

[4387] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students. The laptops are decentralized and integrated into the classroom.

[4388] SD23-Central Okanagan appears to have a more advanced technology programme than many of the other districts in the claim. About half of the comparator elementary schools have carts with laptops, while the other half have centralized computer access in a laboratory. All the secondary schools have both centralized computers and laptops on carts. However, none of the comparator schools has laptops or computers individually assigned to students. As a result, I

find that although technology is better integrated into the classroom in SD23-Central Okanagan schools than in other districts, the CSF has a significant advantage over comparator schools with respect to technology.

vii. Crowding

[4389] École L'Anse-au-Sable has about 15 m² per student enrolled at the school. This represents more space per student than all but four of the 30 comparator elementary schools for which square metres per student were reported, and more than all but one secondary or middle school. It also represents almost 50% more space per student than the 11 m² per student at average comparator elementary and secondary schools.

[4390] There is no real difference between École L'Anse-au-Sable's capacity utilization and that of majority schools. École L'Anse-au-Sable is using 92% of its 210-student operating capacity. At comparator schools, the average capacity utilization is 94% at the elementary level and 106% at the middle school and secondary levels. About 17 of 30 comparator elementary schools and seven of 11 secondary/middle schools are operating above 90% capacity.

viii. Early Childhood Programming

[4391] Mr. Blais explained that although École L'Anse-au-Sable does not have a Strong Start programme, it does have a preschool located in portables on the school site.

[4392] About half of comparator elementary schools offer some form of early childhood programming. Seven offer preschool only, three offer Strong Start only, three offer Strong Start and preschool and one offers Strong Start, preschool and daycare.

I) Analysis

[4393] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a

reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[4394] The plaintiffs argue that there are a number of problems with the facilities at École L'Anse-au-Sable that make the global educational experience at École L'Anse-au-Sable not equivalent to the educational experience afforded to the majority. They say that the negative aspects of the facilities and travel times are not counterbalanced by the quality of instruction, educational outcomes, or extracurricular activities at the school. They also say the gaps in École L'Anse-au-Sable's facilities are not compensated for by École L'Anse-au-Sable's small class sizes.

[4395] On the negative side, École L'Anse-au-Sable has a deficient sportsfield. It is too small for secondary programming, in particular. However, when use of the Capital News Centre is taken into account, the CSF does have adequate sportsfields for secondary students. While the Capital News Centre lacks the convenience of a field on the same site, the evidence does not establish that the barriers to using that sportsfield are prohibitive. To the extent that École L'Anse-au-Sable does not have adequate sportsfields, it arises out of decisions taken by the CSF not to use the sportsfield across the street, a somewhat surprising decision given that one selling point used by the CSF to persuade the Ministry to acquire Central Okanagan Academy was its proximity to the large playfields across the street.

[4396] A reasonable rightsholder parent would also find it problematic that École L'Anse-au-Sable has very small classrooms. They are smaller than the average classroom size at all comparator school. This is particularly difficult for the CSF because it has many split classes, requiring more space to work with groups of students in the classroom. On the other hand, École L'Anse-au-Sable has fewer students to a class, on average, than majority schools do.

[4397] The library presents another detraction from the overall educational experience at École L'Anse-au-Sable. The library is very small on an absolute basis, a per student, and per-class size basis. Further, travel times can be problematic. While bussing is not uncommon in SD23-Central Okanagan, many École L'Anse-au-Sable students face longer travel times than they would to travel to comparator schools. This is particularly so at the elementary level, where the average bus ride time for majority elementary school students is 17 minutes. The average bus ride time at École L'Anse-au-Sable is 51 minutes. More than half of bussed students spend more than 30 minutes on the bus. On the other hand, 45% of students spend less than 30 minutes on the bus.

[4398] A reasonable rightsholder parent might also find noise to be a problem at École L'Anse-au-Sable. However, there is no comparative evidence to allow the Court to discern whether this is also a problem at comparator schools. There is likewise no credible comparative evidence to allow the Court to compare the size of the main entrance and office space at École L'Anse-au-Sable to that of comparator schools.

[4399] On the positive side, a reasonable rightsholder parent would find it very attractive that École L'Anse-au-Sable offers excellent Francophone programming, and has a strong Francophone identity because of the work done by educators like Mr. Blais. Additionally, École L'Anse-au-Sable is a visually attractive and appealing school. It is in better condition than comparator schools in SD23-Central Okanagan.

[4400] Additionally, a reasonable rightsholder parent would find École L'Anse-au-Sable's class sizes to be particularly attractive. École L'Anse-au-Sable's average class sizes are markedly smaller than those at comparator schools at every level, with the difference growing as cohorts age through the system. This allows École L'Anse-au-Sable to offer students more individualized attention than is available at comparator schools. Moreover, the CSF has better student-to-staff ratios than does SD23-Central Okanagan. It also has more space per student than most comparator

schools, and more than 50% more space per student than the average comparator elementary and secondary schools.

[4401] École L'Anse-au-Sable also assigns one computer to every student, giving it a significant advantage over comparator schools in terms of its technology programming. Technology is better integrated into the curriculum at École L'Anse-au-Sable than it is in comparator schools.

[4402] Further, École L'Anse-au-Sable has a very attractive gymnasium. It is sufficiently attractive that it is used by the outside community.

[4403] There are also a number of neutral factors. École L'Anse-au-Sable has considerable multipurpose space, more than many secondary schools with significantly larger enrolment. Like several other schools, its multipurpose space is also an atrium. École L'Anse-au-Sable has an average amount of learning assistance space. It operates at nearly the same capacity utilization as average comparator schools. It offers a preschool, similar to about half of all comparator elementary schools, which offer some form of early childhood programming.

[4404] Taking all that evidence into account, I find that a reasonably prudent rightsholder parent would be likely to consider that the global elementary school educational experience at École L'Anse-au-Sable meets the same standard as the comparator elementary schools in and around Kelowna. In my view, École L'Anse-au-Sable, like the comparator schools, has a mix of positive and negative features. In the context of an imperfect education system like the one in British Columbia, the minority cannot expect to have the best of each type of amenity.

[4405] With reference to secondary instruction, the plaintiffs acknowledge that École L'Anse-au-Sable cannot reasonably offer all the same elective courses offered at majority schools. However, they say that the quality of secondary instructional spaces are not at par with those available at larger SD23-Central Okanagan schools. In their submission, the secondary facilities ought to be superior to allow École L'Anse-au-Sable to compete with majority secondary programmes.

[4406] École L'Anse-au-Sable does not have many purpose-built specialty classrooms for secondary programming. However, it has a science lab, and with the addition of portables and through its technology programme, it is able to provide students with an array of options courses: from Japanese to technology and design to robotics, in addition to more traditional optional courses like art, cooking, sewing and carpentry.

[4407] École L'Anse-au-Sable has also taken a number of steps to enhance the secondary school experience. École L'Anse-au-Sable secondary students can participate in a welcome camp, SD23-Central Okanagan sports leagues and special field trips.

[4408] I acknowledge that the CSF believes that its secondary facilities ought to be more attractive to ensure substantive equivalence. However, given the very small number of students at the secondary level, in my view, secondary students cannot expect an equivalent global educational experience to what is offered at majority schools. The minority is entitled to instruction and access to core facilities. The CSF could achieve this in many ways. It could choose to educate children in a heterogeneous environment. Instead, it chooses to instruct students in a very small secondary programme. Because of that choice, it is not always financially or pedagogically appropriate for them to have fully equivalent facilities to what the majority is able to offer.

[4409] Overall, in light of the very small number of secondary-age children currently enrolled and that can be expected to enrol, École L'Anse-au-Sable offers a level of secondary programming that is proportionate to the number of students attending the programme.

4. The Educational Experience in West Kelowna

[4410] The plaintiffs argue that the numbers warrant a second newly-constructed homogeneous elementary facility in West Kelowna. The plaintiffs do not make any specific arguments about the quality of education for children living in West Kelowna,

and how École L'Anse-au-Sable does not meet their needs. I infer from their arguments concerning other communities, like Victoria, that the CSF likely plans to reduce travel times.

[4411] I find that the numbers in West Kelowna are entitled to instruction in a series of classrooms, near the bottom of the sliding scale. Currently, students from West Kelowna are receiving instruction in a distinct, homogeneous facility offering a global educational experience equivalent to what is found in majority schools. They receive those services in a nearby community, and receive transportation services. In my view, that affords students from West Kelowna with more than what they would be entitled to if services were provided in West Kelowna proper.

[4412] As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities themselves (*Mahe* at 371 to 372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment that shorter travel times were appropriate to prevent assimilation, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[4413] The CSF has determined that it is appropriate to establish a new catchment area and construct the West Kelowna Elementary Project. The right to start a programme in West Kelowna falls within its right to management and control. The defendants must not stand in the way of the CSF's decision in that respect.

[4414] However, given the small numbers that can be expected in the new programme, there is no requirement for the Province to build a new homogeneous school facility for those students. The defendants need only ensure that the baseline instructional services are available. It is simply not practical to expect the

Province to construct a new facility for 50 children before any programme has taken hold in a geographic region, and in a region where it generally is not financially or pedagogically appropriate to educate that number of children in their own school facility. If the CSF wants to start a heterogeneous programme to serve students from West Kelowna in their home community, it is open to it to do so.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[4415] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Kelowna and the dealings of the CSF, the Ministry and SD23-Central Okanagan in connection with it.

[4416] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the Province's capital funding system. With respect to Kelowna, I make findings that are of particular relevance to Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

1. Capital Planning History

[4417] Dr. Ardanaz recalled that when the FEA took jurisdiction in Kelowna, SD23-Central Okanagan offered elementary and secondary Programmes Cadres. Elementary students were housed in A.S. Matheson Elementary, a dual track (English/French) school. Secondary students attended at Kelowna Secondary, a heterogeneous, triple-track (English/French immersion/French) school.

[4418] The CSF's initial planning for Kelowna envisioned the acquisition of an SD23-Central Okanagan school to consolidate the Kelowna programmes in a homogeneous environment. In the CSF's June 1998 Capital Plan Submission for

1998/99, the CSF's second-highest ranked project was the acquisition of Gordon Elementary in Kelowna (the "Gordon Elementary Acquisition Project").

[4419] The Ministry supported and funded the Gordon Elementary Acquisition Project in August 1998. Based on the \$871,000 appraised value of Gordon Elementary, SD23-Central Okanagan was compensated with a \$400,000 project approval that allowed it to redevelop Kelowna Secondary.

[4420] Dr. Ardanaz explained that the CSF thought that Gordon Elementary offered insufficient space for growth, and was generally in disrepair and in need of renovations. At the time, the building had only four classrooms, some of which were used for administrative purposes.

[4421] The CSF's early project requests concerning Gordon Elementary envisioned two phases: first a renovation, then an addition (the "Gordon Elementary Renovation/Addition Projects"). In its September 1998 Capital Plan Submission for 1999/00, the CSF sought a small addition to Gordon Elementary as its sixth-highest ranked project, and a second addition and renovation as an unranked future project. The CSF requested the same projects, with similar rankings, through 2001.

[4422] In June 2002, Mr. Miller wrote to Dr. Ardanaz in connection with the Gordon Elementary Renovation/Addition Projects. The Ministry approved funding for the first half of the CSF's plan, a minor space project in the amount of \$371,710, with all the funds to be recovered by agreement with the Federal government. Mr. Miller advised that the Ministry supported the project despite it being a lower priority because the CSF's Planning Officer had learned of some increased, urgent space pressure at École L'Anse-au-Sable.

[4423] According to Dr. Ardanaz, the CSF proceeded with the first phase addition to Gordon Elementary, adding space for storage and administration. It also added portables to accommodate the CSF's secondary programme.

[4424] Following that work, the CSF did not continue requesting the second phase of the Gordon Elementary Renovation/Addition Projects. The CSF's September 2002 Capital Plan Submission for 2003/04 does not ask for any projects for Kelowna.

[4425] With the CSF's October 2003 Capital Plan Submission for 2004/05, the CSF's planning for Kelowna changed to a request for a new elementary secondary school on a new site (the "Kelowna Elementary/Secondary Project"), and took on a higher priority. That year, the Kelowna Elementary/Secondary Project was the CSF's second-highest ranked project. Consistent with the Ministry's directions to all school boards, the CSF asked for project funding in the third year of the Ministry's capital budget, with a site acquisition in 2006/07, and planning and construction of the school in 2007/08.

[4426] Meanwhile, the CSF identified a surplus SD23-Central Okanagan school it wanted to acquire, Bellevue Creek Elementary. In April 2004, the CSF Board of Trustees passed a resolution modifying its request for the Kelowna Elementary/Secondary Project from a new site and school to the acquisition of Bellevue Creek Elementary. The Minister supported that project in June 2004. The Ministry also accelerated funding, making it available in the first year of the capital plan, as it appeared that Bellevue Creek Elementary was readily available.

[4427] As planning progressed and negotiations with SD23-Central Okanagan proved challenging, the CSF learned of the availability of Central Okanagan Academy, and decided that it preferred that school. Since it was more expensive than Bellevue Creek Elementary, the CSF attempted to justify the added expense to the Ministry. In particular, the CSF highlighted that the Central Okanagan Academy Site would "meet the CSF's immediate needs" for a secondary programme without further renovations, while Bellevue Creek Elementary would require an addition. The CSF also offered to subdivide and sell part of the Central Okanagan Academy site to finance the additional cost. The Ministry supported the CSF's acquisition of the Central Okanagan Academy Site on that basis. The CSF sold Gordon

Elementary and applied the proceeds to the acquisition of the Central Okanagan Academy Site, but it never proceeded with the subdivision of the site. I describe this in more detail below.

[4428] École L'Anse-au-Sable moved to Central Okanagan Academy Site in the spring of 2005. Thereafter, it did not make any requests for projects in Kelowna for two Capital Planning Cycles. Mr. Bonnefoy advised that Central Okanagan Academy met the CSF's immediate needs, and the CSF had yet to consider the further development of the site.

[4429] The CSF began making capital requests for Kelowna again in its November 2006 Capital Plan Submission for 2007/08. That year, the CSF requested an addition to École L'Anse-au-Sable for its secondary programme (the "École L'Anse-au-Sable Secondary Addition Project") as its fourth-highest ranked project. The CSF requested the École L'Anse-au-Sable Secondary Addition Project again as its fifth-highest ranked project in its October 2007 Capital Plan Submission for 2008/09. Both years, the Echo Report shows that both the CSF and the Ministry considered the project to be a high priority.

[4430] With its May 2009 Capital Plan Submission for 2009/10, the CSF moved to a ward-based approach to its Capital Plan Submissions. That year, the project changed slightly to a request for projects to increase the capacity of École L'Anse-au-Sable from a school with capacity for 40K/125 elementary students to an elementary/secondary school with capacity for 40K/200 elementary and 125 secondary students.

[4431] In July 2009, the CSF provided the Ministry with a PIR in support of its requested Kelowna project (the "2009 Kelowna PIR"). That PIR proposes that the CSF partner with the CCFO on the project. The CCFO would construct a separate building on the site concurrent with the construction schedule for the École L'Anse-au-Sable Secondary Addition Project. The CSF did not include any details about the amount of funding the CCFO would contribute to the CSF's project.

[4432] Mr. Bonnefoy advised that the École L'Anse-au-Sable Secondary Addition Project never went forward. To accommodate secondary enrolment, the CSF used its AFG funds to purchase portables to use for music and shop classes.

[4433] The CSF's June 2010 Capital Plan Submission for 2010/11 was the first submission in Mr. Allison's time as Secretary-Treasurer. That year, the CSF's planning for Kelowna officially changed. The CSF asked for two projects in Kelowna: First, the CSF again asked to replace École L'Anse-au-Sable with a school with greater elementary and secondary capacity. It also sought the West Kelowna Elementary Project. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, these were said to be the CSF's #1 priority. The CSF sought accelerated funding for them in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan.

[4434] In support of its capital requests for Kelowna, in January 2011 Mr. Allison sent Mr. Cavelti an update to its 2009 Kelowna PIR. The CSF reviewed and updated the PIR with 2011 data, and updated the design aide sheet and Financial Summary. The PIR for that year showed that the Ministry considered the Kelowna project to be a high priority, and the West Kelowna Project to be NPIR. The CSF's lack of sequential prioritization is not reflected in the PIRs.

[4435] In the CSF's November 2012 Capital Plan Submission for 2012/13, the CSF requested the same projects with the same form of prioritization as it had previously. However, the Echo Report shows that the Ministry gave both projects a threshold ranking of "NPIR". According to Mr. Allison, the Ministry had not asked him to update the 2009 Kelowna PIR following the update he made in January 2011.

[4436] In its September 2013 Capital Plan Submission for 2013/14, the CSF requested the École L'Anse-au-Sable Replacement Project and the West Kelowna Elementary Project. At that point, the CSF's planning for École L'Anse-au-Sable changed again to a plan to reconstruct the school on a new site. The CSF submitted two In-House PIRs in support of them, and identified sites for each project.

[4437] In the Echo Report, the West Kelowna Elementary Project received a threshold ranking of NPIR. The École L'Anse-au-Sable Replacement Project was considered to be a low priority Building Condition Project based on its FCI rating: a departure from the high threshold ranking the Ministry gave the project several years earlier.

[4438] In his feedback on the CSF's Kelowna PIRs, Mr. Cavelti asked Mr. Allison to resubmit the École L'Anse-au-Sable Replacement Project as a Building Condition Project, and asked him to clarify how the existing school would be used after the construction of the new facility. He also asked for facility condition information.

[4439] In his October 22, 2014, reply to Mr. Cavelti, Mr. Allison confirmed the CSF's intent to dispose of the existing École L'Anse-au-Sable site and to apply those proceeds to the project costs. Mr. Allison refused Mr. Cavelti's request for facility condition information, advising that the Ministry had independent knowledge of the school's FCI score. Mr. Allison also explained the CSF's view that École L'Anse-au-Sable on a new site was an Expansion Project as well as a Building Condition Project.

[4440] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

[4441] As of the conclusion of the evidence at trial in August 2015, the Ministry had not supported any further capital projects for the CSF in the Kelowna area.

2. École L'Anse-au-Sable at Gordon Elementary

[4442] When the CSF assumed jurisdiction in Kelowna, its students were housed in heterogeneous programmes at A.S. Matheson Elementary and Kelowna Secondary. As the community of Francophone parents in Kelowna was organized and ambitious, the CSF immediately set to work seeking a homogeneous facility.

[4443] The CSF kept its leased space pending its acquisition of a new site and school. Dr. Ardanaz also asked SD23-Central Okanagan officials about surplus facilities. Dr. Ardanaz recalled that officials from SD23-Central Okanagan were supportive, and told him that SD23-Central Okanagan planned to close one or two schools, giving Dr. Ardanaz some hope. Initially, the CSF looked at moving its programmes to either DeHart School or East Kelowna Elementary, but neither school was made available to the CSF.

[4444] Dr. Ardanaz explained that eventually SD23-Central Okanagan officials informed him, confidentially, of their plans to close Gordon Elementary. Dr. Ardanaz visited the school, on a site that seemed large enough to eventually accommodate an elementary/secondary school. It did, however, need some renovations.

[4445] The CSF requested the Gordon Elementary Acquisition Project in its earliest capital plans. It was transferred to the CSF by way of an arrangement that gave SD23-Central Okanagan \$400,000 toward a project at Kelowna Secondary. Gordon Elementary was formally transferred to the CSF and was renamed École L'Anse-au-Sable in September 1998. Secondary students continued to be accommodated at Kelowna Secondary.

[4446] Ms. Daragahi described Gordon Elementary when she began teaching there in 2003. She explained that the building was in an industrial neighbourhood, and lacked visibility. The building had four classrooms, and another two classrooms in portables. A third portable was used as a library. The gymnasium was undersized for some of the requirements of Grades 5 through 8. The building had no air conditioning, and did not offer any space for music instruction.

[4447] Ms. Daragahi's children attended École L'Anse-au-Sable at Gordon Elementary the first year she taught there. Concerned about the lack of arts programming and extracurricular activities, she enrolled her children at a French immersion school close to her home. That school offered music classes, lunchtime clubs and bigger classrooms. Ms. Daragahi conceded on cross-examination that her decision was not just based on school facilities and programming. She also took into account her sons' friendships with other students at Glenmore Elementary.

[4448] Mr. Bonnefoy visited École L'Anse-au-Sable at the former Gordon Elementary when he arrived at the CSF in 2004. He confirmed Ms. Daragahi's view that the building was located in an industrial area of Kelowna, and lacked aesthetic appeal. When he visited, the school had four classrooms and five portables with hallways built around them. Three of the portables were being used for a library, technical needs, and special education, respectively.

3. Acquisition of Central Okanagan Academy

[4449] In 2003, the CSF began requesting an elementary/secondary school in Kelowna on a new site as the CSF thought the site was too small. Around February 2004, the École L'Anse-au-Sable APÉ struck a committee to begin searching for a new site. The committee acquired a list of surplus schools from SD23-Central Okanagan. That list included Bellevue Creek Elementary in the Mission area of Kelowna, and Lakeview Heights Elementary in the Lakeview Heights area of Kelowna.

[4450] Dr. Ardanaz recalled that Lakeview Heights Elementary was quite small. The committee did not favour it. Dr. Ardanaz also visited Bellevue Creek Elementary, and favoured it as a site for an elementary/secondary school. So, in March 2004, Dr. Ardanaz wrote to Mr. Larry Paul, Secretary-Treasurer for SD23-Central Okanagan, and asked to begin negotiating for the CSF to acquire Bellevue Creek Elementary with a goal of finalizing the agreement before July 2004.

[4451] Mr. Miller confirmed that he was aware of the discussions between the CSF and SD23-Central Okanagan, and of the CSF's interest in Bellevue Creek Elementary. However, the Ministry would not have done any independent analysis of whether the site would meet the CSF's needs.

[4452] According to Mr. Miller, in April 2004, Dr. Ardanaz informed the Ministry that the CSF Board of Trustees had resolved to amend its earlier Capital Plan Submission. Previously, the CSF had sought an elementary/secondary school at a cost of more than \$6 million. The amended request asked to acquire Bellevue Creek Elementary at a cost of \$2 million.

[4453] Mr. Miller confirmed that the Ministry supported this request as part of its 2004/05 capital budget. On June 2, 2004, Minister Christensen wrote to Ms. Renée Popov, Chairperson of the CSF Board of Trustees, the chair of the CSF, and advised her of the Ministry's support for the acquisition of Bellevue Creek Elementary, subject to feasibility work to confirm the project scope and budget. In a letter providing further details, Mr. Miller confirmed that the Minister supported a school to accommodate a nominal capacity up to 40 Kindergarten and 200 students in Grades 1 to 12 at a cost of \$2 million. The Minister agreed to support \$600,000 interim financing to enable the CSF to sell Gordon Elementary to generate capital reserve funds to contribute to the project.

[4454] Mr. Bonnefoy visited Bellevue Creek Elementary when he became Secretary-Treasurer in the spring or summer of 2004. His view was that the building was in need of renovations and groundwork, and would not provide facilities for a full secondary programme. However, he thought that the school would provide a "baby step" of improvement above Gordon Elementary.

[4455] Mr. Miller advised that the Ministry attempted to persuade SD23-Central Okanagan to dispose of Bellevue Creek Elementary to the CSF. The Ministry saw that SD23-Central Okanagan was requesting a new school in the Mission Hills area of Kelowna. In September 2004, Mr. David Jack, then the CSF's Planning Officer, wrote to Ms. Eileen Sadlowsky, the Secretary-Treasurer for SD23-Central

Okanagan, and advised that SD23-Central Okanagan had too much excess capacity in the area to justify that school. He suggested that SD23-Central Okanagan could reduce its capacity by disposing of Bellevue Creek Elementary and Anne McClymont Primary, and in doing so justify its proposed project. However, Mr. Miller did not understand Mr. Jack to be promising a new school in the Mission area; Mr. Miller was unaware of any new schools being built in that area since that time.

[4456] According to Mr. Bonnefoy, SD23-Central Okanagan eventually indicated a preference for the CSF to acquire Lakeview Heights Elementary. Mr. Bonnefoy recalled that school was located in West Kelowna, where the CSF was not interested in starting a programme at that time.

[4457] With the Bellevue Creek Elementary acquisition proceeding slowly, the CSF continued exploring other options. In the fall of 2004, local parents and administrators learned that Central Okanagan Academy was available for sale.

[4458] On visiting Central Okanagan Academy, Mr. Bonnefoy found the gymnasium to be impressive and large. The property had attractive landscaping. It also had a drive-up complex of modular classrooms that appeared to be in good condition. The site had also been developed in consideration of a larger plan for the construction of ancillary buildings around the gymnasium.

[4459] Mr. Bonnefoy had some reservations about Central Okanagan Academy. Although Mr. Bonnefoy thought the school could meet the CSF's basic needs for a secondary programme, it did not offer a full complement of specialty classrooms for secondary enrichment courses, like a shop classroom.

[4460] Mr. Bonnefoy was also concerned about the adequacy of the small playfield for secondary students. However, the CSF Board of Trustees was attracted to excellent amenities at the Capital News Centre. The Capital New Centre offered ice rinks, a planned swimming pool, ball fields and play fields. The CSF Board of Trustees hoped to negotiate use of the playfields and amenities.

[4461] The CSF commissioned MQN Architects to prepare a Phase I Feasibility Study of various options in Kelowna. It was completed and submitted to the Ministry in November 2004. That feasibility study evaluated the relative cost of several options, including the existing Gordon Elementary Site, Bellevue Creek Elementary, Central Okanagan Academy, acquiring vacant land, and two other closed schools in the Kelowna school district: Lakeview Heights Elementary and Anne McClymont Primary.

[4462] According to Mr. Bonnefoy, the only real options were the acquisition of Bellevue Creek Elementary, Central Okanagan Academy or Lakeview Heights Elementary. The CSF's preferred option was to acquire Central Okanagan Academy, which was located in a good location for transportation and visibility. However, at a projected cost of \$4,192,000, it was more expensive than acquiring Bellevue Creek Elementary (\$3,610,590) or Lakeview Heights Elementary (\$3,857,208.25). To finance the amount of purchase price that exceeded the approved project funding, the CSF proposed to the Ministry that it would remove the modular classroom complex and subdivide and sell that portion of the property.

[4463] The feasibility study examined what modifications would be necessary to the Central Okanagan Academy site for the CSF to provide a full elementary/secondary programme. The plan envisioned building three future additions around the gymnasium. One addition would serve elementary students; a second would serve as a secondary wing.

[4464] Mr. Miller testified about the Ministry's view of the different options. It was his understanding that, even with an addition for secondary grades, Bellevue Creek Elementary appeared to be less expensive than Central Okanagan Academy. The Ministry was looking for the CSF to "close the gap" and justify the more expensive option, by recovering some funds to contribute to the project.

[4465] This was communicated to the CSF by Mr. Jack. On November 17, 2004, he wrote to Mr. Bonnefoy, observing that Central Okanagan Academy would meet the CSF's immediate space needs, with some minor renovations, while Bellevue

Creek Elementary would require an addition to provide for basic secondary spaces. Mr. Jack also requested updated numbers and complete design aid sheets, which would also show the costs of acquiring the Central Okanagan Academy including the use of city playfields to facilitate the CSF disposing of some of the lands at Central Okanagan Academy.

[4466] On November 18, 2004, Mr. Bonnefoy responded to Mr. Jack. He wrote that he understood that the CSF was responsible for financing the cost difference between acquiring Central Okanagan Academy and the least expensive option, which came to \$582,000. He confirmed that the CSF planned to do so by subdividing and selling part of Central Okanagan Academy.

[4467] On December 8, 2004, Ms. Popov wrote to Minister Christensen and officially asked to change the CSF's project request and approval from the acquisition of Bellevue Creek Elementary to the acquisition of Central Okanagan Academy. She wrote that Central Okanagan Academy provided the CSF with "a unique opportunity to acquire a property that offers the CSF the ability to immediately offer a full complement of K-12 programs to our students." Ms. Popov also wrote that École L'Anse-au-Sable was facing decreasing enrolment because it could not offer a full secondary programme. She went on to say that the CSF viewed Bellevue Creek Elementary as only an interim solution to the CSF's long-term needs in Kelowna. Mr. Bonnefoy agreed this implied that Central Okanagan Academy was a long-term solution to the CSF's needs.

[4468] Ms. Popov also tried to justify the extra cost of the Central Okanagan Academy. She confirmed that the CSF had received interim support from the City of Kelowna to subdivide and develop a portion of the site as a means of generating the financial resources needed to offset the budget difference between the cost of acquiring Bellevue Creek Elementary and the cost of acquiring Central Okanagan Academy. She also confirmed that the CSF and the City of Kelowna had agreed to pursue use of the Capital News Centre by École L'Anse-au-Sable. She also pointed to a potential innovative approach to offering sports programming by way of a Public

Private Partnership arrangement with the Capital News Centre, a “reality” that she said was “already confirmed by CSF staff”.

[4469] Mr. Bonnefoy explained that although the CSF made these representations, it was his view that the Central Okanagan Academy site in fact posed significant problems. When pressed on cross examination, Mr. Bonnefoy agreed that it would “probably” be reasonable for the Minister to conclude based on this letter that the CSF would be able to offer a full complement of secondary programming at Central Okanagan Academy, and that it presented a long-term viable option for the CSF.

[4470] Mr. Miller testified that the Minister relied on the CSF’s representations concerning the use of the Capital News Centre and plans to subdivide the Central Okanagan Academy site. Based on the CSF’s representations, the Minister approved the CSF’s acquisition of Central Okanagan Academy.

[4471] On February 2, 2005, Minister Christensen wrote to Ms. Popov and officially approved the request to acquire Central Okanagan Academy. He explained that his approval was based on a business case that included the use of proceeds from the future disposal of Gordon Elementary and surplus lands from Central Okanagan Academy. He approved capital funding in the amount of \$3,183,426 to be used toward the acquisition of the property. He also approved local borrowing authority of up to \$1.76 million to allow the CSF to complete the property acquisition and finance additional site and renovation costs. He explained that he looked forward to the development of the site as a regional Kindergarten to Grade 12 school. The Minister also accelerated funding to allow the CSF to acquire an immediately available site.

[4472] On receiving Minister Christensen’s letter, the CSF issued a press release announcing the project. The press release states that the project would allow the CSF to serve elementary and secondary students in a “safe and modern” school facility.

[4473] Mr. Bonnefoy confirmed that the CSF reached an agreement with the Capital News Centre for the use of its playfields, and that the agreement was in

place throughout his tenure with the CSF. According to Mr. Bonnefoy, the CSF received about \$900,000 from the sale of Gordon Elementary, which was applied to the cost of the acquisition.

[4474] However, the CSF never subdivided Central Okanagan Academy. According to Mr. Miller, the Province only learned as much during the course of these trial proceedings, in the spring of 2014.

[4475] Ms. Daragahi explained that École L'Anse-au-Sable moved to Central Okanagan Academy over spring break in 2005. The secondary programme at Kelowna Secondary migrated to École L'Anse-au-Sable gradually, with one grade being added to the school each year.

4. Capital Planning After the Acquisition of Central Okanagan Academy

[4476] A year and a half later, the CSF began seeking the École L'Anse-au-Sable Secondary Addition Project. While the Ministry consistently treated this as a high priority project, it never went forward. Instead, the CSF added portables to École L'Anse-au-Sable to accommodate some secondary programmes, including a space for art and shop classes.

[4477] More recently, the CSF has focused on replacing École L'Anse-au-Sable, first on the same site and then on a different site.

[4478] In or about 2012, Mr. Allison learned that some farm land adjacent to École L'Anse-au-Sable was available for sale. Mr. Allison thought that site would be suitable for a replacement to École L'Anse-au-Sable.

[4479] On July 20, 2012, at the direction of Mr. Allison, counsel for the CSF sent a with-prejudice letter to counsel for the defendants in connection with the École L'Anse-au-Sable Replacement Project and the farm land. Counsel made an urgent request for project approval and funding to acquire the site, stressing the opportunity was time sensitive.

[4480] As he believed that another offer had been made on the site, Mr. Allison made an offer to purchase the site subject to Ministry funding. Having not heard back from the Ministry, counsel for the CSF wrote to counsel for the defendants on a with prejudice basis again on August 22, 2012. Counsel informed the Province that the CSF had made an offer on the property subject to, *inter alia*, ministerial approval. Counsel attached a copy of the contract of purchase and sale, and asked for a prompt reply.

[4481] Mr. Miller responded by way of a letter directly to Mr. Allison on January 8, 2013. He explained that the August 22, 2012, letter had not been brought to his attention until recently. He pointed to a limited amount of capital funding available to the Ministry, and advised that funds were not available outside the Capital Planning Cycle. He also averted to the need to submit a PIR in support of a capital project before the Ministry would consider supporting it. He suggested the CSF had not submitted a revised PIR for a site or new facility in Kelowna as part of its 2012/13 Capital Plan Submission. He encouraged the CSF to include a PIR for a new school site (and facility) in Kelowna as part of its 2012/13 Capital Plan Submission.

[4482] When Mr. Allison was asked about Mr. Miller's response while under cross-examination, he maintained it came as a surprise to him that the Ministry had limited capital funding available. He stressed that the Ministry ought to have been planning for the CSF's capital needs, as it has been aware of the CSF's priorities by virtue of this litigation since about 2010. However, he conceded that the CSF had not prepared a PIR for this project, despite the fact that he knew it had been a requirement for some time. He admitted that the 2011 updated PIR he prepared was for a very different project: an addition, not a new school and site.

5. Conclusions

[4483] When the CSF first took jurisdiction in Kelowna, its second-highest priority was to acquire a site and school in Kelowna and consolidate its programme there. SD23-Central Okanagan took a decision to close the former Gordon Elementary, and told the CSF of its intent. The CSF acquired the site. Dr. Ardanaz thought at

the time that the option was a good one, although the school needed some renovations. However, the school was not in an ideal location for the CSF, and was not on a big enough site for the CSF to build an elementary/secondary school. Notably, the CSF had no input into what school was closed and made available to it; that decision was in the hands of SD23-Central Okanagan.

[4484] The CSF's acquisition of the former Gordon Elementary in 1997 or 1998 was supported within eight months. SD23-Central Okanagan profited by \$400,000 toward the replacement of Kelowna Secondary. This appears to be less than half the appraised value of Gordon Elementary, and was intended to compensate SD23-Central Okanagan for the value of its Local Capital contribution to that school.

[4485] From 1998 through 2002, the CSF requested renovations and additions to École L'Anse-au-Sable at Gordon Elementary as Building Condition Projects. Those projects generally were not high priority ones. However, the CSF was able to complete some renovations to the school to the amount of \$371,710 in order to accommodate more students. The Province did not fund those renovations; it recovered the cost from the Federal Government.

[4486] By 2003, Kelowna became the CSF's highest priority. The CSF sought a new elementary/secondary school. Parents engaged in a site search using a list of SD23-Central Okanagan surplus schools as a starting place. Again, the CSF was restricted by the schools that SD23-Central Okanagan had chosen to close, and did not have any input into what schools would be available for acquisition.

[4487] The CSF initially favoured acquiring the former Bellevue Creek Elementary, a closed SD23-Central Okanagan school. The Ministry announced support for that plan in June 2004. The Ministry also accelerated funding on an exceptional basis by making funding available in the first year of the capital budget so the CSF could seize an opportunity. This was contrary to the three-year rolling capital approvals typical at that time. The Ministry also assisted by attempting to entice SD23-Central Okanagan to sell the former Bellevue Creek Elementary by confirming that doing so

would reduce capacity in the area and make it more likely that SD23-Central Okanagan would receive a different project approval.

[4488] While the CSF favoured acquiring Bellevue Creek Elementary, SD23-Central Okanagan tried to persuade the CSF to acquire Lakeview Heights Elementary, a school in West Kelowna. The CSF was not interested in opening a school in West Kelowna in 2004.

[4489] The CSF's plans changed while it was waiting for SD23-Central Okanagan to officially decide to dispose of Bellevue Creek Elementary. The CSF favoured acquiring Central Okanagan Academy. The CSF's feasibility work explored the acquisition of a number of different schools and sites. The acquisition of the former Central Okanagan Academy Site was the most expensive of all of them. It was more expensive than acquiring Bellevue Creek Elementary and building a secondary addition to the school.

[4490] The CSF attempted to persuade the Ministry to fund its acquisition of the Central Okanagan Academy Site. For one, the CSF proposed that it would remove a "portable complex" from the site to allow it to subdivide the site and finance the amount of the purchase price that exceeded the approved project funding. Notably, the "portable complex" is the main school building. Removing the portable complex to subdivide the site was never a serious option unless the Ministry had approved funding to build new additions around the gymnasium.

[4491] The CSF also represented to the Ministry that acquiring that school would provide "a unique opportunity to acquire a property that offers the CSF the ability to immediately offer a full complement of K-12 programs to our students." The CSF also represented that the CSF planned to use the Capital News Centre to offer sports programming.

[4492] The Minister relied on the CSF's representations: its plan to subdivide the property, use city sports fields and the statement that the school could meet the CSF's immediate needs for secondary programming. Based on those

representations, the Minister approved the CSF's request to acquire Central Okanagan Academy as a way of accommodating elementary and secondary students in the area. The Ministry also provided accelerated funding for the CSF, contrary to the usual three-year rolling capital plan approvals that were in place at the time, in order to allow the CSF to respond to an immediate opportunity.

[4493] Once the CSF acquired and moved to Central Okanagan Academy, it did not request renovations to create space for secondary students for the next two Capital Planning Cycles. This suggests that, as Mr. Bonnefoy confirmed, Central Okanagan Academy met the CSF's needs in Kelowna for a short period of time. The CSF also adhered to its representation that it would use the Capital News Centre. However, the CSF did not subdivide and sell its property, and never told the Ministry as much.

[4494] By November 2006, though, the CSF began requesting an addition to École L'Anse-au-Sable to accommodate its secondary programme. The Ministry saw that as a high priority. That project was never approved because the Ministry did not approve any new Expansion Projects between 2005 and 2011.

[4495] By 2009, though, the CSF's planning changed again, to a replacement of École L'Anse-au-Sable as a K-12 facility. The CSF provided a PIR in support of the project, and the Ministry continued to treat it as a high-priority project. By 2012, the CSF was writing to the Ministry and indicating it wanted to reconstruct École L'Anse-au-Sable on a different site. Thereafter, the Ministry saw a disconnect between the reconstruction on the same site noted in the PIR and the project the CSF was requesting. At that point, the Ministry began ranking the CSF's project as "NPIR" rather than as a high priority project.

[4496] The planning for École L'Anse-au-Sable officially changed to a request for a new site and school in 2013. That approach would allow the CSF to remain in the school as swing space while a new school was constructed. The CSF did not consider accommodating students in a heterogeneous environment temporarily, as the CSF did when it built a replacement school in other areas, like in Victoria.

[4497] Notably, in its October 2014 revised In-House PIR concerning the École L'Anse-au-Sable Replacement Project, the CSF stated that Central Okanagan Academy was not large enough to accommodate an elementary/secondary school. This is directly contrary to the CSF's experience and plans up to that point. The CSF had always planned to construct an elementary/secondary school around the existing gymnasium. Plans had been prepared for that project before the CSF learned of the site, and the CSF found them enticing. Moreover, the site was never subdivided and sold, which leaves more room than otherwise would have been envisioned for that project. I also note that the CSF thought at one point there was enough room on the site for the CCFO to build its own building on the Central Okanagan Academy Site. As I see it, this was a misrepresentation in the CSF's PIR.

[4498] Once the project became a Building Condition Project rather than an Expansion Project, the Ministry considered it to be a low priority project, likely because the FCI score for École L'Anse-au-Sable is relatively strong. Notably, the Province's method for evaluating Building Condition Projects would not have taken into account that the CSF did not have purpose-built, permanent secondary facilities at École L'Anse-au-Sable.

[4499] The CSF has engaged in some site searches in Kelowna for the École L'Anse-au-Sable Replacement Project. When property adjacent to École L'Anse-au-Sable became available, the CSF sought funding on an emergency basis to acquire it outside the regular capital planning process. The Ministry did not fund those projects, citing as a reason a lack of capital funding available outside Capital Planning Cycles.

[4500] Overall, the CSF occupies École L'Anse-au-Sable at the Central Okanagan Elementary Site, with its deficiencies, because of its concerted effort to acquire that site. École L'Anse-au-Sable is the school that the CSF wanted and chose. It believed at the time that it would allow it to meet the needs of secondary students in the Kelowna area.

[4501] The Ministry has recognized the need for the CSF to have more space for secondary students as a high priority. The CSF has not been able to pursue its plans for a secondary addition because the Ministry has not funded Expansion Projects for many years. Further, the CSF shifted its priorities and began asking for a Building Condition Project after about 2009. The Ministry's capital planning process would not recognize a lack of specialized secondary spaces as a relevant factor when determining whether to approve a Building Condition Project.

[4502] With respect to West Kelowna, the CSF first requested the West Kelowna Elementary Project in 2010, when this litigation began. It continued to request that project until 2014. It was always one of the CSF's "number one priority" projects. However, the CSF never identified a site in West Kelowna. Moreover, the CSF rejected a school in West Kelowna, Lakeview Heights Elementary, when it was looking to acquire a school in about 2004. In my view, the West Kelowna Project has never gone forward because it has not been a priority for the CSF as the CSF has been able to accommodate students from West Kelowna at École L'Anse-au-Sable.

F. Justification and Remedy

[4503] I conclude that rightsholders in the Kelowna area are receiving what they are entitled to in Kelowna. If I had found otherwise, then it would have been open to the Ministry to justify that breach pursuant to s. 1. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed the justification question. Since I set out the framework for crafting remedies in Chapter X, Remedies, I do not find it necessary to address what remedy would have been appropriate to respond to the circumstances in Kelowna.

G. Summary

[4504] I conclude that if the CSF were to construct the École L'Anse-au-Sable Replacement Project, the number of children likely to take advantage of that

programme is about 200 elementary students and about 80 secondary students. Ultimately, about 50 students would be likely to attend the Proposed West Kelowna Elementary Project in a newly-built school in that community.

[4505] Given École L'Anse-au-Sable's size in comparison to majority schools, I find that the numbers in the catchment area for the École L'Anse-au-Sable Replacement Project fall in the middle to high-end of the sliding scale. The numbers warrant a homogeneous facility with elementary facilities that offer a global educational experience that is equivalent to what is offered at majority elementary schools in SD23-Central Okanagan. In light of the very small number of secondary school students, though, École L'Anse-au-Sable is only entitled to Francophone instruction and proportionate access to core secondary-school instructional facilities. The situation is different for the Proposed West Kelowna Catchment Area, where the numbers will warrant only instruction in a series of classrooms.

[4506] I conclude that a reasonably prudent rightsholder parent would be likely to consider that the global educational experience for elementary students at École L'Anse-au-Sable meets the same standard as the comparator schools in and around Kelowna. I am also satisfied that a reasonable rightsholder parent would find that the global educational experience afforded to secondary students is proportionate to the number of students that can be expected to enrol in a programme. I find that the numbers for West Kelowna are currently receiving homogeneous instruction outside the community where they live, which is one way of meeting the entitlement standard.

[4507] With connection to responsibility, I find that the CSF's circumstances in Kelowna primarily arise out of decisions taken by the CSF: its choice of and lobbying efforts toward acquiring the Central Okanagan Academy, and its failure to prioritize a project in West Kelowna. However, the Ministry's lack of funding for Expansion Projects after about 2005 and the Ministry's framework for evaluating Building Condition Projects based on FCI score rather than functionality also materially contributed to the lack of permanent secondary facilities in Kelowna.

XXVIII. ÉCOLE ÉLÉMENTAIRE OCÉANE (NANAIMO)

[4508] Nanaimo is located on the east coast of Vancouver Island. There, the CSF operates École Élémentaire Océane, a homogeneous, French-language elementary school serving children in Kindergarten to Grade 7. École Élémentaire Océane is housed in the former Princess Anne Elementary school. The Province acquired École Élémentaire Océane for the CSF from SD68-Nanaimo-Ladysmith in about 2005. In 2014/15, 100 children were enrolled at École Élémentaire Océane.

[4509] The CSF also offers a heterogeneous secondary programme at Nanaimo District Secondary School (the “Nanaimo Francophone Secondary Programme”). In 2014/15, 51 children were enrolled in that programme.

[4510] The CSF proposes to demolish École Élémentaire Océane and rebuild the facility as a homogeneous elementary/secondary school to accommodate children in Kindergarten through Grade 12 (the “Nanaimo Replacement Elementary/Secondary Project”). In 2014, the CSF estimated that project would cost more than \$23 million.

A. Evidence

[4511] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all spoke to their experiences with École Élémentaire Océane. Mr. Miller gave evidence about the Province’s role in the CSF’s acquisition of École Élémentaire Océane, and Mr. Stewart spoke to school closures in Nanaimo.

[4512] Additionally, the Court heard from Ms. Bédard, the current principal of École Élémentaire Océane and the Nanaimo Francophone Secondary Programme.

Ms. Bédard has worked for the Programme Cadre and the CSF since 1985/86, first as a teacher and later as an administrator. She worked for CSF programmes in Surrey and Vancouver before taking the position at École Élémentaire Océane. I find that Ms. Bédard’s credibility is suspect because of her highly partisan attitude. Her answers often appeared calculated to try to favour the CSF’s position in the litigation. When challenged, she became argumentative and evasive. She did not leave the impression of a strong leader for École Élémentaire Océane.

[4513] The Joint Fact Finder's Report also describes schools in Nanaimo and the surrounding areas. The Fact-Finding Team relied on Ministry and District Data, and visited eight of 41 SD68-Nanaimo-Ladysmith and SD69-Qualicum schools to take measurements, including École Élémentaire Océane. The Fact-Finding Team also used an aerial mapping tool to determine the size of outside areas and portable and modular locations. I find this to be a highly reliable and helpful source of evidence.

B. History and Context

1. The CSF's Nanaimo catchment area

[4514] According to Dr. Kenny, French-Canadian employees of the Hudson's Bay Company played an important role in Nanaimo's early development, as did French missionaries and French-speaking Belgians who worked in Nanaimo's coal mines. The Francophone community began to formally organize itself in the mid-1970s, when local Francophones created the Association des Francophones de Nanaimo.

[4515] With respect to education, Dr. Kenny advised that French was taught as a subject of instruction as early as 1877. In the 1970s, the community mobilized for a Programme Cadre, which was established in 1980. The programme quickly grew from 27 students in its first year, to 50 students in 1982. By 1983, though, the programme began to lose students to French immersion. By the 1990s, the Programme Cadre teacher was being used to teach as a course of instruction to majority students, and some funds intended for the programme were being misapplied. There was a sentiment among some Francophones that the majority was hostile to the programme.

[4516] When the CSF took jurisdiction in Nanaimo, SD68-Nanaimo-Ladysmith operated heterogeneous Programmes Cadres at the elementary and secondary level. The CSF consolidated a Programme Cadre in SD69-Qualicum into those programmes.

[4517] Today, the CSF operates École Élémentaire Océane as a homogeneous French-language elementary school serving children in Kindergarten to Grade 7, as

well as the Nanaimo Francophone Secondary Programme at Nanaimo District Secondary. École Élémentaire Océane does not have a French-language preschool, daycare or Strong Start programme within its walls.

[4518] The catchment area for École Élémentaire Océane and the Nanaimo Francophone Secondary Programme consists of the entire territory of SD68-Nanaimo-Ladysmith and SD69-Qualicum. The catchment area spreads along the eastern coast of Vancouver Island, from Qualicum to the northwest, through Nanaimo, to Chemainus at the southeast. Its territory therefore includes the communities of Qualicum Beach, Parksville, Nanoose Bay, Lantzville, Nanaimo, Gabriola Island, Ladysmith and Chemainus. However, the CSF population is largely concentrated in Lantzville and Nanaimo, within the territory of SD68-Nanaimo-Ladysmith.

[4519] Within École Élémentaire Océane's catchment area, SD68-Nanaimo-Ladysmith operates 27 elementary schools, two middle schools and seven secondary schools. It offers French immersion at three elementary schools and at Nanaimo District Secondary. SD69-Qualicum operates four elementary schools, two middle schools and two secondary schools. It offers French immersion at one middle school.

2. Conclusions

[4520] When analyzing the Nanaimo Community Claim, I will take into account the geographic reach of the Nanaimo catchment area across an urban centre, Nanaimo, and a number of smaller communities. The geographic spread and the number of communities served create challenges for delivering minority language education, particularly regarding transportation. I will also take into account the long history of Francophone education in Nanaimo and its roots in the Programme Cadre, and the perception that it faced hostility from the majority. I will also consider that École Élémentaire Océane and the Nanaimo Francophone Secondary Programme face competition from French immersion programmes in both SD68-Nanaimo-Ladysmith and SD69-Qualicum.

[4521] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[4522] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[4523] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[4524] Dr. Landry estimated that in 2011 there were 322 elementary-age children (age 5-13) living in the Nanaimo Replacement Elementary/Secondary Project's catchment area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 425 such children: growth by more than 30%.

[4525] I note that Dr. Landry also found 1,180 children of non-Francophones in the Knowledge Category, and 305 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in the Nanaimo area.

[4526] Dr. Landry also reported that in 2011 there were 201 secondary-age children (age 14-17) of Mother-Tongue Rightsholders, which Mr. McRae projected to remain relatively stable to 2023. I do not find Dr. Landry's counts of 670 secondary-age children in the Knowledge Category and 60 in the Regular Home Use Category to be helpful evidence.

[4527] I find that a reasonable proxy for the total universe of rightsholders' children in the catchment area into the reasonably foreseeable future is about 425 elementary-age children and 200 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[4528] École Élémentaire Océane serves students in Kindergarten through Grade 7. The evidence shows that enrolment at École Élémentaire Océane has grown from 74 students in the 1996/97 school year, to 100 students in the 2014/15 school year. In my view, it has been relatively stable at about 100 students since the CSF occupied the former Princess Anne Elementary. The school's enrolment was 79 students when the CSF first occupied the school in 2004/05. Beginning with the 2005/06 school year, and in every year since, enrolment has been within 10 students in either direction of 100 students. The average enrolment in those years was 102 students. Current known demand is therefore about 100 students.

[4529] The Nanaimo Francophone Secondary Programme serves students in Grades 8 through 12. Enrolment in that programme grew from 15 students in 1996/97 to 51 students in 2014/15. The data show that enrolment at the Nanaimo Francophone Secondary Programme has increased relatively steadily, but unevenly. From its inception until 2007/08, enrolment in the programme was always within 10 students in either direction of 20 students. After that, enrolment grew steadily until 2012/13, when enrolment peaked at 56 students. From 2009/10 through 2014/15,

enrolment has been within 10 students in either direction of 50 students. In the past six years, average enrolment has been 50 students. Current known secondary demand is therefore about 50 students.

[4530] Only one child of a non-rightsholder was admitted to École Élémentaire Océane pursuant to the CSF's Expanded Admissions Policy when it was in force, which is negligible.

[4531] As a result, I conclude that known demand at the elementary level in Nanaimo is about 100 children, and demand for the secondary programme is about 50 children.

3. The Uptake Rate

[4532] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[4533] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[4534] The plaintiffs say that the CSF seeks a new school with nominal capacity for 365 students, or operating capacity for 348 students, which would serve students in Kindergarten through Grade 12. In other words, it asks for a school with operating capacity for 248 Kindergarten and elementary students, and 100 secondary students. That would provide the CSF with 11 elementary and four secondary classrooms. They suggest that the existing enrolment at École Élémentaire Océane is not a reliable measure of demand for minority language education because, in their view, the facility is deficient and deters enrolment at École Élémentaire Océane.

[4535] The defendants urge that for the CSF to fill its proposed school by 2023, it would require a 58% proxy participation rate of elementary-age children, and participation of 50% of the secondary population.

[4536] I conclude that there are about 100 elementary-age rightsholders' children attending École Élémentaire Océane. Given the proxy universe of 425 rightsholders' children in the area, the proxy participation rate at École Élémentaire Océane is about 24%. This is relatively low, and provides some room for the participation rate to grow.

[4537] However, there are a number of factors that suggest the growth on construction of a new school will not be considerable. École Élémentaire Océane competes with a number of French immersion programmes. Enrolment at École Élémentaire Océane has also been stable for many years. As I explain below, I do not consider that the facilities at École Élémentaire Océane are a significant deterrent to parents.

[4538] Further, the proxy universe of eligible children covers the entire École Élémentaire Océane catchment area. That catchment area is so large that it includes a number of communities at a great distance from École Élémentaire Océane: Qualicum, Parksville, Nanoose Bay, Gabriola Island and Chemainus. The evidence shows that very few École Élémentaire Océane students live in those

communities. Few rightsholders from those communities would choose to send their children to École Élémentaire Océane.

[4539] The CSF has experience reconstructing an owned, homogeneous facility on the same site to improve building condition and add secondary space, which it did at École André-Piolat (North Vancouver). École André-Piolat began as an owned, homogeneous school and was replaced as a Building Condition Project. It re-opened in 2004 with the intent that it would quickly grow to serve children in all grade levels. Since then, enrolment at the elementary levels (K-7) has increased from 140 children in the school's first year to 355 children in 2014/15. Thirteen children of non-rightsholders were admitted pursuant to the CSF's Expanded Admissions Policy, so enrolment growth was about 144%.

[4540] Dr. Castonguay, using Dr. Landry's methodology, calculated the number of elementary-age (5-12) children with Mother-Tongue Rightsholder parents living in North Vancouver. He found that in 2011 there were 562 such children in the catchment area. Assuming the number of children of Mother-Tongue Rightsholders in the area remained constant, the proxy participation rate at the K-7 level grew from 25% in 2004/05 to 61% in 2014/15: an increase of 36%.

[4541] North Vancouver does not present a perfect parallel. North Vancouver is an urban setting, where parents have a wider variety of options and neighbourhood schools available to them. Since there are fewer alternatives in Nanaimo, the École Élémentaire Océane participation rate might increase by a greater magnitude than it did in North Vancouver. On the other hand, École Élémentaire Océane serves a much broader geographic region than does École André-Piolat, which weighs toward École Élémentaire Océane seeing less of an increase to its participation rate than did École André-Piolat. The evidence also suggests to me that École André-Piolat was in worse condition when it was reconstructed than École Élémentaire Océane is in now.

[4542] Taking into account all the surrounding circumstances, I consider that if École Élémentaire Océane were reconstructed on the same site, and added

secondary space, it could expect up to about 170 students to attend the programme. This would reflect a participation rate of 40%, and 16% growth of the current participation rate.

[4543] Turning to anticipated secondary enrolment, I find that the Nanaimo Francophone Secondary Programme has 50 students enrolled, representing a proxy participation rate of 25% of the 200-student proxy universe. That participation rate also leaves some room for growth. However, due to the wide reach of the catchment area and the stable enrolment in secondary levels, the growth is unlikely to be substantial. I also note that if students moved to a homogeneous facility with fewer secondary students, it is likely that the CSF would experience attrition between the elementary and secondary level as students left for the greater breadth of programming available in a larger school.

[4544] In North Vancouver, the CSF added secondary space when École André-Piolat was reconstructed with the intent of consolidating its heterogeneous secondary programme into the newly-built elementary/secondary school. The school offered a full complement of middle and secondary school instruction from about 2006/07 through 2011/12. The evidence shows that École André-Piolat always experienced significant attrition between Grade 7 and Grade 8, and between Grade 8 and Grade 9. Since 2011/12, École André-Piolat has only offered an elementary/middle school programme. The secondary programme failed due to low enrolment.

[4545] Another parallel can be drawn between École Élémentaire Océane and École Au-cœur-de-l'île (Comox). The school was built to consolidate heterogeneous elementary, middle and secondary programmes into a single homogeneous elementary/secondary school. Enrolment in the heterogeneous secondary programme was consistently between 15 and 20 students in Grade 9 through 12 in the five years preceding its consolidation into the new facility. In 2011/12, the first year with a full secondary programme, the school had 22 children in Grades 9 through 12. By 2014/15, there were 36 children enrolled in Grades 9 through 12.

[4546] Dr. Landry's research assistant, Ms. Guignard Noël, estimated that 157 secondary-age children (age 14-17) in the Comox catchment area have a Mother-Tongue Rightsholder Parent. Assuming that the total universe of eligible children remained stable, the participation rate in Grades 9 through 12 grew from about 10% in the heterogeneous programme, to 23% three years into the homogeneous secondary programme.

[4547] I consider that the experience at École Au-cœur-de-l'île is a closer analogy to the situation in Nanaimo than is École André-Piolat. Both École Au-cœur-de-l'île and École Élémentaire Océane are located on Vancouver Island, and serve smaller urban and rural centres. Like École Élémentaire Au-cœur-de-l'île, the Nanaimo Replacement Elementary/Secondary Project would bring a heterogeneous secondary programme into a newly-built homogeneous elementary/secondary school.

[4548] However, the situation in Comox must be treated with some caution. There is a significant military base in Comox with a Francophone population. This is not the case in Nanaimo. As a result, secondary enrolment in Nanaimo is likely to peak at a lower level than it will at École Au-cœur-de-l'île. I also consider that École Au-cœur-de-l'île is a newer school, making it hard to discern long-term enrolment patterns.

[4549] Overall, I consider that while there is room for the secondary participation rate in Nanaimo to grow, it is not certain that moving those children to a homogeneous facility will result in growth to the participation rate. The participation rate might grow as it appears to be doing in Comox. However, as I have concluded elsewhere, the CSF will continue to see some attrition as students approach secondary levels, and will always struggle to retain secondary students because of the greater breadth of programming available at majority secondary schools. Indeed, enrolment can be so low that a homogeneous secondary programme will fail, as it did in North Vancouver.

[4550] Taking into account all the surrounding circumstances, I find that the CSF can reasonably expect about 70 children to participate in a secondary programme at a newly-constructed, homogeneous elementary/secondary school in Nanaimo. This reflects a participation rate of about 35%, or 10% growth to the participation rate.

D. Entitlement

[4551] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement. In this case, the entitlement analysis differs for the elementary and secondary components of the Nanaimo Replacement Elementary/Secondary Project.

1. Appropriate Comparator Schools

[4552] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents. However, in some cases, where a minority language school's catchment area is so large as to encompass a number of communities, it may be appropriate to consider a more limited subset of comparator schools: one that corresponds with the areas in which rightsholder parents actually reside.

[4553] Nanaimo is one of the claim areas that encompasses a very large catchment area: one that is so large that not all schools are realistic alternatives for rightsholder parents. The evidence shows that in 2012/13 only three families from Qualicum Beach, Parksville and Nanoose Bay (SD69-Qualicum) combined sent their children to École Élémentaire Océane. For the vast majority of rightsholder parents, the schools in SD69-Qualicum are not the realistic alternatives that they would consider when deciding where to enrol their children.

[4554] I also note that one SD68-Nanaimo-Ladysmith school is located on Gabriola Island, which is a ferry ride away from Nanaimo. No École Élémentaire Océane

students live on that island, and it is very unlikely that any CSF parents would choose to send their children to that school.

[4555] Otherwise, École Élémentaire Océane families are distributed across the SD68-Nanaimo-Ladysmith catchment area. As a result, I conclude that the appropriate comparator schools are the elementary, middle and secondary schools in SD68-Nanaimo-Ladysmith (excluding Gabriola Elementary). Those are the majority schools that rightsholder parents would consider when making enrolment decisions for their children.

2. Location on the Sliding Scale

[4556] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[4557] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[4558] The evidence shows that the average operating capacity at comparator schools is 280 children. Nine of 29 elementary and middle schools (31%) have operating capacity for 205 elementary-age children or fewer. Average enrolment at the comparator schools is about 263 students. Seven of 29 schools have enrolment between 150 and 200 students. Since École Élémentaire Océane could achieve enrolment up to 170 students, given the size of comparator schools, it is

pedagogically appropriate and cost effective to build an elementary school for a school of École Élémentaire Océane's size in the Nanaimo area.

[4559] At the secondary level, though, schools are much larger. Nanaimo District Secondary has 965 students enrolled. There is no evidence concerning its operating capacity, or the enrolment and capacity at other secondary schools in the area. However, in light of the large difference between the 70 students I anticipate would enrol at École Élémentaire Océane in a combined elementary/secondary programme and the 965 students enrolled at Nanaimo District Secondary, it would not be pedagogically appropriate or cost-effective for a stand-alone secondary school to be built for the secondary population in Nanaimo.

[4560] Of course, the CSF proposes to build a combined elementary/secondary school. The CSF is entitled to some deference in its determination that model is pedagogically and financially appropriate for Nanaimo's linguistic minority. However, given the small size of the Nanaimo Francophone Secondary Programme's projected population as compared to that of the comparator secondary school, it is not practical in terms of cost and pedagogy for École Élémentaire Océane to offer equivalent secondary programming and services to those at SD68-Nanaimo-Ladysmith secondary schools. École Élémentaire Océane will be educating a small fraction of the number of secondary school students as do local purpose-built secondary schools.

[4561] Given École Élémentaire Océane's size in comparison to majority schools, I find that the numbers at the elementary level fall at the high end of the sliding scale, warranting distinct, equivalent homogeneous facilities that offer a global educational experience equivalent to what is offered at majority schools. In light of the small number of secondary school students, though, the numbers at the secondary level fall in the middle of the sliding scale, warranting minority language instruction with proportionate access to core secondary-school instructional facilities.

3. Global Elementary/Middle School Experience

[4562] The plaintiffs argue that the elementary educational experience at École Élémentaire Océane is substandard due to the quality of a number of its amenities: its main entrance, administrative space, classrooms, washrooms, learning assistance space, library, gymnasium, storage space, environment, transportation and early learning programmes. I will weigh those factors together with others relevant to the global educational experience.

a) Facility Condition and Appearance

[4563] Mr. Bonnefoy, Mr. Allison and Ms. Bédard all testified that École Élémentaire Océane is unattractive. Mr. Allison described École Élémentaire Océane as the “oldest looking” school that the CSF owns, and recounted that it requires considerable maintenance.

[4564] Ms. Bédard explained that the entrance to École Élémentaire Océane is to the rear of the school site. The schoolyard is landscaped. It also has a grass field, a fenced-in garden, and an outdoor play structure. She did not make the exterior sound unappealing.

[4565] There is no objective evidence concerning the curb appeal of comparator schools. As a proxy, I look to the age and FCI scores, which are generally correlated with a school’s state of repair.

[4566] Mr. Frith reported that École Élémentaire Océane has an average age of 61.4 years. It was built in 1951, and had several additions in the 1960s and 1980s. Most SD68-Nanaimo-Ladysmith elementary and intermediate schools were built in the 1940s, and had additions from the 1960s to the 1990s. The average age of SD68-Nanaimo-Ladysmith’s schools is 34 years. Eight of twenty-nine (28%) comparator schools are older than 40 years old. However, École Élémentaire Océane is the oldest of all schools by about 10 years.

[4567] École Élémentaire Océane's FCI score is 0.31. The average comparator school FCI score is likewise 0.31. Twelve of 29 comparator schools have an FCI score between 0.29 and 0.35.

[4568] Since the CSF owns École Élémentaire Océane, it is responsible for repairs to the building. It contracts with SD68-Nanaimo-Ladysmith to offer those services, and administrators have typically found that work to be effective. According to Ms. Bédard, she only asks for repairs to École Élémentaire Océane in an emergency.

[4569] In 2012, parents of École Élémentaire Océane students contacted the CSF to complain about the condition of École Élémentaire Océane, expressing fear that there might be asbestos in the school (a concern that was unproven before the Court). Mr. Allison collected asbestos reports from SD68-Nanaimo-Ladysmith, one of which was as recent as 2010, and hired a consultant to assess the building. The CSF also performed its own safety review of the school, looking for other problems.

[4570] Mr. Allison explained that the assessments pointed to minimal problems with the water at École Élémentaire Océane, so he instructed school staff to let the water flow for several minutes each day. The CSF also addressed mold in the gymnasium. The CSF also planned to remedy reported asbestos issues while students were on spring break. Over the spring of 2013, the CSF also fixed a crack in the roof to prevent airborne asbestos, trained staff on asbestos issues, placed WHIMIS ID labels on rooms that could contain asbestos-based materials, and painted the boiler room.

[4571] In the same period, parents continued to press against the CSF. Although the CSF shared their plans to improve the school in January 2013, parents were unsatisfied and continued to press for more remediative work. While the CSF offered assurances, parents were not satisfied.

[4572] The parents exchanged a series of emails with Ms. Bédard in which they accuse the CSF of stalling on remediative work for the purposes of this litigation.

Ms. Bédard forwarded the message to Mr. Allison. Mr. Allison was surprised at the parents' views because he believed that the CSF had diligently repaired the school. He did not think the parents' concerns were fair.

[4573] For her part, Ms. Bédard refused to offer an opinion on what the parents expressed while she was under cross-examination. She stated she had no opinion on what they said, and refused to get involved because she felt like she was being put in the middle of the dispute. In connection with this issue, Ms. Bédard was evasive and unhelpful.

[4574] To bring closure to the dispute, in October 2013 the CSF circulated a letter to École Élémentaire Océane parents which summarized all the steps the CSF had taken to remediate the building. According to Mr. Allison, the CSF's intent was to dispel any belief among the parents that the CSF was delaying remediation for the purposes of litigation. The CSF also suggested another meeting between CSF staff and parents, but the parents never requested such a meeting.

b) Main Entrance and Administrative Space

[4575] Ms. Bédard described the École Élémentaire Océane main entrance as small, with only enough space for two chairs. According to the Joint Fact Finder's Report, the main entrance of École Élémentaire Océane is 42 m². That works out to about 0.4 m² per student. The average main entrance size of the 29 comparator schools is 44 m², which also equates to an average of 0.4 m² per student. Twenty of 29 comparator schools (69%) have 50 or fewer m² of space in their main entrance.

[4576] The plaintiffs argue that the main entrance at École Élémentaire Océane is actually 24 m², as is stated in the design aide sheet for École Élémentaire Océane in the file for École Élémentaire Océane. They say that measurement is authoritative because the Fact-Finding Team relied on the design aide sheets for room measurements for SD68-Nanaimo-Ladysmith schools. However, École Élémentaire Océane is not an SD68-Nanaimo-Ladysmith school. It is a CSF school. I also note that Mr. Jack, in his capacity as a member of the Fact-Finding Team, visited École

Élémentaire Océane (among other schools) and took actual measurements. The Introduction to the Joint Fact Finder's Report states that "the area of the main entrance was indicated if there was a clearly definable space that the building specialist could either measure during site visits, for schools that were visited" or that could be discerned from floorplans if schools were not visited. As a result, I treat the measurements reported in the Data Sheet for École Élémentaire Océane as authoritative, as it was based on actual measurements.

[4577] The principal's office is near the main entrance to École Élémentaire Océane. It has a window onto the hallway, which Ms. Bédard reports must be covered when administrators are dealing with confidential matters. It also has windows that face the schoolyard, which can cause distracting noise when children are playing outdoors. The nearby secretary's office contains a cot for sick children, since there is no dedicated infirmary.

[4578] The plaintiffs argue, pointing to the floorplans in the Joint Fact Finder's Report, that the administrative areas at SD68-Nanaimo-Ladysmith schools are better located because they are immediately adjacent to the school's main entrance, while the entrance of École Élémentaire Océane's is up a set of stairs and around the corner. Unfortunately, the floor plans cannot be used to support this proposition. Looking at the École Élémentaire Océane floorplan, it appears as though its office, too, is adjacent to the main entrance.

[4579] According to the Joint Fact Finder's Report, École Élémentaire Océane has an administrative space of 32 m², or 0.33 m² per student. Administrative spaces at the comparator schools range from 31 m² to 72 m² and average to 47 m², or 0.27 m² per student.

[4580] Only one school has less administrative space than École Élémentaire Océane: Rock City Elementary. Rock City Elementary also has a population of 322 students, making it more than triple the size of École Élémentaire Océane. Further, seven of 29 schools (24%) have less than 40 m² of administrative space.

[4581] École Élémentaire Océane also has a staff room, which is 26 m². The staff room at École Élémentaire Océane contains tables and chairs, a dishwasher, and other staff amenities. When other staff preparation space is included, staff have 39 m² of working space. Comparator schools have, on average, 61 m² of staff room and preparation space. Only Pleasant Valley Elementary has less staff space than does École Élémentaire Océane.

c) Classrooms

[4582] According to Mr. Allison, École Élémentaire Océane has two wings coming off of its entrance. Mr. Allison described the classrooms as being of a “decent” size. The classrooms have large windows that let in a good amount of natural light.

[4583] École Élémentaire Océane has six classrooms. Five of the classrooms are used for elementary divisions: Kindergarten, a Grade 1/2 split, a Grade 2/3 split, a Grade 4/5 split and a Grade 6/7 split. The sixth classroom is used as a multipurpose room for music, art and English language arts instruction.

[4584] Ms. Bédard explained some of the problems with the classrooms. The windows are single paned, with unattractive blinds that are difficult to open and close. The door handle moldings do not always work well, and need to be changed from time to time.

[4585] The average classroom size at École Élémentaire Océane is 81 m². The average classroom size at comparator schools is 82 m². Average classroom sizes range from 76 m² (Ladysmith Intermediate) to 92 m² (Cilaire Elementary). Twenty-two of 29 comparator schools (76%) have less than 85 m² average classroom size.

[4586] Ms. Bédard advised that the Kindergarten classroom at École Élémentaire Océane is big enough for educational stations workstations, a teacher desk, and a carpeted area. It has its own washroom. The floor was recently replaced, with the hope that it will eliminate an odour.

[4587] The Kindergarten classroom at École Élémentaire Océane measures 92 m². This is larger than the 90 m² average Kindergarten classroom in comparator schools. Sixteen of 29 comparator schools (55%) have a smaller Kindergarten classroom than does École Élémentaire Océane.

d) Storage

[4588] École Élémentaire Océane has dedicated storage space under the stage in the gymnasium, and an equipment room off of the gymnasium. The area underneath the stage is used for equipment that is not used frequently because École Élémentaire Océane staff fear, without knowing, there may be asbestos under the stage. Ms. Bédard described the equipment storage room as being crowded and easily disorganized.

[4589] Ms. Bédard also complained there is little storage in classrooms for classroom materials. The washroom in the Kindergarten classroom contains some metal storage cabinets, which are divided off from the toilet with some curtains. The plaintiffs argue it is unsanitary to store items in a washroom. École Élémentaire Océane staff also store materials in some of the school's other spaces: the multipurpose room, the learning assistance room, the library, the school's laundry room, and in an outdoor covered play area.

[4590] The Court was provided with some photographs showing École Élémentaire Océane's storage areas. I note that many of them appear to be quite untidy and disorganized. These are the types of problems that the CSF could remedy using its AFG or operating funding by installing shelving units. It could also add an exterior storage unit to its large site, as many other schools do in the Province.

[4591] The Joint Fact Finder's Report indicates that in the comparator schools, like École Élémentaire Océane, materials are stored in the classroom. I note that the École Élémentaire Océane classrooms are about the same size as classrooms at comparator schools, which suggests to me that there is little difference between the circumstances at École Élémentaire Océane and comparator schools.

e) Multipurpose and Special Education Space

[4592] The sixth classroom at École Élémentaire Océane is used as a multipurpose space. It is used for art, music and English instruction, and is available for project work and an after-school homework programme.

[4593] The École Élémentaire Océane multipurpose room measures 77 m², or .77 m² per student. The comparator schools have, on average, 115 m² of built-in multipurpose space, or an average of 0.48 m² per student. Not included in that average are the four schools that use portable classrooms as multipurpose space. Ms. Bédard stated she had never considered adding a portable to École Élémentaire Océane to relieve space issues.

[4594] Ms. Bédard argued that École Élémentaire Océane lacks some facilities. Although École Élémentaire Océane uses its multipurpose room to teach music, it does not offer a band programme for older students because the multipurpose room is too small. Notably, all of the comparator schools teach music education in their multipurpose rooms, so I infer that this problem is the same at comparator schools. However, average comparator schools do have more absolute multipurpose space, which likely allows for more activities to take place in them.

[4595] There is no lunch room at École Élémentaire Océane, so students eat in their classrooms. None of the comparator schools has a lunch room; they, too, have students eat lunch in classrooms.

[4596] There are four spaces for learning assistance at École Élémentaire Océane. A small room that was designed as a kitchen has been converted into space for learning assistance and counselling. A former closet serves as a second office for that work. Learning assistants sometimes use a counter in École Élémentaire Océane's photocopy room for one-on-one work. There is also an office adjacent to the school library that is sometimes used by learning assistants, but not for work with students due to the size of space.

[4597] Taking into account that many of these facilities are makeshift, the Joint Fact Finder's Report concluded that École Élémentaire Océane has 40 m² of learning assistance space, less than all SD68-Nanaimo-Ladysmith elementary and middle schools. Looking at the amount of space proportionate to its enrolment, École Élémentaire Océane has 0.40 m² of space per student. On average, SD68-Nanaimo-Ladysmith schools have 133 m² of learning assistance space, or 0.75 m² of space per student.

[4598] However, in addition to those spaces, École Élémentaire Océane has a smaller classroom (a former computer room) that is used for learning assistance, counselling and for special needs students. It is, essentially, a second multipurpose room that is used for learning assistance. There are stations in the room: a quiet, sensory deprivation area; an active area with a trampoline; a table for teachers to work with small groups of students; and a carpeted area for students to sit. In September 2014, École Élémentaire Océane had just purchased a Smart Board, and planned to install it in this classroom for Francisation.

[4599] That space contributes a further 48 m² to École Élémentaire Océane's multipurpose and learning assistance space. When that is added to École Élémentaire Océane's learning assistance space as reported by the Joint Fact Finder's Report, it has about 88 m² of space for learning assistance, or 0.88 m² per student, in addition to the makeshift spaces not counted in the Joint Fact Finder's Report. That gives it slightly less than average total space in light of its enrolment, but more total learning assistance space than eight of 29 schools (28%), and more space per student for learning assistance than all but two schools.

[4600] Other spaces at École Élémentaire Océane have also been converted into makeshift office space. For the past several years, the Francisation and Physical Education teacher have chosen to use part of a special needs washroom as their office. Those teachers leave the room when students use the washroom. Ms. Bédard explained that she has discouraged the use of the washroom for that purpose, but the teachers have ignored her concerns. She confirmed while under

cross-examination that she leaves it to the teacher to decide whether she wants to work in that space.

f) Washrooms

[4601] Ms. Bédard complained that the washrooms and the area surrounding them are old, and frequently smell of urine. To remedy the situation, some ventilators were installed, but Ms. Bédard complained that they are too noisy. There is no credible evidence concerning the state of washrooms at comparator schools.

g) Library

[4602] École Élémentaire Océane has a purpose-built library. Ms. Bédard reported that for a period of time, it could not hold the school's collection of books. Recently, more bookshelves were added to hold the collection, which decreased the area for students to work on projects. Ms. Bédard reported that there is insufficient space for student seating, so some students work on the floor. When the APÉ meets in the library, school staff bring in seating from elsewhere.

[4603] The École Élémentaire Océane library is about 68 m². The average comparator school library is 140 m². The École Élémentaire Océane library is smaller than all SD68-Nanaimo-Ladysmith libraries; it is smaller than the smallest SD68-Nanaimo-Ladysmith library (Cilaire Elementary) by a margin of 23 m².

[4604] École Élémentaire Océane's library is also small on a *per capita* basis. It offers about .67 metres of library space per student. It allows about 3.5 m² per student in an average École Élémentaire Océane class. Comparator schools offer about 0.82 m² per student enrolled in the school, and 6.2 m² per student in an average class.

h) Gymnasium

[4605] The École Élémentaire Océane gymnasium is located near the school's main entrance. Ms. Bédard explained that the gymnasium is small with a low ceiling; too low for standard basketball hoops. As a result, École Élémentaire

Océane does not host games or tournaments at the school. The gymnasium also has a maximum occupancy for 176 people. With 104 student enrolled at the school, the gymnasium is too small to hold the entire community of students, staff and parents for community events. Ms. Bédard also complained of a poor quality floor, and unused and dangerous equipment affixed to the walls. Sometimes, she has to choose between the gymnasium overheating or using a loud ventilation system.

[4606] The gymnasium has a stage, which Ms. Bédard described as a benefit. However, she complained that it is very small, with old curtains that do not work properly. There is also a kitchen adjacent to the gymnasium, which is adequate for use by the APÉ and the school's cooking club.

[4607] École Élémentaire Océane's gymnasium measures 167 m². It allows 1.7 m² per student enrolled at the school, and 8.7 m² per student in an average-sized École Élémentaire Océane class. It is much smaller than comparator gymnasiums, which range from 187 m² (Davis Road Elementary) to 568 m² (North Cedar Intermediate). On average, those schools have about 370 m² of gymnasium space, or 2 m² per student enrolled in the school, or 16 m² per student enrolled in an average-sized class. École Élémentaire Océane's gymnasium is about 45% the size of the average comparator school gymnasium.

[4608] The plaintiffs point out that the gymnasium sizes at École Élémentaire Océane and École Élémentaire Deux-Rives (Mission) are similar. The CSF therefore invites me to infer that the problems manifest at École Élémentaire Deux-Rives, as described by the physical education teacher at that school and discussed in Chapter XXX, École Élémentaire Deux-Rives (Mission), are also manifest at École Élémentaire Océane. While I am satisfied that the size of the gymnasium at École Élémentaire Océane is restrictive and presents challenges, given the different class sizes and compositions at École Élémentaire Océane and École Élémentaire Deux-Rives, I cannot infer that the detailed issues that arise at École Élémentaire Deux-Rives also arise at École Élémentaire Océane.

i) Environmental Factors

[4609] Ms. Bédard's evidence was that the ventilation system at École Élémentaire Océane is noisy, particularly in the gymnasium, washrooms, library and the learning assistance room. The administrative area can also be noisy when the sound of children playing outdoors emanates through the windows. Further, Ms. Bédard said the temperature at École Élémentaire Océane can be unpredictable: too hot at some times and too cold at others. When the ventilation system in the gymnasium is turned off due to its noise, the gymnasium can become very warm.

[4610] There is no evidence concerning noise and temperature at comparator schools.

j) Transportation

[4611] The CSF provides transportation services to École Élémentaire Océane students that live within a Transportation Zone that extends from Parksville to the north, through Nanaimo, to Ladysmith to the south. It therefore excludes students from Qualicum Beach and Chemainus. Parents of children living in those communities are paid a stipend by the CSF to drive their children to a central pick-up point. The CSF does not provide any transportation services to students attending the Nanaimo Francophone Secondary Programme.

[4612] In 2012/13, 83 of École Élémentaire Océane's 94 students took the bus to school. The average bus ride time to École Élémentaire Océane was 60 minutes. About 50% of students had a bus ride time of 30 minutes or more; 20% had bus travel times of 45 minutes or longer. The longest ride time was 75 minutes, and the shortest three minutes.

[4613] Only eight of 29 comparator schools provide bus transportation services. The average bus ride time at those schools is 15 minutes. The average maximum bus ride time at those schools is 25 minutes. Pleasant Valley Elementary has a longest bus ride time of 33 minutes and an average bus ride time of 23 minutes. Only 23 of their 289 students (8%) take the bus to school. North Oyster Elementary

buses the highest proportion of students to school other than École Élémentaire Océane, at 77%. Its longest bus ride time is 30 minutes, and its average bus ride time is 20 minutes.

k) Early Childhood Education

[4614] École Élémentaire Océane does not have dedicated space for early childhood education. This was something that concerned École Élémentaire Océane administrators as early as August 2005, shortly after the CSF acquired École Élémentaire Océane.

[4615] Ms. Marsan advised that in 2007, at parent requests, she looked into opening an early childhood programme at École Élémentaire Océane. Since there was no space for the programme at the school, the only option seemed to be placing a portable on the site. Ultimately, the parents did not pursue that course because neither they nor the CSF were willing to pay for a portable.

[4616] Later, in November 2010, Ms. Marsan was contacted by a member of a Francophone Association in Nanaimo that was revisiting the idea of opening an early childhood education programme. She encouraged the parents to commission a needs survey to determine what kind of service should be opened in the community. It is not clear what became of the needs assessment.

[4617] Ms. Bédard explained that there is a Francophone preschool in Nanaimo, but it is not integrated into École Élémentaire Océane. Ms. Bédard is aware that many students who attend that preschool go on to attend École Élémentaire Océane. However, she has never attempted to organize activities with the preschool.

[4618] Early childhood programmes are not common at the comparator schools. Twenty-one of 29 comparator schools (72%) do not offer any early childhood programming. Seven schools have Strong Start programmes, and one has a Strong Start and a Daycare.

I) Other Factors

i. Francophone Experience

[4619] Reasonable rightsholder parents would find it very attractive that the CSF provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I describe in Chapter XV, Linguistic and Cultural Programming. Of course, since École Élémentaire Océane competes with French immersion at the elementary level, this factor might not be enough to persuade parents to enrol their children at École Élémentaire Océane.

[4620] To address concerns that École Élémentaire Océane students use English outside the classroom (as is common in BC's minority language schools), École Élémentaire Océane staff plan clubs and games to underline the idea that French does not only belong in the classroom. For example, École Élémentaire Océane has clubs for yoga, Rubik's Cubes and traditional dance.

[4621] École Élémentaire Océane is also used by community groups. Once a week, the Association des Francophones de Nanaimo uses the library with a group of small children. However, there is not a large amount of space for the community to come together and socialize.

[4622] When Ms. Bédard was cross-examined, she was asked about the positive aspects of École Élémentaire Océane. She was firm in her contention that the quality of education at École Élémentaire Océane was not good enough because of facility concerns. She stated that she tells parents visiting the school that in spite of everything, staff work hard to overcome obstacles, and that parents have no other choice if they want their children to receive a Francophone education in Nanaimo. In this aspect of her evidence, Ms. Bédard was evasive and not credible. It is clear, however, that she makes little effort to market the school in any positive way.

ii. Class Sizes

[4623] École Élémentaire Océane's class sizes are lower than or comparable to those at the comparator schools. At the Kindergarten level, classes are much

smaller, with only 15 students per class as compared to the majority's 20 students. Class sizes are comparable at the primary level. École Élémentaire Océane's Grade 1-3 class sizes average to 22 students; the average across SD68-Nanaimo-Ladysmith is likewise 22 students. At the intermediate level, École Élémentaire Océane's class sizes are smaller again, with an average of 21 students as compared to SD68-Nanaimo-Ladysmith's 26 students to a class.

iii. Student to Staff Ratios

[4624] The CSF's student to teacher ratio is 15 students to each teacher. This is better than the student to teacher ratio for SD68-Nanaimo-Ladysmith, which is 19 students to each teacher.

[4625] The CSF also outperforms SD68-Nanaimo-Ladysmith on the special needs student to special needs teacher ratio. The CSF has four such students to teachers, while SD68-Nanaimo-Ladysmith has nine such students to each teacher.

iv. Graduation Rates

[4626] The CSF's six-year completion rate is about 95%. SD68-Nanaimo-Ladysmith's is 72.5%. Turning to first-time graduation rate, the CSF has an 88% graduation rate, while SD68-Nanaimo-Ladysmith has a 75% rate. These are significant differences that would be of interest to rightsholder parents.

v. Technology

[4627] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students. The laptops are decentralized and integrated into the classroom.

[4628] At all the comparator schools, computers are desktop computers located in computer labs. I take from this that the technology programme at École Élémentaire Océane is more advanced than that of the comparator schools, and better integrated into the classroom learning environment.

vi. Crowding

[4629] École Élémentaire Océane has slightly more space per student than comparator schools. The average comparator school has 12 m² per student enrolled. École Élémentaire Océane has 14 m² per student. Only eight of 29 comparator schools (28%) have more space per student than does École Élémentaire Océane.

[4630] The Joint Fact Finder's Report advised that École Élémentaire Océane has operating capacity for 112 students. Thus, in the 2014/15 school year, it was operating at 12 students below capacity, or at 89% of its operating capacity. École Élémentaire Océane has never had enrolment of 119 students; its peak enrolment was 110 students in 2008/09.

[4631] The average capacity utilization at comparator schools is 99%. Only 10 comparator schools (34%) are operating at below 90% capacity. Thirteen schools (45%) are operating at more than 100% of their operating capacity. More than half of all comparator schools use portables, while École Élémentaire Océane does not.

m) Analysis

[4632] When determining whether minority facilities meet the standard of majority schools, the question is whether there are meaningful differences that would deter a reasonable rightsholder from sending their children to the minority school. The test requires substantive equivalence, takes the perspective of a reasonable rightsholder, and compares the global educational experience at minority schools to the experience at local majority schools that represent realistic alternatives for the rightsholder parents.

[4633] The plaintiffs say the defendants led no evidence to contradict Ms. Bédard's assessment that the quality of education at École Élémentaire Océane is substandard, and no evidence to prove poor educational outcomes in comparator schools. As such, they say that in light of Ms. Bédard's assessment, the evidence shows the global educational experience at École Élémentaire Océane is

substandard. Of course, Ms. Bédard is not an expert, so her opinion evidence should be given very little weight, particularly given her lack of credibility.

[4634] The defendants argue that the CSF has the power to use its AFG and operating funds to fix or renovate its schools. It suggests that many of the deficiencies at École Élémentaire Océane are quick fixes that are within the CSF's means to address.

[4635] There are a number of factors that a reasonable rightsholder parent would find detracts from the global educational experience at École Élémentaire Océane. Chief among them, almost all École Élémentaire Océane students take the bus to school; more than half the students that bus have a bus ride time longer than of 30 minutes, and 20% have bus travel times of 45 minutes or longer. (The corollary of this is that half of École Élémentaire Océane's students spend less than 30 minutes on the bus.) Students at comparator schools generally do not bus to school. When they do, the average bus ride time is 15 minutes, and the average maximum ride time is 25 minutes. The longest bus ride time of any of the comparator schools is 30 minutes at North Oyster Elementary.

[4636] École Élémentaire Océane is also the oldest of all the comparator schools by about 10 years. Its library is significantly smaller than the average comparator school library, and the smallest library of all the comparator schools. Its gymnasium, too, is smaller than the gymnasiums at all the comparator schools, and significantly smaller than the average gymnasium. This no doubt makes it difficult to instruct some elements of the physical education curriculum and bring the school community together. École Élémentaire Océane also has less absolute multipurpose space than comparator schools, which prevents it from offering older students a band programme.

[4637] Of less importance, it is doubtful that parents might be concerned that École Élémentaire Océane staff have less staff break room and preparatory space than almost all comparator schools.

[4638] On the positive side, École Élémentaire Océane offers very attractive Francophone programming, with excellent extra-curricular activities and engagement with the Francophone community. École Élémentaire Océane also has an advanced technology programme, with a two-to-one tablet programme for primary grades and a one-to-one laptop programme for intermediate students. That programme is far more advanced than the programmes at comparator schools.

[4639] École Élémentaire Océane also has smaller class sizes at the Kindergarten and intermediate grade levels than comparator schools. A district-to-district comparison shows that the CSF has much better student to teacher and special-needs student to special-needs teacher ratios than SD68-Nanaimo-Ladysmith. The CSF's graduation rates, at both the six-year and -first-time level, are significantly better than those of SD68-Nanaimo-Ladysmith.

[4640] Most factors are neutral: École Élémentaire Océane is in an average state of repair as compared to other schools based on its FCI score. While there have been some conflicts between École Élémentaire Océane parents and CSF administration, the CSF has generally been diligent acting to repair École Élémentaire Océane and remedying what problems exist with its building condition.

[4641] École Élémentaire Océane likewise has an average amount of main entrance space, and has classrooms that are an average size as compared to other schools. Its Kindergarten classroom is slightly larger than average. It is slightly better than average in terms of crowding on both the square-meters-per-student and capacity utilization measures. It has an average amount of learning assistance space, falling in the middle of the range. While its administrative space is, on an absolute basis, smaller than that at all but one school, the one school with less administrative space has more than triple École Élémentaire Océane's population. While it has problems with storage, comparator schools likewise have to store materials in classrooms. Although École Élémentaire Océane does not have space for early childhood programming, most comparator schools also do not offer those

programmes. École Élémentaire Océane students, like those at SD68-Nanaimo-Ladysmith schools, eat lunch in their classrooms.

[4642] In my view, a reasonably prudent rightsholder parent would be likely to consider that the global educational experience for elementary students at École Élémentaire Océane meets the same standard as the comparator schools in an around Nanaimo. In my view, École Élémentaire Océane, like the comparator schools, has a mix of positive and negative features. In the context of an imperfect education system like the one in British Columbia, the minority cannot expect to have the best of each type of amenity.

4. Global Secondary School Experience

a) Facts

[4643] The Nanaimo Francophone Secondary Programme operates out of Nanaimo District Secondary, a heterogeneous, triple track (French/English/French immersion) facility.

[4644] The CSF has one teacher for the programme. According to Ms. Bédard, Nanaimo Francophone Secondary Programme students take only two classes in French: French and Social Studies. Because the CSF has only 50 students between five grades, those courses are taught in split classes. Ms. Bédard has considered adding another course in French to the schedule. However, she has not done so because she did not want students to miss out on opportunities to take their exploratory options courses.

[4645] Until 2012, the CSF had one classroom at Nanaimo District Secondary. In 2012/13, Ms. Bédard negotiated the use of a second room, a vacant science lab that the CSF paid to renovate. The CSF used the room for learning assistance, a homework programme and counselling. Since that room is at the opposite end of the corridor from the CSF's first classroom, the teachers in those rooms use text messaging to communicate with one another.

[4646] When she testified, Ms. Bédard anticipated the situation would improve for 2014/15. The Nanaimo Francophone Secondary Programme was moving to two contiguous classrooms linked by a CSF resource room. Ms. Bédard was hopeful the new arrangement would create greater community for CSF students.

[4647] Nanaimo Francophone Secondary Programme students take most of their courses in English. However, Nanaimo Francophone Secondary Programme students can take math and science with French immersion students if those courses are not full. The CSF pays SD68-Nanaimo-Ladysmith an amount per block that each CSF student takes in the Nanaimo District Secondary Programme, which amounts to about \$484,482 for the year.

[4648] There are some communication problems associated with the fact that CSF students take most of their courses with the SD68-Nanaimo-Ladysmith programme. CSF learning assistance support staff are not always aware when Nanaimo Francophone Secondary Programme students are struggling in their SD68-Nanaimo-Ladysmith courses. Further, Ms. Bédard does not have direct contact with SD68-Nanaimo-Ladysmith teachers. She must relay information through the Nanaimo District Secondary principal, who passes the information on to SD68-Nanaimo-Ladysmith staff. Ms. Bédard has to ask Nanaimo District Secondary staff for CSF student marks for their report cards. The Nanaimo District Secondary principal deals with discipline of CSF students. Sometimes Ms. Bédard does not learn about disciplinary issues until long after the fact.

[4649] Ms. Bédard confirmed that she has little contact with Nanaimo Francophone Secondary Programme students. In the second semester, CSF students in Grade 12 do not take any courses with CSF teachers, which makes it difficult for Ms. Bédard to give those students information specific to the CSF. Ms. Bédard likewise does not have much interaction with the parents of Nanaimo Francophone Secondary Programme students. She hesitates to contact them because she does not want to duplicate information parents already receive from SD68-Nanaimo-Ladysmith.

[4650] When Nanaimo Francophone Secondary Programme students graduate, they participate in the Nanaimo District Secondary graduation ceremony. Ms. Bédard does not attend. Instead, she attends the École Élémentaire Océane final assembly that takes place on the same day.

[4651] Ms. Bédard explained that she has found it challenging to create a sense of community for students in the Nanaimo Francophone Secondary Programme. Most students in the programme default to speaking English. She recounted that the classrooms at Nanaimo District Secondary were too small for some events she tried to schedule. Few Nanaimo Francophone Secondary Programme students attend CSF field trips and provincial-level Francophone events like the Jeux Francophones.

b) Analysis

[4652] The proportionality analysis mirrors the perspective used in the equivalence analysis: it adopts a substantive equivalence analysis, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with this question, as the government could meet the appropriate entitlement standard by funding any range of amenities and services.

[4653] Currently, secondary students from the Nanaimo area attend the Nanaimo Francophone Secondary Programme. By virtue of attending that programme, students have access to the wide range of specialty classrooms and course offerings available at a majority secondary school. However, they are only able to take a few CSF courses, and have limited ability to take courses with French immersion students. The school has limited Francophone presence and less control over its programming than it would if secondary students were enrolled in a homogeneous elementary/secondary school.

[4654] Given the relatively low number of secondary students attending the secondary programme in Nanaimo, I find that the current heterogeneous programme offers secondary-age rightsholders' children in the Nanaimo area appropriate

amenities in light of the number of children likely to take advantage of a secondary programme in the area.

[4655] As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities themselves (*Mahe* at 371 to 372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment concerning what travel times were appropriate, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[4656] In this case, the CSF has determined that it would be preferable to educate secondary students in Nanaimo in a combined elementary/secondary school. Generally, the right to do so would fall within its right to management and control. The defendants generally should not stand in the way of such a decision.

[4657] If the CSF were intent on doing so, it could choose to add some core secondary facilities to the École Élémentaire Océane site using portables, as it did in Kelowna. Given the low number of children likely to participate in a secondary programme in Nanaimo, this would meet the entitlement standard by providing minority language secondary instruction with access to core secondary specialty facilities in a homogeneous environment.

[4658] However, only a very small number of secondary students would be likely to attend the secondary component of a newly-constructed elementary/secondary school: up to 70 children. Further, École Élémentaire Océane currently offers a global educational experience that is equivalent to the experience offered to the majority in the Nanaimo area. There are no surplus elementary/secondary schools available for the CSF to acquire and purchase. In those circumstances, it is not

practical in terms of cost for the Province to fund the construction of a K-12 school in Nanaimo.

[4659] In my view, secondary-age rightsholders are already receiving what they are entitled to given the low number of secondary students in the area. If the CSF were already entitled to a newly-built elementary facility, then it might be practical in terms of pedagogy and cost to build a secondary component into a newly-constructed school. It goes beyond the bounds of practicality to ask the Province to rebuild École Élémentaire Océane to offer more secondary amenities in Nanaimo.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[4660] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Nanaimo and the dealings of the CSF, the Ministry and SD68-Nanaimo-Ladysmith in connection with it.

[4661] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Nanaimo, I make findings that are of particular relevance to Chapter XXXV, Leases; Chapter XXXVII, Building Condition Projects and the Building Condition Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

1. History of Capital Requests

[4662] When the CSF took jurisdiction in Nanaimo, SD68-Nanaimo-Ladysmith operated two heterogeneous Programmes Cadres: an elementary programme at Quarterway Elementary, and a secondary programme at Nanaimo District Secondary.

[4663] The CSF's earliest capital requests for the Nanaimo area focused on acquiring a site and building an elementary/secondary school to consolidate those

programmes. That project was the CSF's tenth-highest priority project in its June 1998 Capital Plan Submission for 1998/99. The CSF did not rank the project in its September 1998 Capital Plan Submission for 1999/00. It was consistently the CSF's seventh- or eighth-highest priority from 1999 through 2002. Throughout this period, the CSF informed the Ministry that it had not identified any appropriate SD68-Nanaimo-Ladysmith facility available for transfer.

[4664] By April 2004 the CSF identified a surplus site, SD68-Nanaimo-Ladysmith's former Princess Anne Elementary. The CSF subsequently amended its Capital Plan Submission for Nanaimo to a request to acquire Princess Anne Elementary (the "Princess Anne Acquisition Project"), at a cost of \$2 million. The CSF also made that project its fourth-highest priority.

[4665] In June 2004, Minister Christensen announced support for the CSF to acquire Princess Anne Elementary, subject to feasibility work. The Minister accelerated funding to make it available in the first year of the capital budget because, by Mr. Miller's account, Ministry staff knew that Princess Anne Elementary was readily available, and the request suggested the building was suitable for the CSF's needs.

[4666] The CSF occupied Princess Anne Elementary in 2004 or 2005. Feasibility work suggested the building required renovations to make it suitable for a secondary programme. Those renovations had not been included in the total project budget. The Ministry told Mr. Bonnefoy that the correct approach would be to request funding for a secondary addition in a future capital plan.

[4667] The CSF did not request a secondary addition in subsequent capital plans. The CSF made no project request for Nanaimo in its October 2004 Capital Plan Submission for 2005/06. Then, with projected enrolment of 20-40 secondary students, the CSF began requesting a new site and a 200-student, homogeneous secondary school in Nanaimo (the "Nanaimo Secondary Project"). It was said to be the CSF's fifth-highest priority project in its October 2005 Capital Plan Submission for 2006/07, the eleventh-highest priority in its November 2006 Revised Capital Plan

Submission for 2007/08, and its fifteenth-highest priority in its October 2007 Capital Plan Submission for 2008/09.

[4668] The Minister did not approve the Nanaimo Secondary Project. Mr. Miller said the Ministry thought the request was completely different from the secondary school addition the CSF had first envisioned with the Princess Anne Acquisition Project.

[4669] In 2007, the CSF also began seeking seismic upgrades to École Élémentaire Océane. The CSF's analysis suggested the school posed a medium seismic risk. The seismic upgrade was the CSF's eighth-highest priority in its October 2007 Capital Plan Submission for 2008/09.

[4670] The CSF moved to ward-based capital planning with its May 2009 Capital Plan Submission for 2009/10. That year, the CSF ranked a seismic upgrade to École Élémentaire Océane as its highest-priority project in the Northern Vancouver Island ward. The Nanaimo Secondary Project was its second-highest ranked project in that ward. The CSF did not request any other projects for the Northern Vancouver Island ward.

[4671] With the June 2010 Capital Plan Submission for 2010/11, the CSF's capital planning for Nanaimo took another turn. That year, the CSF requested the replacement of École Élémentaire Océane as a Kindergarten to Grade 7 school on the same site. It did not request any secondary school space. The CSF also did not sequentially rank its priorities. Instead, like most other project proposals, this project was said to be the CSF's highest priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF's form of ranking was not reflected in the Echo Report. The CSF made the same request with the same priority in its November 2012 Capital Plan Submission for 2012/13.

[4672] The CSF began seeking secondary space again with its September 2013 Capital Plan Submission for 2013/14. That year, the CSF requested the Nanaimo Replacement Elementary/Secondary Project as its only project in the Northern Vancouver Island ward, and as its highest priority (like all other projects).

[4673] In support of its request, the CSF submitted an In-House PIR for the Nanaimo Replacement Elementary/Secondary Project dated November 2013.

[4674] The Echo Report for the CSF's September 2013 Capital Plan Submission for 2013/14 suggests the Ministry assigned the project a low priority. In his letter offering feedback on the CSF's PIRs, Mr. Cavelti explained the Ministry was treating the Nanaimo Replacement Elementary/Secondary Project as a Building Condition Project and had assigned the project a threshold ranking based on the building's FCI score. Mr. Cavelti asked the CSF to provide the FCI information summary for the school, and also enquired about the CSF's plans for the existing École Élémentaire Océane. He also asked the CSF to evaluate other options, such as renovating or replacing the existing building on the same site.

[4675] Mr. Allison responded to Mr. Cavelti's concerns by way of a letter dated October 22, 2014. He advised that the CSF planned to demolish the existing École Élémentaire Océane and build on the existing site, although it had identified sites for acquisition in its PIR. However, the CSF refused to consider renovating the existing facility because, in the CSF's view, the building was so small that a renovation was not feasible. The CSF also wrote that the Ministry was "well aware of École Océane's facility condition", and refused to provide the requested FCI information.

[4676] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated In-House PIR, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email. Those projections

extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students.

2. Early Francophone Education in Nanaimo

[4677] When the CSF took jurisdiction in Nanaimo, SD68-Nanaimo-Ladysmith operated an elementary Programme Cadre at Quarterway Elementary. The Programme Cadre facilities at Quarterway Elementary were newer than those used by other Programmes Cadres. It had a welcoming entrance and a large Kindergarten classroom.

[4678] At that time, SD69-Qualicum also operated a Programme Cadre in Parksville. According to Dr. Ardanaz, the CSF amalgamated the SD69-Qualicum Programme Cadre into its Nanaimo programme, for both pedagogical and financial reasons.

[4679] In 1999, SD68-Nanaimo-Ladysmith notified Dr. Ardanaz that the CSF programme could not stay at Quarterway Elementary due to growing French immersion enrolment. Dr. Ardanaz was invited to a special closed meeting of the SD68-Nanaimo-Ladysmith Board of Trustees where it would discuss a future home for the CSF. The agenda for the May 5, 1999, meeting presented three options: providing the CSF with no space at all, moving the CSF elementary programme to a portable pod on a vacant site, or moving it to Harewood Elementary, where SD68-Nanaimo-Ladysmith offered a French immersion programme. Dr. Ardanaz was disappointed that SD68-Nanaimo-Ladysmith was considering not allowing the CSF any space.

[4680] After the meeting, Dr. Ardanaz requested assistance from Ministry officials. Dr. Ardanaz understood that Ministry staff intervened, and the CSF was allowed to remain at Quarterway Elementary. Dr. Ardanaz maintained that Ministry staff were instrumental in ensuring the CSF continued to have space available to it.

3. The Acquisition of the Former Princess Anne Elementary

[4681] The CSF remained in leased space at Quarterway Elementary for many years. The CSF also began searching for space to accommodate an elementary/secondary programme.

[4682] The CSF engaged BCBC to perform the site search on its behalf. In a June 1999 report, BCBC identified six potential sites. However, many of those sites were not zoned for school use, which the CSF found prohibitive. The CSF also met with Malsapina College to discuss potential accommodation of secondary students there, but the college was not interested.

[4683] The site search was on hiatus until about 2003. In the fall of 2003, Dr. Ardanaz met with Mr. Rick Borelli, Superintendent of SD68-Nanaimo-Ladysmith, who informed him that SD68-Nanaimo-Ladysmith was considering five schools for closure. Dr. Ardanaz expressed his view that of the five schools, Princess Anne Elementary was ideal because it was the most accessible.

[4684] The CSF hosted an open house for École Élémentaire Océane parents and teachers to tour and provide comments on Princess Anne Elementary. The CSF determined the facility would be acceptable for the immediate future, although it would require some upgrading and renovations to make it appropriate for secondary students.

[4685] On March 16, 2004, Dr. Ardanaz wrote to Mr. Borelli and informed him the CSF considered Princess Anne Elementary to be the ideal facility for its needs in Nanaimo. Dr. Ardanaz initially asked to lease the facility because SD68-Nanaimo-Ladysmith had not suggested it was willing to sell. SD68-Nanaimo-Ladysmith responded with a lease asking price, and sought a proposal from the CSF.

[4686] Meanwhile, in April 2004, Mr. Miller advised, the Ministry received a letter from Dr. Ardanaz informing it that the CSF Board of Trustees had changed its project request for Nanaimo from a request for a new site and K-12 school to the acquisition of Princess Anne Elementary from SD68-Nanaimo, for a total cost of \$2

million. This was a reduction from the approximately \$7 million the CSF had been requesting for a site and elementary/secondary school.

[4687] On June 2, 2004, Minister Christensen wrote to Ms. Popov, then Chairperson of the CSF, and advised that the Ministry had approved the CSF's capital request to acquire Princess Anne Elementary, subject to completion of a feasibility study to confirm the scope and budget. By way of a June 15, 2004, letter, Mr. Miller wrote that, based on the CSF's proposal, the Ministry was supporting \$2 million for the acquisition, to "accommodate a school with a nominal capacity up to 40 Kindergarten students and 200 students grades 1-12". He advised that the Ministry would also provide accelerated funding in the first year of the capital plan.

[4688] The CSF occupied Princess Anne Elementary, which was renamed École Élémentaire Océane, at the start of the 2004/05 school year. However, the transaction for the acquisition of the school took several more months to complete.

[4689] In the summer of 2004, Mr. Jack, the CSF's Planning Officer at the time, asked Mr. Bonnefoy for the CSF's feasibility work for the Princess Anne Acquisition Project. He specifically asked for the rationale for the purchase, the options considered, the appraised value, the proposed agreement, and the estimated total cost of the project if renovations and equipment allowance were required. Having not received a response, on December 9, 2004, Mr. Jack wrote to Mr. Bonnefoy again and asked when the Ministry would receive the information it needed to pay for the school. He suggested the CSF should focus on acquiring the school with the minimum amount of renovations to ensure it was suitable for the CSF's immediate needs. He stated that any major addition or renovation would best be requested in a future capital plan.

[4690] Mr. Bonnefoy forwarded Mr. Jack's message to Mr. Edmund Lee of MQN Architects, who were engaged to prepare the Phase I Feasibility Study for the Princess Anne Acquisition Project. Mr. Bonnefoy requested "something very quick and dirty asap". Mr. Bonnefoy explained that he was asking Mr. Lee for final information for the feasibility work to forward to the Ministry.

[4691] Mr. Lee forwarded the feasibility information to Mr. Bonnefoy the next day. That information stated that “the main change to the existing school would be the retrofit of (3) classrooms to: a kindergarten class, special ed. room, and a media tech room.”

[4692] Mr. Bonnefoy forwarded Mr. Lee’s work to the Ministry later in December 2004. The feasibility work compared the cost of four options for the facility: leaving the school as is, renovating it as a K-7 facility, renovating and adding an addition for a secondary component, or re-building the school a K-12 facility. The latter two were suggested as “future options”. Mr. Bonnefoy commented that the CSF intended to comply with Mr. Jack’s suggestion by focusing on immediately-needed renovations, putting off renovations to convert the school to an elementary/secondary facility for a future capital plan.

[4693] The cost of renovating the building as a K-7 school was said to be \$370,600. Mr. Bonnefoy explained that those renovations were largely cosmetic. Including the cost of acquiring the site, the project budget was estimated to be slightly more than \$1.6 million.

[4694] The future option of renovating and adding a secondary wing was estimated to be just over \$6 million, including the site acquisition. This is about \$4 million more than the acquisition and minor renovation option. Notably, around the same time, the CSF was projecting secondary enrolment to be between 20 and 40 students. Mr. Bonnefoy agreed while under cross-examination that the CSF was effectively asking for an additional \$4 million for just 20 to 40 students.

[4695] Mr. Jack replied on December 22, 2004, that he saw support for about \$1.9 million toward the purchase of Princess Anne Elementary and associated renovation and equipment costs. Mr. Jack asked Mr. Bonnefoy to confirm his agreement with the project budget. Mr. Bonnefoy responded in January 2005 that, subject to one change to the equipment allowance, Mr. Jack’s calculations were “agreeable”.

[4696] Mr. Jack's numbers formed the basis of the project approval for the Princess Anne Acquisition Project. On February 2, 2005, the CSF received a letter from Minister Christensen confirming the supported project would involve the acquisition of the closed Princess Anne Elementary School from SD68-Nanaimo Ladysmith. He wrote that the approval was granted for capital funding in the amount of \$2,051,048 to be used towards the acquisition and renovation of the facility.

[4697] Minister Christensen also stated that he looked forward to the development of the site as a Kindergarten to Grade 12 school to benefit francophone students in Nanaimo. Mr. Miller suggested in his evidence the Ministry had thought the project would, in fact, allow the CSF to accommodate an elementary/secondary programme. Mr. Bonnefoy was curious about this aspect of Minister Christensen's letter, as he thought it was clear the secondary component of the project was not going.

[4698] Renovations of Princess Anne took place over the summer of 2005.

[4699] In December 2005, Mr. Bonnefoy received a letter from Mr. Jack related to the CSF's lease costs for the 2005/06 school year. He asked why the CSF continued to claim lease costs in Nanaimo given that the CSF had "capacity to accommodate all of the students in the area, including the secondary students." He stated that he believed the CSF had planned to move the Nanaimo Francophone Secondary Programme to its new school. Mr. Bonnefoy responded that the CSF had yet to receive a capital project approval for a secondary addition, so it needed to continue leasing space at Nanaimo District Secondary.

[4700] Although Mr. Bonnefoy maintained that the CSF always planned to request a secondary addition to École Élémentaire Océane in subsequent plans, it never did so. The CSF sought a new site and a homogeneous secondary school for a number of years, then began seeking the Nanaimo Replacement Elementary/Secondary Project. To date, the Ministry has not supported any of these projects.

[4701] Meanwhile, SD68-Nanaimo-Ladysmith has some closed schools available. In March 2012, Mr. Stewart was involved in discussions around two closed schools

in SD68-Nanaimo-Ladysmith: Dufferin Elementary and Mount Benson Elementary. Neither school had been submitted for disposal at that time. Mr. Stewart believed that both schools were still closed at the time of his retirement in 2014. Mr. Stewart learned of those schools through some without-prejudice or privileged discussions, which were not explored before the Court.

[4702] In September 2013, Mr. Phil Turnin, the CSF's contact at SD68-Nanaimo-Ladysmith, contacted Mr. Allison and informed him that SD68-Nanaimo-Ladysmith planned to replace Nanaimo District Secondary. Mr. Allison understood that Mr. Turnin wanted to know if the CSF wanted space for its students included in the project. Mr. Allison responded to Mr. Turnin that the CSF was not interested because it intended to build its own elementary/secondary school.

4. Conclusions

[4703] The evidence establishes that the CSF typically did not rank projects in Nanaimo as a high priority from the CSF's inception through about June 2003. This appears to have been because there were no clear opportunities to acquire a site.

[4704] In that period, the CSF leased space from SD68-Nanaimo-Ladysmith. That relationship was not always an easy one. In 1999, SD68-Nanaimo-Ladysmith threatened to evict the CSF's elementary programme from its heterogeneous space at Quarterway Elementary to satisfy its own needs for French immersion space. The CSF was not evicted because a Ministry official intervened through informal channels and exerted pressure on SD68-Nanaimo-Ladysmith to ensure the CSF could keep its space at Quarterway Elementary.

[4705] In about 2003 and 2004, SD68-Nanaimo-Ladysmith went through a school closure process and identified five schools for potential closure. The CSF chose from among those schools, and identified the former Princess Anne Elementary as the one that was best suited to its needs.

[4706] Once the CSF learned the former Princess Anne Elementary was available for acquisition, it amended its capital plan to make the project a higher priority and

told the Ministry it was interested in the site. It did not request an associated renovation or addition for secondary students; it only requested the school acquisition. It reduced the anticipated project budget by \$5 million.

[4707] The Province then quickly approved the project in about 2004. This shows how the Province has been amenable to the CSF amending its priorities to take advantage of opportunities as they arise. The Ministry also accelerated project funding to provide it in the first year of the capital plan, contrary to the typical process that approved funding three years before the funding and transaction would actually go forward. The evidence establishes that SD68-Nanaimo-Ladysmith profited by about \$1.2 million as a result of the transaction.

[4708] Along with the acquisition, École Élémentaire Océane underwent cosmetic and functional renovations in about 2005. Feasibility work was prepared quickly after the CSF delayed providing that work to the Ministry for many months. It is possible that some building condition problems could have been addressed in that renovation, but were not because the feasibility work was prepared in some haste, without adequate assessment of the health and safety issues at École Élémentaire Océane.

[4709] Since the CSF acquired École Élémentaire Océane, it has not requested health and safety or building condition renovations. Of course, the Ministry has not approved any new Building Condition Projects in that time. The CSF has only requested seismic work. As I introduced in Chapter III, Introduction to the Capital Planning Process, and discuss in detail in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF, the Ministry has assessed the seismic risk of most school buildings in the Province. The Ministry is proceeding with those projects largely in order of priority based on those assessments of seismic risk. Any seismic issues at École Élémentaire Océane will be dealt with in due course based on its level of seismic risk.

[4710] The CSF told the Ministry that it would acquire the former Princess Anne Elementary with a view to it accommodating elementary and secondary students.

The evidence establishes that the Ministry relied on the CSF's representation and believed that the former Princess Anne Elementary would be able to immediately accommodate elementary and secondary students, bringing an end to the CSF's lease at Nanaimo District Secondary.

[4711] Although the CSF foresaw the need for renovations to add secondary school amenities, it did not inform the Ministry of those needs when it made the request to acquire Princess Anne Elementary. Further, the CSF delayed preparing its feasibility work, and when that work was completed, the CSF focused on basic renovations required to occupy the school. This was consistent with the request from the Ministry and the general approach to capital planning at the time. The CSF pointed to the need for a future addition for secondary programming in its feasibility work, but only as a "future option".

[4712] While Mr. Bonnefoy stated in his evidence that he expected the Ministry to approve an addition to École Élémentaire Océane for secondary students in the future, the CSF never asked for those renovations. Rather, although the CSF only foresaw secondary enrolment of 20 to 40 students, the CSF began requesting a new site and a homogeneous secondary school. It typically was not a high-priority project relative to the CSF's other project requests. Given the low number of students and the high cost of the projects, the Ministry was justified in never approving that project.

[4713] By 2010, the CSF's capital planning for Nanaimo had changed again to a request for a replacement to École Élémentaire Océane as a Building Condition Project that would serve students in elementary and middle school; it did not request any secondary space in Nanaimo. It was only in 2013/14 that the CSF began seeking secondary space again, this time through the replacement of École Élémentaire Océane as a combined elementary/secondary school. Overall, given the shifts in the CSF's capital planning for secondary space at École Élémentaire Océane and the relatively late request for the Nanaimo Replacement

Elementary/Secondary Project, it is not surprising the Province has not supported that project.

[4714] Overall, I find that responsibility for the current situation lies largely with the CSF. The CSF did not adequately assess École Élémentaire Océane when it acquired it to discern what types of renovations it required, accounting for many of the problems with the current facility condition. After that, it did not request any Building Condition Projects to respond to building condition concerns. Responsibility also lies with the CSF for the lack of secondary facilities, as the CSF misrepresented to the Ministry that École Élémentaire Océane provided space appropriate for secondary students, and then failed to request a secondary addition to École Élémentaire Océane going forward.

[4715] Of course, the projects would not have been likely to move forward if the CSF had requested them for several reasons. École Élémentaire Océane's FCI score does not make it a high priority for a Building Condition Project from the Ministry's perspective. The Ministry typically does not fund projects to bring them up to modern Area Standards. Further, the Ministry has not funded any new Building Condition Projects since 2005. I address these problems in Chapter XXXVII, Building Condition Projects and the Building Condition Driver.

F. Justification and Remedy

[4716] I conclude that rightsholders in Nanaimo are receiving the types of minority language educational facilities that they are entitled to in Nanaimo. If I had found otherwise, then it would have been open to the Ministry to justify that breach pursuant to s. 1. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed the justification question. Since I set out the framework for crafting remedies in Chapter X, Remedies, I do not find it necessary to address what remedy would have been appropriate to respond to the circumstances in Nanaimo.

G. Conclusion

[4717] I conclude that if the CSF were to construct the Nanaimo Replacement Elementary/Secondary Project, the number of children likely to take advantage of that programme is about 170 elementary students and about 70 secondary students. Given École Élémentaire Océane's size in comparison to majority schools, I find that the school falls in the middle to high end of the sliding scale. The numbers warrant a homogeneous school with facilities that are equivalent to the types of elementary school facilities at majority schools. In light of the very small number of secondary school students, though, École Élémentaire Océane is only entitled to proportionate access to core secondary-school instructional facilities.

[4718] I conclude that a reasonably prudent rightsholder parent would be likely to consider that the global educational experience for elementary students at École Élémentaire Océane meets the same standard as the comparator schools in and around Nanaimo. I am also satisfied that a reasonable rightsholder parent would be likely to find that the global educational experience afforded to secondary students is proportionate to the number of students that can be expected to enrol in a programme in Nanaimo.

[4719] Responsibility for any deficiencies in the global educational experience at École Élémentaire Océane lies with the CSF's capital planning practices, particularly its failure to identify its need for Building Condition Projects and for secondary space to the Ministry.

XXIX. ÉCOLE ÉLÉMENTAIRE LA VÉRENDRYE (CHILLIWACK)

[4720] École Élémentaire La Vérendrye is in the Fraser Valley region of British Columbia. There, the CSF operates École Élémentaire La Vérendrye, a homogeneous, French-language Kindergarten to Grade 6 school. École Élémentaire La Vérendrye is housed in the former Atchelitz Elementary, a facility owned by the CSF. The Province acquired École Élémentaire La Vérendrye for the CSF from SD33-Chilliwack in about 1998. In 2014/15, 46 children were enrolled at École Élémentaire La Vérendrye.

[4721] In Chilliwack, the CSF proposes to construct a new, homogeneous elementary (K-6) school on a new site to replace École Élémentaire La Vérendrye (the “École Élémentaire La Vérendrye Replacement Project”). In 2014, the CSF estimated that project would cost more than \$8 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[4722] Mr. Bonnefoy, Mr. Allison and Dr. Ardanaz all described École Élémentaire La Vérendrye. Mr. Miller spoke about his dealings with the CSF and SD33-Chilliwack on behalf of the defendants.

[4723] Additionally, the Court heard from two CSF educators. Ms. Natalie Butters, the physical education teacher at École Élémentaire Deux-Rives (Mission), gave evidence about her experiences teaching in the École Élémentaire La Vérendrye gymnasium.

[4724] Ms. Gilbert is the current assistant principal at École Élémentaire La Vérendrye. Ms. Gilbert joined the staff at École Élémentaire La Vérendrye in 2005/06, and stayed for two years before working for the CSF’s provincial administration in connection with its technology programme. She returned to École Élémentaire La Vérendrye in 2011/12, and continues to work there as a teacher and as assistant principal.

[4725] The Joint Fact Finder's Report describes École Élémentaire La Vérendrye and comparator schools. The Fact-Finding Team relied on Ministry and District Data, and visited a member of the Fact-Finding Team visited five of 27 comparator schools. The Fact-Finding Team relied on measurements of playgrounds and parking areas, location of portables and aerial photographs from the City of Chilliwack on-line map service. I find this source of evidence to be highly reliable.

B. History and Context

1. The CSF's Chilliwack Catchment Area

[4726] Dr. Kenny found a Francophone presence in Chilliwack dating back to the beginning of European colonisation. However, Chilliwack's earliest schools instructed students in English.

[4727] French-language education in Chilliwack began in the 1970s following pressure from the Francophone parents for a Programme Cadre, particularly the French-speaking personnel of a local Canadian Forces Base. The Department of National Defence opened a private French-language school in Chilliwack, École Élémentaire La Vérendrye, in 1974. It offered the Québec curriculum from Kindergarten to Secondary 2 (the equivalent of Grade 8 in British Columbia). The school was transferred to the control of SD33-Chilliwack in 1989, and became a Programme Cadre.

[4728] In 1992, École Élémentaire La Vérendrye moved off the military grounds to its current site at the former Atchelitz Elementary on Lickman Road. By 1995, the Programme Cadre served 98 children spread between École Élémentaire La Vérendrye, Vedder Middle School and Sardis Senior Secondary School.

[4729] Today in Chilliwack, the CSF operates École Élémentaire La Vérendrye as a homogeneous Kindergarten to Grade 7 French-language elementary school. École Élémentaire La Vérendrye offers preschool out of a portable on its site, but it does not offer Strong Start or Daycare. There is no Francophone secondary programme in the Fraser Valley. On graduation from École Élémentaire La Vérendrye, students can attend École Gabrielle-Roy in Surrey, which is about 80 km away from École Élémentaire La Vérendrye.

[4730] École Élémentaire La Vérendrye's catchment area consists of the entire territory of SD33-Chilliwack. In that area, SD33-Chilliwack operates 19 elementary schools, four middle schools, one elementary/middle school and one

middle/secondary school. French immersion is offered at two SD33-Chilliwack elementary schools and two SD33-Chilliwack middle schools.

2. Conclusions

[4731] When analyzing the Chilliwack Community Claim, I will take into account the semi-urban, but agricultural nature of Fraser Valley communities. The CSF's proposed new catchment areas will overlap with the catchment areas of neighbourhood schools and a few French immersion schools in a more urban setting, as well as some smaller schools outside city limits designed to serve children living in agricultural communities. Thus, the new programme will compete with programmes closer to the homes of CSF students. I will also take into account the long history of Francophone education in Chilliwack, and how it arose out of the historic presence of a Canadian Forces Base.

[4732] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[4733] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children is likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[4734] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue)

Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[4735] Dr. Landry estimated that in 2011 there were 157 elementary-age children (age 5-12) living in the catchment area for the École Élémentaire La Vérendrye Replacement Project that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 183 elementary-age children of Mother-Tongue Rightsholders in the catchment area, an increase of about 17%.

[4736] I note that Dr. Landry also found 150 children of non-Francophones in the area in the Knowledge Category, and 40 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in Chilliwack.

[4737] I therefore conclude that a reasonable proxy for the universe of rightsholders' children in the catchment area for the École Élémentaire La Vérendrye Replacement Project is about 180 elementary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[4738] École Élémentaire La Vérendrye currently serves students in Kindergarten through Grade 7. The evidence shows that enrolment at École Élémentaire La Vérendrye has decreased from 84 students in 1996/97, to 46 students in 2014/15. The grade configurations have changed over time, with École Élémentaire La Vérendrye offering Grades 8 and 9 from about 2001 through to the end of 2004/05. In those years, enrolment at École Élémentaire La Vérendrye appears to have increased. Leaving aside those years, with few exceptions, enrolment has

been steady or has decreased. Since about 2006/07, enrolment has been largely stable, hovering between about 45 and 55 students.

[4739] The CSF's records show that the CSF admitted eight children of non-rightsholders to École Élémentaire La Vérendrye pursuant to its Expanded Admissions Policy when it was in force. This accounts for 17% of the school's current enrolment. Given the conclusions that I reach in Chapter VII, The Number of Children, these students must be removed from the "known demand". I therefore estimate that the known demand for an education at École Élémentaire La Vérendrye in its present location and facility is about 40 children.

3. The Uptake Rate

[4740] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[4741] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[4742] The plaintiffs say that the CSF seeks a new elementary school with nominal capacity for 120 children and operating capacity for 111 students. That would give the CSF space for five classrooms for Kindergarten to Grade 6 instruction in Chilliwack.

[4743] The plaintiffs submit that École Élémentaire La Vérendrye's existing enrolment does not provide a reliable measure of current demand for minority language education. They point out that the CSF has problems retaining students through Grade 7, which they relate to École Élémentaire La Vérendrye's facility condition and location.

[4744] The defendants urge that for the CSF to fill its requested school to capacity, the CSF would need to achieve a 66% proxy participation rate by 2023. They also stress École Élémentaire La Vérendrye's stable enrolment in recent years.

[4745] Currently, about 40 children of rightsholders attend École Élémentaire La Vérendrye. Given the proxy universe of about 180 children, the proxy participation rate in Chilliwack is about 22%, leaving considerable room for growth. This is particularly so because, as I discuss below, École Élémentaire La Vérendrye has many deficiencies: the building is an old one, located outside central Chilliwack, and lacks a purpose-built gymnasium and library.

[4746] On the other hand, some factors suggest that growth will not be substantial. École Élémentaire La Vérendrye competes with neighbourhood and French immersion schools. Further, enrolment at École Élémentaire La Vérendrye has been stable for nearly 10 years.

[4747] The CSF's primary complaints concerning École Élémentaire La Vérendrye relate to its location in an agricultural and industrial area of Chilliwack, and its facility condition. The CSF's experience moving its programme at École L'Anse-au-Sable is the closest corollary.

[4748] In Kelowna, the CSF initially acquired the former Gordon Elementary, which was in poor condition and not located in an ideal location. The CSF moved to a better facility at a central location in the spring of 2005, part way through the 2004/05 school year. At that time, its enrolment was 103 students in Kindergarten to Grade 6. Its enrolment grew to 163 students in those levels over three years before stabilizing back at between 120-130 elementary-age students. Enrolment therefore

grew by about 20%. Using Dr. Landry's data, and assuming that the universe of rightsholders in Kelowna remained stable over time, the elementary-age participation rate grew from 24% to 28%: growth by about 5%.

[4749] Kelowna has some similarities to Chilliwack. Both programmes are longstanding, well-established minority language education programmes. The Okanagan area, like the Fraser Valley region, has both urban and agricultural aspects. This weighs towards applying the Kelowna parallel in Chilliwack.

[4750] On the other hand, École L'Anse-au-Sable added a secondary component to its programme when it was constructed, which likely helped to attract students into the elementary programme. The CSF does not propose to add a secondary programme in Chilliwack; it hopes to build a secondary school in Abbotsford to serve children from across the Fraser Valley. This weighs toward École Élémentaire La Vérendrye achieving a somewhat lower participation rate than at École L'Anse-au-Sable. Weighing toward École Élémentaire La Vérendrye realizing a higher participation rate is the fact that the CSF proposes to build a new school for École Élémentaire La Vérendrye, while École L'Anse-au-Sable moved into an older school.

[4751] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect about 60 children in Kindergarten to Grade 6 to take advantage of minority language education in a newly-built, homogeneous school in central Chilliwack. This represents a participation rate of about 33%: an increase of about 11% above the current participation rate.

D. Entitlement

[4752] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[4753] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools are those within the catchment area of the minority

language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[4754] In this case, the appropriate comparator schools for École Élémentaire La Vérendrye are all those in SD33-Chilliwack. The maps show that there are a number of rightsholder parents sending their children to École Élémentaire La Vérendrye from across the school district. Thus, all those schools are the local alternatives that parents would consider when making enrolment decisions for their children.

[4755] The group of appropriate comparator schools does not include the middle schools in SD33-Chilliwack. Since 2007/08, École Élémentaire La Vérendrye has only had students enrolled in Grade 7 in 2008/09, 2011/12 and 2014/15, and even then only two students in each the Grade 7 cohort in each year. Thus, in most instances, middle schools are not realistic alternatives for rightsholder parents.

[4756] SD33-Chilliwack has one elementary/middle school, Rosedale Traditional Community School, which serves children in Kindergarten to Grade 9. I include that school among the comparator schools because it is a realistic option for some rightsholder parents. However, given that Rosedale Traditional Community School serves an older group of students, École Élémentaire La Vérendrye generally cannot expect to have the same range of specialty classrooms as that school.

2. Location on the Sliding Scale

[4757] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[4758] In *Association des Parents- SCC*, the Court suggested that courts may defer to decisions in earlier litigation concerning where the numbers fall on the sliding

scale (at para. 48). In *Vickers #1*, Mr. Justice Vickers concluded that the numbers in the Lower Mainland and Fraser Valley (3,848 students likely to enrol in CSF schools based on an agreed statement of fact) warranted the highest level of management and control (at paras. 44-47). As I see it, Mr. Justice Vickers was situating the numbers at the school district level for the purpose of determining what level of management and control was warranted province-wide. He was not determining entitlement to individual school facilities in specific communities. Thus, I do not consider myself bound by Mr. Justice Vickers' determination of this question.

[4759] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[4760] The plaintiffs argue that in light of the Ministry's decision to fund the acquisition of École Élémentaire La Vérendrye as a homogeneous facility for the CSF in the late 1990s, the numbers in Chilliwack entitle rightsholders to distinct, homogeneous educational facilities substantively equivalent to those of the majority: at the high end of the sliding scale. In my view, that overlooks the financial and pedagogical concerns at the heart of the sliding scale analysis. As the number of children likely to take advantage of a programme grows and changes, what was formerly financially and pedagogically appropriate may no longer be so.

[4761] The average operating capacity at comparator schools is 303 students. The smallest school was built to accommodate 111 students (Cheam Elementary). Only two other schools were built to accommodate fewer than 200 students: Greendale Elementary (158 students) and Cultus Lake Community School (180 students).

[4762] The average enrolment at the schools the Joint Fact Finder's Report describes is 335 students. Only three schools have fewer than 200 students

attending it: Greendale Community Elementary (142 students), Cultus Lake Community School (164 students) and Cheam Elementary (166 students).

[4763] I estimate that even with a newly-built, homogeneous school in a central location, the enrolment at École Élémentaire La Vérendrye is only likely to approach about half the operating capacity and enrolment of the smallest SD33-Chilliwack school. This suggests that it is generally not financially or pedagogically appropriate in the area to educate such a small number of students in a homogeneous facility in Chilliwack.

[4764] As I discuss in Chapter XVII, École Élémentaire La Passerelle (Whistler) and Chapter XVIII, École Élémentaire de la Vallée de Pemberton (Pemberton), the Province only rarely builds schools with capacity for fewer than 100 students. Where it has, the school was built to serve an isolated and remote community; a new school was the only practical way of providing those children with an education.

[4765] Of course, the CSF is entitled to some deference in its decision to operate École Élémentaire La Vérendrye as a standalone, homogeneous school. What is appropriate for the minority may differ from what is appropriate for the majority, and the CSF is best able to discern when that is so. Moreover, the long history of minority language education in Chilliwack weighs toward providing a centre for the local Francophone community. However, these decisions have an impact: educating a small group of students together deprives them of the pedagogical benefit of interacting with large populations, and is not always cost-effective.

[4766] As I see it, 60 elementary-age children are not entitled to a newly-constructed homogeneous facility fully equivalent to those provided to the majority in Chilliwack. At the same time, 60 children will normally be divided into three or four divisions. Thus, the numbers warrant more than just basic elementary instruction. The numbers therefore fall in the middle to low end of the sliding scale, warranting instruction with access to the core facilities required to provide minority language education.

3. Global Educational Experience

[4767] The plaintiffs argue that students attending École Élémentaire La Vérendrye are receiving a substandard educational experience. They point to École Élémentaire La Vérendrye's location and visibility; its unattractive parking lot; its lack of a gymnasium and learning assistance space; its air quality; a lack of soundproofing; a small school site; an inadequate main entrance area and library; and long travel times. I weigh these factors together with other factors relevant to the overall educational experience.

a) Location and Visibility

[4768] According to Mr. Bonnefoy, École Élémentaire La Vérendrye is located in a rural area of Chilliwack. When Ms. Gilbert first visited the school, she found it difficult to locate.

[4769] Although the area is rural, École Élémentaire La Vérendrye is bordered by Lickman Road, a busy industrial road with frequent semi-trailer traffic. According to Ms. Gilbert, traffic along that road often exceeds the posted speed despite annual campaigns concerning speed in the school zone. There is also an uncontrolled railway crossing nearby. Ms. Gilbert advised that the crossing has prevented École Élémentaire La Vérendrye staff from using nearby running trails for physical education.

[4770] Examining the map of the catchment area, it is clear that École Élémentaire La Vérendrye is not centrally located in Chilliwack. However, it is not outside the community; it simply is not in one of the main residential and commercial areas of town. There are at least six other schools in Chilliwack that are not in the commercial and residential heart of the city. Of course, given that École Élémentaire La Vérendrye is a regional school, the location is a greater concern for École Élémentaire La Vérendrye than it is for majority neighbourhood schools.

b) Site

[4771] According to Ms. Gilbert, the École Élémentaire La Vérendrye schoolyard is small. Its playfield consists of a paved area and a grass field that floods from time to time. Ms. Butters found it hard to use the field for physical education because the ground is uneven.

[4772] The plaintiffs say the fields at comparator schools are better, citing evidence in parent affidavits. For the reasons I gave Chapter XVI, Introduction to Part 3, the Community Claims, I do not give those statements any weight.

[4773] Objectively, though, the École Élémentaire La Vérendrye site is a small one. At only two acres, it is smaller than all the comparator school elementary sites. The smallest of those sites is 2.5 acres (Promontory Heights Elementary), while the largest is 17 acres (Rosedale Traditional Elementary, a K-9 school). The average comparator school site is six acres. Notably, though, École Élémentaire La Vérendrye offers about 176 m² per student: more space per student than any of the comparator schools, and much more than the comparator school average of about 79 m² per student average.

[4774] Of course, given that a schoolyard is used to teach things like team sports, a lack of a full-sized site may still limit the educational experience at École Élémentaire La Vérendrye.

c) Parking Lot

[4775] According to Ms. Gilbert, there is no school bus loading zone at École Élémentaire La Vérendrye. Mr. Bonnefoy recalled that the parking lot is not sufficiently large to allow a school bus to turn around. As a result, school buses pick up students from the parking lot of Atchelitz Farmers' Hall ("Atchelitz Hall"): a community hall located adjacent to the École Élémentaire La Vérendrye schoolyard.

[4776] École Élémentaire La Vérendrye's parking lot is 750 m². Mr. Milne's data show that the average parking lot at the comparator schools is 1,973 m². They range from 557 m² (East Chilliwack Elementary) to 3,025 m² (Sardis Elementary).

Only East Chilliwack Elementary has a smaller parking lot than does École Élémentaire La Vérendrye.

[4777] The story is different when the parking lot is assessed based on the space per student enrolled at the school. École Élémentaire La Vérendrye has more than 16 m² of parking lot space per student. The average parking lot size for comparator schools is 6 m² per student. École Élémentaire La Vérendrye has more parking lot space per student than any comparator school. The most any comparator school has is 10 m² per student (Bernard Elementary).

[4778] Of course, École Élémentaire La Vérendrye has special parking needs because it operates as a regional school. The Joint Fact Finder reported that in 2012/13 École Élémentaire La Vérendrye transported about 39 students to school by bus: about 90% of its population. Thus, to ensure substantive equality, the CSF requires more space per student than many majority schools of a comparable size would in order to meet its unique needs.

[4779] Notably, the CSF is able to use the adjacent community hall's parking lot as a bus loading zone. There is no evidence concerning the size of that parking lot.

d) Main Entrance

[4780] According to Ms. Gilbert, the main entrance of École Élémentaire La Vérendrye is not easily identified. There is no credible evidence concerning how easily the main entrance of comparator schools can be identified.

[4781] The Joint Fact Finder's Report suggests that École Élémentaire La Vérendrye's entranceway is 9 m². The average comparator school entranceway is about 64 m². École Élémentaire La Vérendrye's entranceway is smaller than all the comparator entranceways, which range from 10 m² (Tyson Elementary) to 266 m² (Rosedale Traditional Elementary). École Élémentaire La Vérendrye has an average amount of entranceway space on a per student basis: about 0.2 m² per student.

e) Learning Assistance Space

[4782] École Élémentaire La Vérendrye has one small office that is used for Francisation and learning assistance. Ms. Gilbert teaches Francisation, and occasionally uses École Élémentaire La Vérendrye's resource classroom when that office is being used for other purposes.

[4783] Otherwise, École Élémentaire La Vérendrye's learning assistance consists of its resource room, a spare classroom. This gives it around 80 m² of space for learning assistance. Majority schools have an average of 105 m² of learning assistance space, ranging from a low of 14 m² (Cheam Elementary) to a high of 300 m² (Rosedale Traditional Community School). École Élémentaire La Vérendrye has more special education space than eight comparator schools. Further, École Élémentaire La Vérendrye has about 1.7 m² of space per student, while the average comparator school has about 0.3 m² of space per student. École Élémentaire La Vérendrye has more than double the space per student than the majority school with the most learning assistance space per student, McCammon Traditional Elementary.

[4784] I recognize that the CSF's learning assistance space is a resource room that is used for other purposes, primarily art instruction. However, the Joint Fact Finder's Report did not report that any of the comparator schools had a spare classroom for those purposes. Moreover, given that École Élémentaire La Vérendrye only has three divisions, it would be surprising if the resource room is consistently being used for other purposes.

f) Library

[4785] There is no purpose-built library at École Élémentaire La Vérendrye. École Élémentaire La Vérendrye uses a portable classroom as a library. Students travel to and from the main building to use the library, which presents logistical difficulties. Part of the library is used to store the school's gymnasium equipment.

[4786] École Élémentaire La Vérendrye has 89 m² of library space, in a portable. The average comparator school library is 136 m². Two schools have smaller libraries than École Élémentaire La Vérendrye: Cultus Lake Community School (72 m²) and Cheam Elementary (74 m²).

[4787] However, examining the space on a per student, and per class size level, École Élémentaire La Vérendrye performs better than average. École Élémentaire La Vérendrye has about 2 m² of library space per student enrolled at the school, much more than the 0.4 metres per student majority-school average. It is also more space per student than any other school has, and more than double the amount of space per student of the school with the most library space, Greendale Community Elementary (0.7 m² per student).

[4788] Of course, no matter the enrolment of the entire school, a library must also be able to accommodate a class. Due to its small class sizes, École Élémentaire La Vérendrye also has about 7 m² per student in an average-sized class. The majority school average is 6 m² per student in a class. Only two schools have more library space per student in a class than does École Élémentaire La Vérendrye: Watson Elementary (8 m²) and Rosedale Traditional Community Elementary (12 m²).

g) Gymnasium

[4789] École Élémentaire La Vérendrye does not have its own gymnasium. The CSF rents Atchelitz Hall, adjacent to École Élémentaire La Vérendrye, for physical education.

[4790] Mr. Bonnefoy advised that the Atchelitz Hall is old and is smaller than a typical elementary or secondary school gymnasium. This limits students from playing some sports, like basketball. According to Ms. Gilbert, the building is cold, and students and staff sometimes wear their jackets inside the hall.

[4791] According to Ms. Gilbert, École Élémentaire La Vérendrye uses the Atchelitz Hall from Tuesdays to Fridays for regular physical education classes, and for some

special activities like a Christmas Breakfast. École Élémentaire La Vérendrye does not use the hall on Mondays because it is used for community events on the weekend and can be dirty and small of alcohol after the weekend.

[4792] The process for taking students to the Atchelitz Hall for a physical education is involved. Ms. Gilbert gave evidence about the procedure. First, the teacher retrieves some physical education materials from the front office: a key, first aid kit, walkie-talkie, and a large bed sheet. Students change into their gymnasium clothes and outdoor shoes at École Élémentaire La Vérendrye. The class walks along the École Élémentaire La Vérendrye building, carrying their gymnasium shoes in their hands, to a storage unit next to the portable used for a library. There, the teacher and class gather equipment. The class then proceeds to Atchelitz Hall. The teacher places the bed sheet at the entrance of the hall for the students to change their shoes without dirtying the floors. Then the physical education lesson begins. This is all done in reverse when the class returns to the school.

[4793] Ms. Gilbert explained some of the conflicts that have arisen between École Élémentaire La Vérendrye staff and the management of the Atchelitz Hall. For one, Atchelitz Hall administration uses a chair as a makeshift lock for one of the doors. Ms. Gilbert removes the chair for safety reasons when teaching physical education, and has been criticized for failing to replace the chair after class.

[4794] From Ms. Gilbert's perspective, there are occasionally issues with the Atchelitz Hall not being cleaned properly after it is used for community events. There have been disputes about whether a mess was caused by weekend lessees or École Élémentaire La Vérendrye. As a result, the principal of École Élémentaire La Vérendrye has directed that École Élémentaire La Vérendrye students cannot use the bathroom at the Atcheltiz Hall. This presents obvious logistical difficulties.

[4795] Ms. Gilbert also recalled one occasion where Atchelitz Hall was scheduled for a community event without prior notice to École Élémentaire La Vérendrye. The physical education classes scheduled for that day had to be held outdoors.

Meanwhile, a crowd of trailers and “topless men” descended on the hall, parking near the school fence.

[4796] These issues have become such that École Élémentaire La Vérendrye staff prefer to use the Atchelitz Hall as little as possible. The hall is not used for school assemblies, for example, or for lunchtime activities.

[4797] All of the comparator schools have gymnasias that are owned by SD33-Chilliwack. Indeed, Mr. Miller testified that it is quite rare to encounter a school without a gymnasium. Almost all the comparator school gymnasiums are located within the comparator school facility. Only Cheam Elementary’s gymnasium is in a separate building, but it is owned by SD33-Chilliwack and accessible by a covered walkway.

[4798] Atchelitz Hall is also small as compared to majority school gymnasiums. The Atchelitz Hall gymnasium is 280 m². The average majority school gymnasium is 390 m². Only two schools have a smaller gymnasium than does École Élémentaire La Vérendrye: Greendale Community Elementary (197 m²) and Cheam Elementary (242 m²).

[4799] École Élémentaire La Vérendrye compares more favourably to majority schools when examining gymnasium size on a per pupil basis. École Élémentaire La Vérendrye has access to 6 m² of gymnasium space per student; majority schools have, on average, 1 m² per student, and none have access to greater than 2.5 m² per student. Examining the amount of space as compared to the average class size, École Élémentaire La Vérendrye has about 22 m² per student in a class; majority schools have an average of 17 m² per student in a class. Only two schools have access to more space per student in a class than does École Élémentaire La Vérendrye: Yarrow Community Elementary (24 m²) and Rosedale Traditional Community School (39 m²).

h) Environmental Factors

[4800] École Élémentaire La Vérendrye is landlocked by agricultural land. The surrounding areas are used as pasture. When they are sprayed with manure used as fertilizer, the smell can be so strong that students remain inside.

[4801] The plaintiffs cite as comparative evidence comments by parents that the schools they visited did not smell like manure. For the reasons I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I cannot give those statements any weight. This is particularly so with respect to the statements concerning the smell, since there is no evidence concerning whether the school visits took place at a time when fertilizing would take place. Indeed, given that Chilliwack is an agricultural area, I infer that many schools experience some problems with agricultural odour from time to time.

[4802] Ms. Gilbert explained that École Élémentaire La Vérendrye's proximity to Lickman Road creates noise problems. Lickman Road is frequented by large trucks, which are audible inside the building. The noise is distracting to her, and was disruptive when she was making a video recording for a student project.

[4803] Ms. Gilbert also advised that the building is not soundproofed. She delivers counselling services in the office that she shares with the school principal. Since the office is not soundproofed, Ms. Gilbert is concerned about the confidentiality of those counselling services.

[4804] The plaintiffs do not cite any comparative evidence concerning the soundproofing or conditions at comparator schools.

i) Transportation

[4805] According to Ms. Gilbert, due to École Élémentaire La Vérendrye's location, all École Élémentaire La Vérendrye students are either driven to school by their parents or travel to school by bus. Since so many students use the bus, École Élémentaire La Vérendrye only offers extracurricular activities at lunch because students cannot stay after school.

[4806] Mr. Milne's data show that in 2012/13, 39 of 43 École Élémentaire La Vérendrye students travelled to school by bus: about 90% of École Élémentaire La Vérendrye students. About half of the comparator elementary schools bus a significant number of students to school (40 or more). Five of 20 comparator schools bus more than half of their students, or more than 80 absolute students.

[4807] École Élémentaire La Vérendrye's bus times can be quite long. The longest bus ride time for any École Élémentaire La Vérendrye student is 78 minutes. The average maximum bus ride time at those comparator schools that bus students to school is 42 minutes. Two comparator schools have a longer maximum bus ride time: Strathcona Elementary (80 minutes) and Watson Elementary (85 minutes). Two further schools have a maximum bus ride time of 60 minutes: East Chilliwack Elementary and Cultus Lake Community School.

[4808] The average bus ride time for École Élémentaire La Vérendrye students is 69 minutes. The average majority school average bus ride time is 34 minutes. Only Strathcona Elementary has a longer average bus ride time (80 minutes), although it only transports 20 students to school (4% of its population). Two further schools have an average bus ride time of 60 minutes: Cultus Lake Community School and Watson Elementary. Cultus Lake Community School transports about 59% of its student population to school (84 students), while Watson Elementary transports 10% of its population to school (42 students)

j) Other Factors

i. Age and FCI Score

[4809] As I see it, a building's average age and FCI are correlated with a building's state of repair.

[4810] Mr. Frith's affidavit reveals that École Élémentaire La Vérendrye's FCI score places its condition among the worst in its catchment area. Its FCI score is 0.58. The majority school average FCI score is 0.31. Only Rosedale Traditional Community Elementary is in worse condition, with an FCI score of 0.61.

[4811] École Élémentaire La Vérendrye is also much older than all the comparator schools. École Élémentaire La Vérendrye's average age is 105 years. The average majority comparator school is 31 years old. The closest school to École Élémentaire La Vérendrye in terms of age is Central Elementary Community School, which is 79 years old.

ii. Francophone Experience

[4812] Reasonable rightsholder parents would find it very attractive that the CSF typically provides excellent services to enculturate its students into the French language and culture and to promote Vitality in British Columbia, as I discussed in Chapter XV, Linguistic and Cultural Programming. However, in Chilliwack the availability of this service, while attractive to rightsholder parents, is tempered by the fact that École Élémentaire La Vérendrye competes with French immersion at the elementary level.

iii. Class Sizes

[4813] On cross-examination, Ms. Gilbert discussed some of the benefits of teaching in a smaller school. She confirmed that École Élémentaire La Vérendrye's small population facilitates her ability to get to know students and their families.

[4814] Indeed, École Élémentaire La Vérendrye has much smaller classes than majority schools at every grade level. École Élémentaire La Vérendrye's average Kindergarten class has 14 children; the average majority comparator Kindergarten class has 20 students. Only one comparator school has fewer than 17 students in its average Kindergarten class: Cheam Elementary, with 15 children per class.

[4815] The difference is more pronounced at the elementary and intermediate levels. École Élémentaire La Vérendrye's average Grade 1-3 class has 14 students. The average majority primary class has 22 students. École Élémentaire La Vérendrye's closest comparator is Bernard Elementary, which has 19 students per average primary class. Looking at intermediate (Grade 4-7) grades, École Élémentaire La Vérendrye's average class has nine students. The average majority

intermediate class has 25 students. No comparator schools have fewer than 20 students in an average intermediate class.

iv. Student to Staff Ratios

[4816] The CSF's student to teacher ratio is better than that of SD33-Chilliwack. SD33-Chilliwack has 17 students to every teacher; the CSF has 15 students to each teacher. The CSF also outperforms SD33-Chilliwack on student to special needs teachers, with four special needs students to special needs teachers, in comparison to SD33-Chilliwack's 11 such students to teachers.

v. Graduation rates

[4817] The CSF's six-year completion rate is 95%. SD33-Chilliwack's is 80%. Turning to first-time graduation rate, the CSF has an 88% graduation rate, while SD33-Chilliwack has an 80% rate. Overall, I find these differences to be marginal, except for the difference between the SD33-Chilliwack's first-time graduation rate and that of the CSF.

vi. Technology

[4818] The CSF is among the most technologically advanced districts in the province. It offers one laptop for every child after Grade 4, and a 2-to-1 tablet programme for primary students. The laptops are decentralized and integrated into the classroom, and are replaced every three years. Almost all comparator schools have centralized desktop computers in labs. Only two have laptops on decentralized carts. I take from this that technology is better integrated into the École Élémentaire La Vérendrye curriculum than the curriculum of comparator schools.

vii. Crowding

[4819] The level of crowding in a school would be of interest to a reasonable rightsholder parent. I assess crowding with reference to operating capacity as reported by Mr. Frith and the Joint Fact Finder, as well as the square metres per student calculated by Mr. Frith. In doing so, I will exercise care not to fall into a

formal equality analysis, and recognize that the CSF may, in fact, need greater space due to its grade configurations.

[4820] École Élémentaire La Vérendrye has 13 m² per student based on its 2014/15 enrolment. The average comparator school had 10 m² per student, ranging from a low of 5 m² per student (Promontory Heights Elementary) to a high of 14 m² per student (Central Elementary). All but three schools have less space per student than does École Élémentaire La Vérendrye. Of course, this calculation does not take into account École Élémentaire La Vérendrye or majority schools' space in portable classrooms.

[4821] École Élémentaire La Vérendrye has operating capacity for 68 children. Based on 2014/15 enrolment, it was operating at 68% of its capacity. The average capacity utilization at comparator elementary schools was 115%, ranging from a low of 63% (McCammon Traditional Elementary) to a high of 189% (Watson Elementary). Sixteen of 20 comparator schools are operating at greater than 90% operating capacity; 10 are operating at more than 100% of their capacity.

viii. Early Childhood Programming

[4822] Ms. Gilbert advised that École Élémentaire La Vérendrye has a portable used by a Francophone preschool. Ms. Josyane Testa, a parent of two former École Élémentaire La Vérendrye students, gave evidence that she helped open the preschool in 1995/96. École Élémentaire La Vérendrye also has a before and after-school care programme that operates out of a portable on site. Ms. Gilbert explained that there is currently no Francophone daycare or Strong Start at École Élémentaire La Vérendrye. The Joint Fact Finder's Report states that there is a daycare programme in a portable as well as a preschool programme. In this instance, I prefer the evidence of Ms. Gilbert, which is consistent with the evidence from Ms. Marsan, the FPFCEB early childhood coordinator, who did not list a group childcare centre in Chilliwack among those in CSF schools.

[4823] Early childhood programming is common in SD33-Chilliwack elementary schools. Three comparator schools offer daycare only, two offer preschool only, and two offer Strong Start only. Three schools offer both preschools and daycare, three offer Strong Start and either preschool or daycare, and one school offers all three services. Only four comparator schools do not offer any early childhood programming.

k) Analysis

[4824] The proportionality analysis mirrors the perspective used in the equivalence analysis: it takes a substantive equivalence approach, from the perspective of the reasonable rightsholder parent, while making a local comparison of the global educational experience. Costs and practicalities are bound up with this question, as the government could meet the appropriate entitlement standard by funding a range of amenities and services. When performing the proportionality analysis, courts may consider *per capita* space, but must be cautious not to stray into a formal equivalence analysis. The overall question is what is practical to provide for the number of students, and whether the children are receiving an education that meets that standard.

[4825] Although École Élémentaire La Vérendrye is located in Chilliwack proper, it is not located in the centre of the municipality. It is in an agricultural area rather than a commercial or residential area. While several comparator schools are likewise not located to the city centre, given that École Élémentaire La Vérendrye operates as a regional school, its location is not convenient to its population. Being located outside the core of the community reduces the school's ability to serve as a centre for the Francophone community in Chilliwack. École Élémentaire La Vérendrye's lack of proximity to central Chilliwack is something that rightsholder parents would find detracts from the overall educational experience.

[4826] Indeed, the evidence shows that about 90% of École Élémentaire La Vérendrye's students travel to school by bus. Travel times can be quite long. A reasonable rightsholder parent would likely fear that this would detract from their

child's overall educational experience, especially given that they likely live closer to a majority school than to École Élémentaire La Vérendrye.

[4827] While this is significant, the evidence establishes that busing is not uncommon in the Chilliwack area. Half of the comparator schools bus a significant absolute number of children to school. Two comparator schools have a longer maximum bus ride time than École Élémentaire La Vérendrye, and two have longer average bus ride times than École Élémentaire La Vérendrye. Given that École Élémentaire La Vérendrye serves such a small population from across Chilliwack, the transportation times are not unexpected.

[4828] A reasonable rightsholder parent would likely find that École Élémentaire La Vérendrye's lack of a gymnasium also undermines the global educational experience. École Élémentaire La Vérendrye leases space at an adjacent community hall. While the gymnasium is small, it provides adequate space for École Élémentaire La Vérendrye given its small population and its small class sizes. However, parents would likely find it unappealing that children had to move to and from the school building to participate in physical education.

[4829] The school's site and facility condition would also be important to a reasonable rightsholder parent. École Élémentaire La Vérendrye is older than all the comparator schools, and is in worse condition than all but one. Although École Élémentaire La Vérendrye has more schoolyard space per student than many majority schools, given the need to teach things like team sports, a reasonably prudent rightsholder parent would likely find that the small site detracts from the overall educational experience.

[4830] Of lesser importance, a reasonable rightsholder parent would likely find that École Élémentaire La Vérendrye's entranceway is slightly smaller and less attractive than the entranceway at majority schools. A reasonable rightsholder parent would also find it unattractive that École Élémentaire La Vérendrye's library is in a portable, although the library does have sufficient space to house a collection and accommodate a class given École Élémentaire La Vérendrye's small size.

[4831] Some factors are neutral ones. École Élémentaire La Vérendrye has less absolute space for its parking lot than comparator schools do. However, given École Élémentaire La Vérendrye's small size in comparison to the majority comparator schools, the space allotted is proportionate to its needs. This is so even after taking into account that École Élémentaire La Vérendrye's special parking requirements as a regional school, as it also has access to the community hall parking lot as a bus loading zone.

[4832] While École Élémentaire La Vérendrye lacks dedicated space for learning assistance, because of its low capacity utilization and its extra classroom space, it has more absolute learning assistance space than many majority schools do. It has more learning assistance space per student than any other school.

[4833] Another neutral factor is École Élémentaire La Vérendrye's early childhood programming. While reasonably prudent rightsholder parents would find École Élémentaire La Vérendrye's early childhood programming attractive, most majority schools also offer early childhood education services.

[4834] A reasonable rightsholder parent would weigh those factors against the positive features of an education at École Élémentaire La Vérendrye. École Élémentaire La Vérendrye offers very attractive services to integrate children into the French language and culture.

[4835] Furthermore, École Élémentaire La Vérendrye's class sizes are significantly smaller than average. This allows École Élémentaire La Vérendrye to offer a personalized education, particularly at the intermediate level. While the benefits of small class sizes are tempered somewhat because intermediate grades are taught in large split classes, given the very small number of students, I do not find that the need to teach multiple curricula detracts from the benefit of the small classes to any significant extent.

[4836] A reasonable rightsholder parent would couple the benefit of the small class sizes together with École Élémentaire La Vérendrye's lack of crowding. Most

majority schools are very overcrowded, with many operating at more than 90% or 100% of their operating capacity. École Élémentaire La Vérendrye has a great deal of space per student, and is operating well below its capacity. This is something that a reasonable rightsholder parent would consider to be very attractive when making enrolment decisions for his or her children.

[4837] École Élémentaire La Vérendrye's technology programme is also something that a reasonable rightsholder parent would find attractive. Unlike SD33-Chilliwack, École Élémentaire La Vérendrye has a technology programme that is fully integrated into its classroom environment. Ms. Gilbert's evidence was that this assists her to teach split grades, and enhances the education offered at École Élémentaire La Vérendrye.

[4838] A parent would also consider that the CSF outperforms SD33-Chilliwack in terms of its first-time graduation rate, and has better student/staff ratios than SD33-Chilliwack. However, this would be of lesser importance than other factors important to a reasonable rightsholder parent because the comparison is not school specific.

[4839] I find that the evidence does not support some of the plaintiffs' claims, such as the claim that École Élémentaire La Vérendrye has worse air quality than comparator schools. There is likewise no credible evidence to support a claim that École Élémentaire La Vérendrye has inferior acoustics to comparator schools.

[4840] The Chilliwack claim is challenging because of the very low number of students at issue. With only 60 students likely to enrol in the school in the best possible circumstances, the numbers fall short of warranting instruction in a homogeneous school. In that way, rightsholders in Chilliwack have greater minority language educational facilities than they are entitled to.

[4841] On the other hand, the facilities at École Élémentaire La Vérendrye are far from ideal. Students endure long transportation times and do not have access to a proper gymnasium. The school is old and is in a poor state of repair. Of course, the CSF cannot expect the best facilities on every aspect. There are many very good

qualities to École Élémentaire La Vérendrye: the school's small size, chief among them, the individual attention given to students and its exceptional Francophone experience.

[4842] In my view, taking all the evidence together, rightsholders in Chilliwack are receiving more than what the numbers warrant. While École Élémentaire La Vérendrye is not perfect, rightsholders have a homogeneous school: something that is not warranted given the very small number of children likely to attend the programme even in the best possible circumstances.

[4843] As I see it, the situation in Chilliwack presents the CSF with a choice: it can continue to occupy an older, unappealing school and retain homogeneity that is not warranted. Or, it can explore the idea of selling the old facility and moving into leased heterogeneous space or possibly a modular structure that would offer more appealing amenities. While many comparator schools are overcrowded, three are operating below 75% capacity, offering room for about 100 students. There was no evidence of the CSF performing any recent site searches or looking at alternatives that are more suited to the small size of the Chilliwack programme. In my view, it is within the CSF's means and jurisdiction to look into such an alternative.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[4844] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history minority language education in Chilliwack and the dealings of the CSF, the Ministry and SD33-Chilliwack in connection with it.

[4845] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the operation of the Province's capital funding system. With respect to Chilliwack, I make findings that are of particular relevance to Chapter XXXV, Leases; Chapter XXXVII, Building

Condition Projects and the Building Condition Driver and Chapter XXXVIII, Site and School Acquisition Projects.

1. The CSF's Capital Plan Requests

[4846] When the CSF took jurisdiction in Chilliwack, École Élémentaire La Vérendrye was operating as a standalone, homogeneous school at the former Atchelitz Elementary.

[4847] According to Dr. Ardanaz, the Chilliwack community was happy with École Élémentaire La Vérendrye, so the CSF immediately began planning to acquire it. The CSF asked to acquire it in its December 1997 Capital Plan Submission for 1998/99 and its June 1998 Capital Plan Submission for 1998/99.

[4848] In August 1998, the Ministry facilitated the transfer of École Élémentaire La Vérendrye to the CSF by approving a capital project for SD33-Chilliwack that would not normally be funded through a Capital Planning Cycle. École Élémentaire La Vérendrye's appraised value was \$175,000 for land and \$518,000 for the building. As the land was considered a Local Capital asset, SD33-Chilliwack would be compensated for 100% of the value of the land. SD33-Chilliwack would also be compensated for 100% of the \$25,000 in Local Capital it had spent for equipment purchased for École Élémentaire La Vérendrye. Thus, SD33-Chilliwack received \$200,000 towards its Local Capital Reserve. The building itself was constructed using 42% Local Capital, so SD33-Chilliwack was compensated with a further \$220,000 in the form of capital approvals. The Minister approved use of those funds for a project concerning SD33-Chilliwack's transportation facility in the Ministry's 1998/99 or 1999/2000 capital budget.

[4849] After the CSF acquired École Élémentaire La Vérendrye, it began making capital requests to renovate it, and later to replace it.

[4850] In its June 1999 Capital Plan Submission for 2000/01, the CSF proposed an addition to École Élémentaire La Vérendrye that would add additional classroom space, a gymnasium, special education space, a library and multi-functional space

for community needs (the “École Élémentaire La Vérendrye Addition Project”). That was the CSF’s fourth-highest ranked project that year. The same project was said to be the CSF’s seventh-highest priority in its June 2000 Capital Plan Submission for 2001/02, its third-highest ranked project in its June 2001 Capital Plan Submission for 2002/03 and its fifth-highest priority in its September 2002 Capital Plan Submission for 2003/04.

[4851] According to Dr. Ardanaz, by 2003, the CSF had installed portables at École Élémentaire La Vérendrye to accommodate secondary and middle school students. Dr. Ardanaz indicated that the portables were not functioning well, so the CSF determined it would be necessary to build an addition to accommodate more students. Thus, in its October 2003 Capital Plan Submission for 2004/05, the CSF sought an addition to École Élémentaire La Vérendrye to add a secondary programme as its third-highest ranked project.

[4852] The École Élémentaire La Vérendrye Addition Project was never supported by the Ministry. While he was not specific, Mr. Miller explained that the Ministry would have weighed École Élémentaire La Vérendrye’s enrolment, capacity and building condition against the projects requested by other districts, and determined not to support the project on that basis.

[4853] The evidence shows that in 2005, Mr. Woycheshin, then the CSF’s Planning Officer, discouraged Mr. Bonnefoy from pursuing the École Élémentaire La Vérendrye Addition Project. He noted that under the formula for scoring Building Condition Projects in place at the time, the building was considered to be a medium priority for capital plan funding. It was therefore unlikely the Minister would support the project. Mr. Woycheshin suggested that the CSF consider a new approach to capital requests for École Élémentaire La Vérendrye, such as disposing of the site and using the proceeds to acquire a new site and build a new school, thus converting the request into an Expansion Project.

[4854] Mr. Bonnefoy explained that the CSF did not pursue Mr. Woycheshin’s suggestion. The CSF believed the proceeds from the sale would not cover the

entire cost of acquiring a new site and constructing a new school. That said, the CSF did not undertake any appraisals of École Élémentaire La Vérendrye during Mr. Bonnefoy's time as Secretary-Treasurer. The CSF likewise did not formally identify potential school sites in Chilliwack.

[4855] Nevertheless, around the same time, the CSF's capital planning approach for Chilliwack changed to requests to replace École Élémentaire La Vérendrye on a different site. That project was the CSF's highest priority in its 2004 and 2005 submissions. By 2006, though, it had been de-prioritized to the CSF's ninth and thirteenth-highest priority projects, respectively.

[4856] The CSF moved to ward-based capital planning with its May 2009 Capital Plan Submission for 2009/10. That year, the CSF only requested a seismic upgrade to École Élémentaire La Vérendrye as its fourth and lowest-ranked project in the Fraser Valley ward. The CSF did not request the École Élémentaire La Vérendrye Replacement Project that year. Despite that, Mr. Bonnefoy maintained that the CSF was still considering selling and replacing the school.

[4857] Mr. Miller advised that significant shifts in district priorities like this can pose challenges for the Ministry. The Ministry expects some consistency from year to year in capital requests because Facility Condition and Expansion needs should remain relatively consistent.

[4858] Mr. Allison became Secretary-Treasurer in 2010. That year, the CSF began requesting a new site and school for the École Élémentaire La Vérendrye Replacement Project again. That year, the CSF ceased sequentially prioritizing its projects. Like most other projects that year, the CSF stated this project was its highest priority and sought funding for the project in the first two years of the Ministry's capital budget (when the Ministry only funds approved projects in the third year of its capital budget). This ranking was not reflected by the Echo Report.

[4859] In its November 2012 Capital Plan Submission for 2012/13 and its September 2013 Capital Plan Submission for 2013/14, the CSF requested the École

Élémentaire La Vérendrye Replacement Project again, always indicating the project was one of its “#1 priorities”, like all projects. By its September 2013 Capital Plan Submission for 2013/14, the CSF envisioned that the replacement would have capacity for 20 Kindergarten and 100 elementary students.

[4860] In support of its September 2013 Capital Plan Submission for 2013/14, the CSF submitted an In-House PIR for the École Élémentaire La Vérendrye Replacement Project dated October 2013. In that PIR, the CSF identified one site at the University of the Fraser Valley’s Yale Road Campus. The CSF informed the Ministry that it believed there were opportunities to subdivide and acquire several acres of that site, subject to claims by First Nations.

[4861] The Echo Report for the CSF’s September 2013 Capital Plan Submission for 2013/14 states that the Ministry would treat the École Élémentaire La Vérendrye Replacement Project as a Building Condition Project and assign it a priority based on the facility’s FCI score. In his email offering feedback on the CSF’s PIRs, Mr. Cavelti asked the CSF to resubmit its PIR as a Building Condition Project and to include FCI data. He also asked the CSF to weigh the options for responding to its need: a renovation, building a new school on the same site, or building on a new site. Mr. Cavelti also sought clarification about whether the CSF would retain and use the school or dispose of it.

[4862] In 2014, the CSF commissioned an appraisal of École Élémentaire La Vérendrye, which led it to believe there was some value to the site. According to Mr. Allison, on receiving the report, the CSF determined that it would be able to contribute to the cost of the École Élémentaire La Vérendrye Replacement Project.

[4863] In a letter responding to the concerns raised by Mr. Cavelti, Mr. Allison clarified that the École Élémentaire La Vérendrye site would be sold, and the proceeds of sale would be applied to the acquisition of a site and construction of a new school. Mr. Allison refused to evaluate alternative ways of responding to the CSF’s needs, telling Mr. Cavelti that the school was not in an area suitable for the

CSF. In connection with Mr. Cavelti's request for FCI data, Mr. Allison responded that "the Ministry is well aware of the facility condition of" the school.

[4864] Mr. Cavelti's primary concern with the CSF's In-House PIRs was with its enrolment projects. The CSF focused on the number of children that were potentially eligible to attend the programme rather than the number of students that would actually enrol in the new school.

[4865] In its revised In-House PIR for Chilliwack, the CSF indicated it had engaged Mr. McRae to provide 10-year cohort retention enrolment projections. Mr. Allison provided the Ministry with those projections in a subsequent email dated October 27, 2014. Those projections assume that the construction of a new facility will have no impact on enrolment, and are based on pure demographics. The CSF did not provide any projections based on a participation rate.

2. Conclusions and Findings of Fact

[4866] The CSF acquired École Élémentaire La Vérendrye at its own request. When the CSF took jurisdiction in Chilliwack, École Élémentaire La Vérendrye was a successful programme, and the community was happy with the facility and its location.

[4867] SD33-Chilliwack profited from the disposal of École Élémentaire La Vérendrye to the CSF. SD33-Chilliwack received \$200,000 for its Local Capital Reserve account. It also received \$220,000 in Capital Reserve funding with approval to use those funds to replace its transportation facility. The transportation facility project is one that the Province would not normally have funded.

[4868] Between 1999 and 2003, the CSF focused on building an addition to École Élémentaire La Vérendrye. The project priority shifted over time, from the CSF's fourth-highest project, to its seventh, to its third. The Ministry never supported the project, likely because the project was designed to address the building's condition and the building was not in worse condition relative to other projects at that time.

The assessment would not have taken into account that the school did not have a gymnasium or library, or the need to bring the school up to modern standards.

[4869] In about 2004, following a suggestion from Mr. Woycheshin, the CSF's Planning Officer at the time, the CSF began requesting the École Élémentaire La Vérendrye Replacement Project. This was the CSF's highest-ranked project in 2004, then the CSF's fifth-highest ranked project, then its eighth. By 2007, the project was the eleventh or twelfth highest ranked project. In 2009, the CSF did not request the École Élémentaire La Vérendrye Replacement Project.

[4870] The gradual lowering of the priority-ranking for the École Élémentaire La Vérendrye Replacement Project would have suggested to the Ministry that the project was not an important one, and was becoming increasingly less important. I note that École Élémentaire La Vérendrye was also experiencing decreasing enrolment in this period. On the other hand, the CSF was justified in changing this priority ranking. Given Mr. Woycheshin's comments, the CSF must have appreciated that Building Condition Projects were not likely to be approved for reasons like the need to bring a building up to current standards. The CSF probably chose to prioritize other projects that were more likely to be approved.

[4871] In 2010, the CSF began asking for the École Élémentaire La Vérendrye Replacement Project Again. Like all projects, it was stated to be the CSF's highest-priority project. While the CSF supported its request with a PIR, the PIR was deficient. When Mr. Cavelti pointed those issues out to Mr. Allison in the normal course, the CSF's response was not a helpful one. The CSF refused to abide by the Ministry's requirements, and resisted taking steps to explain its position and allow the Ministry to support the project before Treasury Board.

[4872] Overall, I find that the CSF has long prioritized renovations to bring École Élémentaire La Vérendrye up to modern standards through the construction of a gymnasium. The CSF's decision to shift sites is a more recent position. It is only since about 2010 that the CSF has made it clear to the Ministry that the school's location is no longer acceptable to it.

[4873] The CSF's Chilliwack projects have not been approved for two reasons. First, the Province has not invested in Building Condition Projects since at least 2005. Second, the Ministry's method for evaluating Building Condition Projects does not take into account the need to bring buildings up to modern standards. As a result, the small body of students at École Élémentaire La Vérendrye continue to occupy a school without a gymnasium or purpose-built library.

F. Justification and Remedy

[4874] I conclude that rightsholders in Chilliwack have access to appropriate minority language educational facilities. If I had not, then it would have been open to the Ministry to justify that breach. I set out the framework for that analysis in Chapter IX, Justification. Because I have done so, and because I find no rights breach, I do not find it necessary to resolve the justification question.

[4875] If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Because I have done so, I do not find it necessary to address what remedy would have been appropriate to respond to the situation in Chilliwack.

G. Summary

[4876] I conclude that if the CSF were to construct the École Élémentaire La Vérendrye Replacement Project, the CSF could reasonably expect about 60 students to enrol in that programme. Those numbers fall in the middle to low end of the sliding scale, warranting instruction with access to the core facilities required to provide minority language education.

[4877] I conclude that rightsholders in Chilliwack are receiving more than the minority language instruction that their numbers warrant: they are receiving homogeneous instruction in a distinct facility. While there are problems with the facility, the CSF has chosen to continue to occupy a homogeneous school when a

programme of that type is not warranted. It is within the CSF's means and jurisdiction to downsize its programme; it has chosen not to.

[4878] I also find that the imperfect facilities in Chilliwack are the result of the operation of the capital funding system, particularly a lack of funding for Building Condition Projects and a system for funding Building Condition Projects that does not prioritize renovations designed to bring buildings up to modern standards. I will take those conclusions into account in Chapter XXXVII, Building Condition Projects and the Building Condition Driver.

XXX. ÉCOLE ÉLÉMENTAIRE DEUX-RIVES (MISSION)

[4879] Mission is located in the Fraser Valley region of British Columbia. There, the CSF operates École Élémentaire Deux-Rives, a homogeneous, French-language Kindergarten to Grade 7 school. École Élémentaire Deux-Rives is housed in the former Windebank Elementary building, a facility owned by the CSF. The Province acquired École Élémentaire Deux-Rives for the CSF from SD75-Mission in about 1998. In 2014/15, 119 children were enrolled at École Élémentaire Deux-Rives.

[4880] The Community Claim for Mission is unique. The only pleaded deficiency with École Élémentaire Deux-Rives is its gymnasium. The CSF proposes building an addition with a new gymnasium to École Élémentaire Deux-Rives (the "Mission Gymnasium Project"). In 2014, the CSF estimated that project would cost about \$1.6 million.

A. Evidence

[4881] École Élémentaire Deux-Rives was described by Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison. Mr. Miller spoke to École Élémentaire Deux-Rives on behalf of the defendants.

[4882] The Court also heard about École Élémentaire Deux-Rives from several CSF educators. Ms. Daragahi, the current principal at École Élémentaire Entre-lacs

(Penticton) spoke about her experience as principal of École Élémentaire Deux-Rives in 2009/10 and 2010/11.

[4883] The Court also heard from Ms. Butters, the physical education teacher at École des Deux Rives. Ms. Butters moved to BC in 1997, and began teaching here in 1998, first as a teacher-on-call for SD34-Abbotsford. Later, she taught at École Élémentaire Deux-Rives and École Élémentaire La Vérendrye (Chilliwack) for the Programme Cadre and later the CSF.

[4884] The Court also heard from Ms. Nicole Valmont. Ms. Valmont is a parent to four children, three of whom attended École Élémentaire Deux-Rives for elementary school. She gave evidence concerning her children's education at École Élémentaire Deux-Rives and her involvement in the school's physical education programme.

[4885] The Joint Fact Finder also made findings concerning École Élémentaire Deux-Rives and comparator schools in SD75-Mission. A member of the Fact-Finding Team conducted telephone interviews with an administrator at each school in the study area and recorded their responses on the data sheets. Additionally, one of the Building Experts visited four of 15 schools, and made unaccompanied visits.

B. History and Context

1. The CSF's Mission Catchment Area

[4886] The City of Mission, according to Dr. Kenny, was the primary pole of Francophone Catholic missionary activity in the Fraser Valley region. The mission had a school with many Francophone teachers, but the primary language of instruction was English.

[4887] Dr. Kenny noted that minority language education became a reality in Mission in 1982, when Mission parents' requests for minority language education were realized with a Programme Cadre. The programme initially had 60 students. In 1983, Mission realized its first French immersion programme, which was

eventually merged with the Programme Cadre. A new Programme Cadre opened in 1994.

[4888] École Élémentaire Deux-Rives was the CSF's first owned, homogeneous school. Today in Mission, the CSF operates École Élémentaire Deux-Rives as a homogeneous Kindergarten to Grade 8 French-language elementary school. According to the Joint Fact Finder's Report, École Élémentaire Deux-Rives offers a preschool, daycare and a before- and after-school care programme on site. There is no secondary programme in the Fraser Valley. On graduation from École Élémentaire Deux-Rives, students can attend École des Pionniers in Coquitlam or École Gabrielle-Roy in Surrey.

[4889] École Élémentaire Deux-Rives currently serves students from Mission and Abbotsford, overlapping with the entire territory of SD34-Abbotsford and SD75-Mission (the "Current Mission Catchment Area"). The CSF plans to divide the École Élémentaire Deux-Rives elementary catchment area along an east-west axis at the Fraser River. Only students living to the north of the Fraser River would continue to attend École Élémentaire Deux-Rives. This would create a new catchment area for Mission that would overlap with the entire territory of SD75-Mission (the "Proposed Mission Catchment Area"). Students living south of the Fraser River (the "Proposed Abbotsford Elementary Catchment Area") will attend the CSF's proposed Abbotsford elementary/secondary school, which I discuss in Chapter XXXI, Abbotsford French-Language Education.

[4890] In the Proposed Mission Catchment Area, SD75-Mission operates 12 elementary schools, two of which offer French immersion. In the Current Mission Catchment Area, in addition to those 12 elementary schools, SD34-Abbotsford operates 30 elementary schools, with French immersion available at four.

2. Conclusions

[4891] When analyzing the Mission Community Claim, I will take into account the semi-urban, but agricultural nature of Fraser Valley communities. The CSF's

proposed new catchment areas will overlap with the catchment areas of neighbourhood schools and a few French immersion schools in a more urban setting, as well as some smaller schools outside city limits designed to accommodate children living in agricultural communities. Thus, the new programme will compete with programmes closer to the homes of CSF students. I will also take into account the deep roots of the Mission Francophone community. I will consider that minority language education has a long history in Mission, and that École Élémentaire Deux-Rives is one of the oldest CSF schools.

[4892] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[4893] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[4894] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[4895] Dr. Landry estimated that in 2011 there were 162 elementary-age (age 5-12) children living in the Proposed Mission Catchment Area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there will be 198 such children in the catchment area: an increase of about 22%.

[4896] I note that Dr. Landry also counted 380 children of non-Francophones living in the Proposed Mission Catchment Area in the Knowledge Category, and 105 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in Mission.

[4897] I therefore conclude that a reasonable proxy for the universe of rightsholders' children in the Proposed Mission Catchment Area is about 200 elementary-age children (age 5-12). I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

[4898] This universe in Mission is complicated by the fact that École Élémentaire Deux-Rives currently accommodates elementary-age children from Abbotsford. The CSF plans to build a new elementary/secondary school in Abbotsford for those students. As I explain in Chapter XXXI, Abbotsford French-Language Education, based on Dr. Landry and Mr. McRae's evidence, a reasonable proxy for the total universe of rightsholders living in the Proposed Abbotsford Elementary Catchment Area into the reasonably foreseeable future is about 288 elementary-age children.

[4899] Taking those two universes together, I conclude that a reasonable proxy for the total community of rightsholders in the Current Mission Catchment Area into the reasonably foreseeable future is about 488 children.

2. Known Demand

[4900] École Élémentaire Deux-Rives currently serves students in Kindergarten through 8. The evidence shows that enrolment at École Élémentaire Deux-Rives

has grown from 100 students in the 1998/99 school year, to 119 students in the 2014/15 school year.

[4901] The grade configuration at École Élémentaire Deux-Rives has changed over time. For most of its history, École Élémentaire Deux-Rives offered Kindergarten through Grade 7, with a brief foray into secondary education in the early 2000s. Beginning in 2013/14, the school began offering Grade 8 once again, to one student in each of 2013/14 and 2014/15.

[4902] The data show that enrolment at École Élémentaire Deux-Rives has decreased in half the years since 1998/99, and increased in the other years. Excluding 2014/15, enrolment since 2001/02 has been at least 10% to 30% below enrolment prior to 2000/01. In most years that it operated as a K-7 school, its enrolment was somewhere between 70 and 95 children.

[4903] In 2014/15 enrolment saw a sharp jump from 92 to 119 children: an increase of 29% in a single year. The CSF's records show that the CSF admitted 16 children of non-rightsholders to École Élémentaire Deux-Rives pursuant to its Expanded Admissions Policy between April 20, 2013 and May 22, 2015. This accounts for 60% of the 27-student enrolment increase between 2013/14 and 2014/15. Given the conclusions that I reached in Chapter VII, The Number of Children, these students must be removed from the "known demand", placing the known demand across the entire Current Mission Catchment Area at 103 children in Kindergarten to Grade 8.

[4904] The CSF also plans to change the grade configurations for École Élémentaire Deux-Rives to a Kindergarten to Grade 6 school. Currently, 91 École Élémentaire Deux-Rives students are in those grade levels. I assume that all of the non-rightsholders were admitted into those grades. As a result, known K-6 demand from rightsholders' children in the Current Mission Catchment Area is 75 children.

[4905] The plaintiffs also provided evidence dividing current elementary enrolment between the Proposed Mission Catchment Area and the Proposed Abbotsford

Elementary Catchment Area. That evidence also excludes children in Grades 7 and 8 who would attend the Abbotsford Elementary/Secondary Programme. The evidence suggests 61 current École Élémentaire Deux-Rives students live in the Proposed Mission Catchment Area: 66% of the current École Élémentaire Deux-Rives K-6 population.

[4906] The evidence does not show in which proposed catchment area the non-rightsholders attending École Élémentaire Deux-Rives reside. For the purposes of my analysis, I divide them between the two catchment areas proportionately to the division of the total universe of children. Thus, I conclude that current demand from rightsholders' children in the Proposed Mission Catchment Area is about 50 students in Kindergarten to Grade 6: 61 students less 11 non-rightsholders (66% of the 16), or 66% of the current K-6 demand of 75 children of rightsholders.

[4907] To summarize, taking into account current enrolment and the CSF's admission of non-rightsholders to École Élémentaire Deux-Rives, the best estimate of current demand across the entire Current Mission Catchment area is 103 children in Kindergarten to Grade 8, and 75 children in Kindergarten to Grade 6. Students from the Proposed Mission Catchment Area make up 66% of École Élémentaire Deux-Rives' current population. Assuming that non-rightsholders' residences are divided proportionately to the residences of the entire École Élémentaire Deux-Rives student population, known demand from the Proposed Mission Catchment Area is 50 children in Kindergarten to Grade 6.

3. The Uptake Rate

[4908] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[4909] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[4910] The CSF is not requesting any additional capacity at École Élémentaire Deux-Rives. The CSF only pleads two problems with the facility. For one, the plaintiffs point to long transportation times, which relates to children travelling from Abbotsford to Mission. Additionally, the plaintiffs plead a gymnasium that is not substantively equivalent to majority gymnasiums. The CSF does not request a newly-constructed homogeneous facility; they only request a gymnasium.

[4911] The participation rate at École Élémentaire Deux-Rives is a relatively low one. Currently, 75 children of rightsholders from the Current Mission Catchment Area (which includes Abbotsford) attend École Élémentaire Deux-Rives. Taking into account the proxy universe of 488 children, the proxy participation rate is about 15%.

[4912] The participation rate is slightly higher when focused on the Proposed Mission Catchment area, where about 50 of the 200-student proxy universe attend École Élémentaire Deux-Rives, for a proxy participation rate of 25%.

[4913] Enrolment at École Élémentaire Deux-Rives has fluctuated, but been relatively stable for the past 15 years. There is no evidence of how the addition of a new gymnasium or a single better amenity has influenced enrolment or participation rate elsewhere in British Columbia.

[4914] Taking into account the relative stability of existing demand in Mission and that the only proposed improvement to the facility would be to its gymnasium, I conclude that the CSF would only see very modest enrolment growth if the

Proposed Mission Gymnasium Project were to go forward. The best estimate of the number of children living in the Proposed Mission Catchment Area that would take advantage of the improved École Élémentaire Deux-Rives is about 65 children. This reflects a 32% participation rate of children from Mission: growth by 7% of the participation rate, and the addition of 15 children.

[4915] Looking at students across the entire Current Mission Catchment Area, I consider it likely that about 100 children in Kindergarten to Grade 6 would be likely to take advantage of the proposed programme with a new gymnasium. This reflects an overall participation rate of about 20%: growth of the participation rate by 5%, and the addition of 25 children to the total known demand. It also allows for slight enrolment growth over École Élémentaire Deux-Rives' stable enrolment pattern once the children in Grades 7 and 8 are removed from the total enrolment count.

D. Entitlement

[4916] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[4917] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will those within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[4918] In this case, the appropriate comparator schools for École Élémentaire Deux-Rives are at least those in SD75-Mission. Given that the CSF has chosen to accommodate children from Abbotsford at École Élémentaire Deux-Rives for many years, it is at least arguable that the comparator schools could also include those in SD34-Abbotsford. However, the Court only heard evidence concerning comparator schools in SD75-Mission.

2. Location on the Sliding Scale

[4919] As I explain in Chapter VIII, Entitlement, the entitlement analysis begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[4920] In *Association des Parents- SCC*, the Court suggested that courts may defer to decisions in earlier litigation concerning where the numbers fall on the sliding scale (at para. 48). In *Vickers #1*, Mr. Justice Vickers concluded that the numbers in the Lower Mainland and Fraser Valley (3,848 students likely to enrol in CSF schools based on an agreed statement of fact) warranted the highest level of management and control (at paras. 44-47). As I see it, Mr. Justice Vickers was situating the numbers at the school district level for the purpose of determining what level of management and control was warranted province-wide. He was not determining entitlement to individual school facilities in specific communities. Thus, I do not consider myself bound by Mr. Justice Vickers' determination of this question.

[4921] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also provides insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[4922] The plaintiffs submit that the numbers in the CSF's Proposed Mission Catchment Area warrant a standalone school with a substantively equivalent gymnasium. They note that there are three SD75-Mission elementary schools operating with enrolment smaller than *École Élémentaire Deux-Rives*, despite being built to accommodate much larger student populations.

[4923] The plaintiffs' argument in this respect is based on École Élémentaire Deux-Rives' current enrolment, which includes students living in the Proposed Abbotsford Elementary Catchment Area, students in Grades 7 and 8, and non-rightsholders admitted pursuant to the CSF's Expanded Admissions Policy when it was in force. If the CSF moves forward with its proposed reconfiguration of the Mission and Abbotsford elementary catchment areas, only 65 children from the Proposed Mission Catchment Area could be expected to take advantage of the programme with a new gymnasium. If the CSF does not start a new elementary programme in Abbotsford, but does open a secondary programme for Grades 7-12 in Abbotsford, then the number of children from the Current Mission Catchment Area that could be expected to take advantage of the École Élémentaire Deux-Rives programme with a new gymnasium is about 100 children.

[4924] The Joint Fact Finder's Report provided data on 11 elementary (K-6) schools in SD75-Mission. The average operating capacities for those schools is 287 students. None of those schools is built to accommodate fewer than 100 children. The smallest of the schools was built to accommodate 157 students (Deroche Elementary). Only one other school, Dewdney Elementary, was built to accommodate fewer than 200 students.

[4925] Of the schools that the Joint Fact Finder described, the average enrolment was 248 children. Three of those schools have enrolment fewer than or proximate to that of École Élémentaire Deux-Rives: Deroche Elementary (66 students), Dewdney Elementary (73 students) and Silverdale Elementary (102 students). Each of them is operating at 50% or less of their operating capacity. Notably, those three schools appear to be the only three SD75-Mission schools that are outside the central area of Mission; they serve communities located outside town.

[4926] Generally, though, the Province does not build schools in the Mission area to have such a small operating capacity. I anticipate that, at most, École Élémentaire Deux-Rives can expect average enrolment of about 100 students per year from the Current Mission Catchment Area if it were to build an addition for a

new gymnasium. This is about one third of the size of the average majority elementary school in the area. Looking at only students from the Proposed Mission Catchment Area, École Élémentaire Deux-Rives could expect about 65 students: less than half the operating capacity of the smallest majority elementary school, Deroche Elementary. This suggests that it generally is not practical in terms of pedagogy and cost for the CSF to offer a global educational experience that is fully equivalent to the facilities and amenities in much larger majority schools.

[4927] As I discuss in Chapter XVII, École Élémentaire La Passerelle (Whistler) and Chapter XVIII, École Élémentaire de la Vallée de Pemberton (Pemberton), the Province only rarely builds schools with capacity for fewer than 100 students. Where it has, the school was built to serve an isolated and remote community; a new school was the only practical way of providing those children with an education.

[4928] However, the evidence concerning enrolment in SD75-Mission suggests that it is sometimes financially and pedagogically appropriate to keep smaller, rural schools open in the area even if they have enrolment of 100 or fewer students. Given that this is the case, and that the CSF has determined that it is pedagogically appropriate to operate a homogeneous school in the area, the numbers may warrant a homogeneous Francophone school either based on the 65 children in the Proposed Mission Catchment Area or based on the 100 children in the Current Mission Catchment Area.

[4929] I therefore find that the numbers in the Proposed Mission Catchment Area (65 children) or the Current Mission Catchment Area (100 students) fall at the middle to high end of the sliding scale, warranting a homogeneous school with core facilities that are proportionate to those at majority schools in light of École Élémentaire Deux-Rives' size.

3. Physical Education Experience

[4930] The plaintiffs plead only two deficiencies concerning École Élémentaire Deux-Rives. First, they claim that students must travel significantly further and

longer to attend École Élémentaire Deux-Rives than to attend a local majority school. I address the long travel times to École Élémentaire Deux-Rives in Chapter XXXI, Abbotsford French-Language Education, in connection with their argument that the numbers warrant a new elementary programme there to reduce travel times.

[4931] Second, the plaintiffs argue that the school facility housing École Élémentaire Deux-Rives does not allow the CSF to offer an equivalent standard of physical education to that of majority schools in the catchment area.

a) Physical Education

[4932] Ms. Butters stated that the gymnasium at École Élémentaire Deux-Rives is the smallest that she has seen in her 20 years as an educator. She described the entire gymnasium as being about half the size of a basketball court in a standard gymnasium.

[4933] The Joint Fact Finder's Report indicates that the École Élémentaire Deux-Rives gymnasium is about 166 m². The average SD75-Mission gymnasium is 373 m². The smallest comparator gymnasium is 270 m² (Deroche Elementary). All the other schools in SD75-Mission have gymnasiums that are about 370 to 400 m². SD75-Mission's gymnasium is less than half the size of comparator majority gymnasia.

[4934] Ms. Butters designs the physical education curriculum for Grades 4 through 8 at École Élémentaire Deux-Rives. In September, students learn safety and simple games, followed by soccer. Then, students take a unit on basketball, followed by units on gymnastics and dance. In December, students do a floor hockey unit, and on their return to school in January they begin a unit on volleyball. Racket activities are taught in February, followed by fitness, track and field, handball, then soccer and baseball.

[4935] Students in Kindergarten through Grade 3 follow a similar schedule to intermediate students, but they do not learn team sports. Instead, they learn simple games and drills to acquire the locomotive skills to play team sports in the future.

[4936] Ms. Butters described a typical gymnasium class. Students warm up by running the perimeter of the gymnasium practicing different steps. Then, students do drills on the lines corresponding with the lines for badminton courts. Students must be spaced very evenly for safety reasons; even then, students lunging from their stations come close to touching one another. After practicing passing and movement, students usually play a game. Due to the size of the gymnasium, only half a class can play at one time. The other half sits or jumps rope on the stage while they wait their turn.

[4937] There are challenges teaching each sport in the gymnasium. When students play soccer, they have little time to react to balls travelling in their direction, which poses safety concerns. There are many injuries when students play basketball because they run into or land on one another when practicing jumps. The volleyball courts are four metres smaller than standard size. With badminton and volleyball, students must restrain their movements to prevent the shuttle or ball from hitting the low ceiling.

[4938] In connection with the required learning outcomes for physical education, Ms. Butters commented that the facilities at École Élémentaire Deux-Rives allow her to fulfill the prescribed learning outcomes for active living. However, programming at École Élémentaire Deux-Rives does not allow students to develop prescribed skills in safety, fair play and leadership, particularly in connection with “safe participation in all aspects of [Physical Education]”. Ms. Butters also finds it difficult to teach the required movements skills in a small space, as the gymnasium size prevents students from following through on movements.

[4939] There are special concerns related to serving the oldest students attending École Élémentaire Deux-Rives. Over the course of its history, École Élémentaire Deux-Rives has usually served students in Kindergarten through Grade 7. At one point, it served students up to Grade 10. Beginning in 2013/14, it served students up to Grade 8.

[4940] Mr. Allison confirmed that the CSF added Grade 8 to École Élémentaire Deux-Rives because of parent requests. At a meeting with parents, Mr. Allison and Mr. Mario Cyr, the CSF's Superintendent, discussed with parents the difficulties that would arise from offering a middle school programming at École Élémentaire Deux-Rives. He conceded that the parents were aware of the condition of the gymnasium when they made their request.

[4941] Ms. Butters has been creative to respond to the needs of École Élémentaire Deux-Rives' oldest students. When École Élémentaire Deux-Rives served students up to Grade 10, older students had physical education all day every Friday. Given the low number of students, she led them in interesting activities like kayaking, swimming, hiking and camping. Students also rode horses in exchange for barn cleaning duties.

[4942] École Élémentaire Deux-Rives currently offers students in Grades 6 through 8 an optional enrichment course in advanced Physical Education on Friday afternoons. Due to the size of the gymnasium, Ms. Butters uses facilities off of the school grounds. In the programme's first year, Ms. Butters taught seven students swimming at a nearby pool. She also created an obstacle course race. In 2014/15, École Élémentaire Deux-Rives opened the course to students in Grade 5. Ms. Butters had 22 or 23 students in that class, which limited her ability to do the same activities as she had the previous year.

b) Community Purposes

[4943] The gymnasium also poses problems related to the CSF's ability to serve the Francophone community, particularly with connection to fielding sports teams and hosting community gatherings.

[4944] École Élémentaire Deux-Rives offers several sports teams: cross country, basketball, volleyball and track and field. École Élémentaire Deux-Rives students compete against students in SD75-Mission schools. Ms. Butters said that École

Élémentaire Deux-Rives students are easily winded when competing against students in larger schools. She attributed this to the size of the gymnasium.

[4945] Ms. Daragahi suggested that when she was principal, the size of the gymnasium made it difficult to arrange tournaments and other activities for students in Grades 5 through 7. Ms. Butters confirmed that École Élémentaire Deux-Rives does not host games because the gymnasium is too small for players, students, teachers and parents.

[4946] Ms. Butters holds sports team practices at lunch time three days per week. She does not hold practices before or after school because most students travel to and from school by bus. As it is, students can only participate in after-school games at other schools if they can arrange their own transportation.

[4947] Since the École Élémentaire Deux-Rives gymnasium is used at lunch for sports team practices three days per week, the gymnasium is only available for student play two lunch hours per week. Only one class at a time can make use of the gymnasium at lunch.

[4948] Ms. Valmont's evidence is that since her daughter began attending Mission Secondary, an SD75-Mission school, she has been able to participate in more sports. She qualified for and attended the national championships for wrestling, and is now on the national wrestling team for her age group. This demonstrates that a lack of a full-size gymnasium at the elementary level does not always hold back students from excelling in sports after they graduate from École Élémentaire Deux-Rives.

[4949] The size of the gymnasium makes it challenging to accommodate non-core functions of the school and extracurricular activities, too. According to Ms. Daragahi, the fire code occupancy limit for the gymnasium is 100 people. When she was principal of École Élémentaire Deux-Rives it had 88 students, plus staff, which prevented École Élémentaire Deux-Rives from holding some gatherings in the gymnasium.

[4950] Nevertheless, Ms. Butters is able to arrange other activities in the gymnasium: She coordinates a song-and-dance presentation for the annual Christmas concert. For Francophone week in March, she organizes a lip-sync show. The school also hosts activities like Cabane à Sucre, traditional music performances, and African dancing from Francophone regions. Most of these activities take place in the gymnasium.

c) Playfields

[4951] While there is room for outdoor play at École Élémentaire Deux-Rives, according to Ms. Daragahi, it is inadequate. She explained that when it rained, the school field would flood with rain water. Students were asked to bring a change of dry clothes to school. She did not ask administrators at Heritage Park Secondary, next door, if they had developed solutions to issues with fields flooding. She also could not say whether this was a common problem at other schools in the area.

[4952] Ms. Butters uses the outdoor areas at École Élémentaire Deux-Rives for physical education. She advised that the school has an outdoor basketball court, but according to her, it is on asphalt, bumpy, and near some classrooms, so it is not used frequently. She confirmed that the field itself is uneven. Ms. Butters has asked school administrators about aerating the field, but this is not always done.

[4953] Ms. Daragahi explained that she sometimes sought permission from Heritage Park Secondary to use their track and field. Sometimes, École Élémentaire Deux-Rives used another adjacent field that was believed to be city property.

[4954] Ms. Butters advised that from time to time, she also uses Heritage Park Secondary facilities for physical education. However, École Élémentaire Deux-Rives does not have any priority for the use of those facilities, so if Ms. Butters is teaching in that area and Heritage Park Secondary staff or students come outside, she returns to the gymnasium with her students.

d) Analysis

[4955] The plaintiffs argue that the gymnasium at École Élémentaire Deux-Rives is not substantively equivalent to the gymnasium at majority schools in the CSF's Proposed Mission Catchment Area. The defendants argue that although École Élémentaire Deux-Rives' gymnasium is smaller than that of comparator schools, its population is also smaller than that of all but two comparator schools.

[4956] There is no doubt that École Élémentaire Deux-Rives' gymnasium is very small. It is smaller than the multipurpose room at one comparator school. It is substantively smaller than every other comparator gymnasium. It is less than half the size of an average gymnasium, and more than 100 m² smaller than the next closest comparator gymnasium.

[4957] The small size of the gymnasium makes it difficult to deliver core physical education services at École Élémentaire Deux-Rives, particularly for students in Grades 4 through 8. Since the gymnasium is too small for all students in a class to play at once, students only participate in physical education for part of the allotted time in each class. Students must restrain their movements to ensure physical safety. It is difficult to ensure that all students meet the prescribed learning outcomes for physical education in that environment.

[4958] While École Élémentaire Deux-Rives' enrolment is smaller than most comparator schools, even those comparator schools with lower enrolment than École Élémentaire Deux-Rives have larger gymnasia. Further, all gymnasia must be built to a sufficient size to accommodate a class. Even considering École Élémentaire Deux-Rives' small class sizes, when examining the ratio of gymnasium size to class size, École Élémentaire Deux-Rives underperforms every majority school.

[4959] The small gymnasium is particularly problematic given the special role that minority language schools play as centres for the Francophone community. With a fire code occupancy limit of 100 people, it is difficult for École Élémentaire Deux-

Rives to host community events and assemblies that bring the school and community together. The school cannot host sporting events, which would be a point of pride for the school community.

[4960] École Élémentaire Deux-Rives staff are able to compensate for some of these issues. Ms. Butters implemented an advanced physical education programme that exposes older students to a wider range of physical education opportunities than a standard gymnasium allows. Skiing, horseback riding and obstacle courses are all things that a reasonable rightsholder parent would find to be unique and exciting opportunities for their children.

[4961] Nevertheless, I am persuaded that the physical education experience at École Élémentaire Deux-Rives is inferior to what is provided at majority schools.

[4962] However, it is not clear to me whether this is sufficient to ground a breach of s. 23: the question for s. 23 is whether the global educational experience meets the appropriate standard, not whether one aspect of that education meets an appropriate standard. The evidence concerning École Élémentaire Deux-Rives was limited to evidence concerning the gymnasium and physical education.

[4963] For the purposes of this decision, I assume, without deciding, that a sub-standard physical education experience is sufficient to ground a breach of s. 23.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[4964] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Mission and the dealings of the CSF, the Ministry and SD75-Mission in connection with it.

[4965] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the Province's capital funding system. With respect to Mission, I make findings that are of particular relevance to

Chapter XXXVII, Building Condition Projects and the Building Condition Driver and Chapter XXXVIII, Site and School Acquisition Projects.

1. Acquisition of Windebank Elementary

[4966] When the CSF took jurisdiction in Mission, it originally operated heterogeneous programmes at North Poplar Elementary in Abbotsford and Mission Central Elementary in Mission. Secondary students attended a programme at Mission Secondary or at W. J. Mouat Secondary in Abbotsford. The FEA planned to acquire a school from SD75-Mission to consolidate its Mission and Abbotsford programmes.

[4967] Dr. Ardanaz testified that he heard that SD75-Mission's former Windebank Elementary was not being used, and had been declared surplus. In its December 1997 Capital Plan Submission for 1998/99 and its June 1998 Capital Plan Submission for 1998/99, the CSF proposed acquiring Windebank Elementary to consolidate its Abbotsford and Mission programmes

[4968] Mr. Bonnefoy was Secretary-Treasurer of SD75-Mission at that time. He described Windebank Elementary as a smaller elementary school, which had been sitting empty and minimally maintained. He noted that the school was on a large site with a nice view. The school had an undersized gymnasium, but was capable of meeting the basic needs of elementary students.

[4969] Mr. Bonnefoy explained that during his tenure as Secretary-Treasurer for SD75-Mission, the school board closed Windebank Elementary, and planned to use it for adult education and as a base for itinerant teachers. After Windebank Elementary closed, Mr. Bonnefoy received a phone call from a CSF official inquiring whether SD75-Mission would consider selling it to the CSF. Mr. Bonnefoy explained that the SD75-Mission Board of Trustees decided to do so provided it could renovate or build an addition to its school board office to house its specialized services, as it was a significant departure from its planning to dispose of Windebank Elementary.

[4970] Mr. Miller was responsible for negotiating appropriate compensation for SD75-Mission. In May 1998, the Minister agreed to compensate SD75-Mission with \$750,000, reflecting 42% of the appraised value of the site, equivalent to SD75-Mission's Local Capital contribution to the school's acquisition. The Minister supported SD75-Mission's request to use the capital funds to replace its school board office on its existing site: a project that would not otherwise have been approved.

[4971] The Ministry also supported \$1.334 million from the 1998/99 Capital Budget for SD75-Mission to renovate Windebank Elementary before it was transferred to the CSF. According to Mr. Miller, because the CSF was in its start-up period, SD75-Mission was better equipped to manage the renovations. SD75-Mission did not profit from the renovation funding.

[4972] Shortly thereafter, Mr. Miller explained, the Ministry received a letter from Ms. Hennessey, then President of the FEA, expressing appreciation for Mr. Miller's assistance, advice and support. This was the CSF's first site acquisition.

[4973] Dr. Ardanaz, Mr. Miller and Mr. Bonnefoy all testified that Windebank Elementary was damaged by fire around this time. Dr. Ardanaz believed that the fire occurred before CSF requested transfer of the school in its Capital Plan Submission. This contradicts the evidence of Mr. Miller and Mr. Bonnefoy, who both believed that the fire occurred later. Given that the CSF's initial request for renovations estimated the renovations would cost \$25,000, and that \$1.3 million was eventually devoted to the project, it is more likely than not that the fire occurred after the CSF made its project request, but before the Ministry announced support for the project.

[4974] Once the CSF acquired Windebank Elementary, it renamed it École Élémentaire Deux-Rives. The CSF consolidated its programmes in Mission and Abbotsford at that school. Mr. Bonnefoy confirmed that SD75-Mission built an addition to its former school board office with the proceeds from the transfer.

2. Subsequent Capital Planning

[4975] Dr. Ardanaz testified that the CSF initially wanted to construct a secondary school elsewhere in the Fraser Valley, and use École Élémentaire Deux-Rives and École Élémentaire La Vérendrye as feeder schools for that secondary school.

[4976] The CSF's capital requests for the Fraser Valley tell a different story. In its June 2000 Capital Plan Submission for 2001/02, the CSF requested an addition to École Deux-Rives as its third-highest ranked project (the "École Élémentaire Deux-Rives Addition Project"). The project summary points to the École Élémentaire Deux-Rives Addition Project as a means for adding appropriate facilities to house secondary students in the Fraser Valley. The CSF continued to request the École Élémentaire Deux-Rives Addition Project, with the same project description, for many years, ranking it as its fourth-highest project in its June 2001 Capital Plan Submission for 2002/03, its ninth-highest project in the September 2002 Capital Plan Submission for 2003/04, and its fifth-ranked project in its October 2003 Capital Plan Submission for 2004/05. This coincides with the period where the CSF did not request a secondary school in Abbotsford, discussed in Chapter XXXI, Abbotsford French-Language Education.

[4977] After that, the CSF did not request capital projects at École Élémentaire Deux-Rives for many years; instead, the CSF began requesting an elementary/secondary school in Abbotsford, beginning with the October 2005 Capital Plan Submission for 2006/07, and thereafter.

[4978] During Mr. Bonnefoy's time as the CSF's Secretary-Treasurer, beginning in the summer of 2004, the CSF did not make any capital requests related to École Élémentaire Deux-Rives. It did not ask to upgrade the school's gymnasium. Mr. Bonnefoy explained that the CSF anticipated that a gymnasium upgrade would cost about \$1.2 million, and capital project request minimums were usually \$1.5 million. Further, the CSF had other capital priorities. The CSF did not upgrade the gymnasium itself because it would have depleted the CSF's AFG. I also note

the evidence in this case suggests that AFG funds are not to be spent to construct a new gymnasium.

[4979] The CSF began requesting projects at École Élémentaire Deux-Rives again once Mr. Allison became Secretary-Treasurer in 2010. In the CSF's June 2010 Capital Plan Submission for 2010/11, the CSF requested the Mission Gymnasium Project. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan.

[4980] The Ministry did not ask for Capital Plan Submissions in 2011. In the CSF's November 2012 Capital Plan Submission for 2012/13 and the September 2013 Capital Plan Submission for 2013/14, the CSF made the same request for the Mission Gymnasium Project as it had in 2010.

[4981] In support of its request in the September 2013 Capital Plan Submission for 2013/14, the CSF submitted a November 2013 In-House PIR for Mission Gymnasium Project.

[4982] Mr. Cavelti wrote to Mr. Allison and provided him with feedback on the CSF's In-House PIRs. He explained that the Mission Gymnasium Project would be evaluated as a Building Condition Project and assigned a priority based on the school's FCI rating. In a follow-up email, Mr. Cavelti asked what the impact would be on the school's enrolment if a new school was opened in Abbotsford.

[4983] The CSF submitted a revised In-House PIR for the Mission Gymnasium Project, which is dated October 2014. In a letter responding to Mr. Cavelti, Mr. Allison wrote that the CSF did not believe that the construction of a K-12 school in Abbotsford was relevant to its request for a new gymnasium in Mission. Nevertheless, he stated that he expected enrolment at École Élémentaire Deux-Rives to grow after the completion of the Abbotsford project. The CSF related its

expectation to the effect it assumed a new gymnasium and a proximate secondary programme would have on its ability to recruit students. He does not appear to have considered that the CSF would lose about a third of its elementary enrolment to the elementary/secondary school.

[4984] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email. Those projections extrapolate from the CSF's current enrolment, and do not consider participation rates or the relationship between enrolment and the total universe of potential students. Those projections seem to be missing enrolment projections for École Élémentaire Deux-Rives.

3. Conclusions and Findings

[4985] École Élémentaire Deux-Rives was the CSF's first owned, homogeneous school British Columbia. The evidence shows that the CSF acquired Windebank Elementary from SD75-Mission in about 1998. At the time, Windebank Elementary was an older school that SD75-Mission did not plan to use as an operating school. SD75-Mission renovated the school before it was transferred to the CSF. In return for transferring the school to the CSF, SD75-Mission received \$750,000 and approval to replace its school board office. That project would not normally have been considered to be a high priority project, and the Ministry would not normally have supported it.

[4986] Between June 2000 and October 2003, the CSF made four capital project requests to build an addition to École Élémentaire Deux-Rives that would replace the school's gymnasium and provide space for a secondary programme.

[4987] Then, the CSF changed its plans and focused on building a secondary school in Abbotsford, to the exclusion of a gymnasium project in Mission. The CSF did not begin requesting a gymnasium project at École Élémentaire Deux-Rives until Mr. Allison became Secretary-Treasurer in 2010, and started this litigation. The CSF refused to rank that project against others. While he was under cross-examination, Mr. Allison maintained that the Mission Gymnasium Project was just as much a priority as all of its other capital projects, including ones like that in Vancouver (West), where the CSF faced severe overcrowding, had limited access to a gymnasium, and had constructed an inconvenient temporary “Bubble Gymnasium” on the school site.

[4988] As I interpret the evidence, the CSF did not begin seriously considering capital project requests related to the École Élémentaire Deux-Rives gymnasium until Mr. Allison became Secretary-Treasurer, and this litigation began, in about 2010. While there were earlier capital requests at École Élémentaire Deux-Rives, those were related to the need to house secondary students in the Fraser Valley. Once the CSF began focusing on the Abbotsford Secondary Programme, it put additions to École Élémentaire Deux-Rives to the side. The gymnasium project at École Élémentaire Deux-Rives was not a real priority for the CSF until it had put its mind to this litigation.

[4989] On the other hand, the evidence is clear that the Ministry considers capital projects like those that would renovate an undersized gymnasium to be a low capital priority. Thus, even if the CSF had made capital project requests for a new gymnasium, it is extremely unlikely that the Minister would have funded it.

[4990] Thus, this is an instance where both parties bear some responsibility for the small gymnasium at École Élémentaire Deux-Rives. The CSF is responsible because it did not make the Ministry aware of its needs, and simply did not request the project. The Ministry’s capital funding system is also responsible because the Facility Condition Driver does not prioritize projects on the basis that schools fall below modern functional standards. Instead, it prioritizes projects based on the

amount of economic life remaining in a building. Thus, as I see it, the Ministry's capital funding system regarding Building Condition Projects materially contributed to the current situation in Mission.

F. Justification

[4991] I conclude that a reasonable rightsholder parent would likely conclude that École Élémentaire Deux-Rives offers a substandard physical education experience to what is afforded to the majority. I assume without deciding that is sufficient to ground a breach of s. 23. That breach is caused by one aspect of the Ministry's funding regime: the fact that the Ministry's Facility Condition Driver does not prioritize projects based on school functionality and modern functional standards. The remaining question is whether the breach is justified.

[4992] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". As I see it, the particular infringing measure that does not prioritize projects based on their failure to meet modern functional standards is likewise intended to further the fair and rational allocation of public funds.

[4993] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I am satisfied there is a rational connection between the fair and rational allocation of public funds and a system that does not fund projects designed to bring buildings up to current standards. By allocating funds based on FCI score, the Ministry is able to ensure objectivity rather than lobbying govern the approval process, and that funds are allocated to the schools in the Province that are in the worst condition from a property management perspective. It also allows the Ministry to allocate more funds to Expansion and health and safety projects.

[4994] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[4995] The extent to which the measure minimally impairs the respondents' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. In this instance, the Province funded the acquisition of a school for the CSF, which guaranteed minority language education in the area. It funded renovations to the school when it was built. Once the school reaches the end of its economic life, it becomes eligible for a replacement, and the school will be rebuilt with a larger gymnasium that meets modern standards. The Province has also provided the CSF with AFG funding that the CSF could use to renovate the gymnasium if it so chose (although it could not build a new gymnasium). Overall, I find that despite the fact that the gymnasium is small and lacks some functionality, the Province's approach was minimally impairing Mission rightsholders' right to minority language educational facilities.

[4996] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[4997] With reference to the situation in Mission, the salutary effects of a system that does not fund functional building upgrades includes the cost savings that the Province generates from not funding the upgrade to the gymnasium at École Élémentaire Deux-Rives. The CSF estimates that the Mission Gymnasium Project would cost about \$1.6 million. The salutary effects also include that the Province has been able to devote more funding to other capital priorities, like projects to improve seismic vulnerability and Expansion Projects in rapidly growing districts.

[4998] The salutary effects are also reflected in what the CSF has been able to achieve in a system that does not fund projects designed only to address building functionality. How those results compare to what the majority achieved demonstrates the extent to which the Province is meeting its goal of fairly and rationally allocating public funds. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[4999] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the AFG, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[5000] The deleterious effects, at the local level, concern the inferior physical education experience that École Élémentaire Deux-Rives' older children experience. The gymnasium tends to suffice for children in primary grades; it is particularly problematic for the admittedly small number of children enrolled in upper years, about Grades 4 through 8.

[5001] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[5002] As a result, since minority language schools will not have a significant impact on the high rate of assimilation in British Columbia, I do not consider heightened assimilation to be a particularly strong deleterious effect. However, given that the gymnasium is the only problem with the facility, the cost of the infringement is relatively low. This is particularly so given the very low enrolment at École Élémentaire Deux-Rives, and the low number of additional students that could be expected to attend the school even with a new gymnasium.

[5003] Weighing those effects together, I find that the salutary effects outweigh the deleterious effects. While the Ministry has chosen not to fund projects designed to bring schools up to a current funding standard, that decision allows the Ministry to address the most pressing capital needs in the Province. The relative impact on rightsholders-- an inferior physical education experience for a small number of students in upper grades-- is worth the cost. I therefore conclude that the deleterious and salutary effects are balanced, and that the breach passes the proportionality test.

G. Remedy

[5004] If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Because I have done so, I do not find it

necessary to address what remedy would have been appropriate to respond to the situation in Mission.

[5005] I do note that although I find a rights breach is justified, the CSF is not without recourse. As I explain in Chapter XII, Public Funds, under the OLEP Agreements, a provision allows the Federal Government to approve complementary contributions to emerging priorities identified by the Province, including infrastructure projects. Mr. Miller advised that these provisions allow some capital projects to be considered for OLEP capital funding. The CSF and the Province might consider asking the Federal Government for project funding to improve École Élémentaire Deux-Rives' gymnasium's functionality.

H. Conclusion

[5006] I conclude that the best estimate of the number of children likely to take advantage of a programme in Mission in the best possible circumstances is about 65 children in Kindergarten to Grade 6 in the Proposed Mission Catchment Area, or 100 children in the Current Mission Catchment Area. Those numbers fall at the middle to high end of the sliding scale, warranting a homogeneous school with core facilities that are proportionate to those at majority schools in light of École Élémentaire Deux-Rives' size.

[5007] I find that École Élémentaire Deux-Rives offers an inferior physical education experience to that offered at majority schools. I assume without deciding that is sufficient to ground a breach of s. 23. The breach is grounded in part in the Ministry's approach to Building Condition Projects, particularly the fact that it does not treat renovations designed to bring schools up to current functional standards as a high priority. . Assuming without deciding that the physical education experience is sufficient to ground a breach of s. 23, I conclude that any breach would be justified as a reasonable limit in a free and democratic society.

XXXI. ABBOTSFORD FRENCH-LANGUAGE EDUCATION

[5008] Abbotsford is located in the Fraser Valley region of British Columbia. There is no minority language education programme in Abbotsford.

[5009] The CSF proposes to acquire a site and build an owned, homogeneous school to accommodate elementary-age children from Abbotsford, and secondary-age children from Abbotsford, Chilliwack and Mission (the “Abbotsford Elementary/Secondary Project”). In 2014, the CSF estimated that project would cost more than \$21 million, excluding the cost of acquiring a site and preparing it for construction.

A. Evidence

[5010] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all testified about their experiences with Francophone education in Abbotsford. Mr. Stewart and Mr. Palmer also spoke to their involvement with the CSF and SD34-Abbotsford on behalf of the defendants.

B. History and Context

1. The CSF’s Proposed Abbotsford Catchment Area

[5011] Dr. Kenny explained that the Fraser Valley has a significant historical French-language presence. French was the dominant language in the area until the gold rush. After English gained prominence, the Francophone community maintained a missionary and farming presence. Dr. Kenny noted that Francophones have been recorded in local histories of Abbotsford since the late 1800s.

[5012] According to Dr. Kenny, in the late-1970s, French-speaking parents in Abbotsford mobilized for a French immersion programme. The Programme Cadre began in 1984, and consisted of a dozen children in one division. In the 1990s, its enrolment reached 69 students. The programme moved twice, in April 1989 (from Clearbrook Elementary to Blue Jay Elementary) and January 1990 (to North Poplar Elementary). Parents protested a third move that would have transferred secondary students from W.J. Mouat to Abbotsford Junior and Senior High Schools in 1993.

Those plans were eventually stayed, although the Programme Cadre was absorbed into the immersion programme in 1994.

[5013] After the CSF was created, it amalgamated the Abbotsford programmes into École Élémentaire Deux-Rives (Mission), thus eliminating any minority language education in Abbotsford. Today, elementary-age children from Abbotsford continue to attend École Élémentaire Deux-Rives. Secondary students attend École Gabrielle-Roy (Surrey), to which the CSF provides transportation, or École des Pionniers (Port Coquitlam) if they can provide their own transportation.

[5014] The CSF plans to divide the École Élémentaire Deux-Rives elementary catchment area along an east-west axis at the Fraser River. Elementary-age students living south of the Fraser River in the Proposed Abbotsford Elementary Catchment Area will attend the Abbotsford Elementary/Secondary Project. Elementary students living to the north of the Fraser River in the Proposed Mission Catchment Area would continue to attend École Élémentaire Deux-Rives.

[5015] The Proposed Abbotsford Elementary Catchment Area would overlap with the entire territory of SD34-Abbotsford. SD34-Abbotsford operates 30 elementary schools, four of which offer French immersion.

[5016] The CSF would also carve off the eastern portion of the École Gabrielle-Roy catchment area and accommodate secondary students from Mission, Chilliwack and Abbotsford at the Abbotsford Elementary/Secondary Project. This would create a new secondary school catchment area for the Fraser Valley that would overlap with the entire territory of SD34-Abbotsford, SD75-Mission and SD33-Chilliwack (the "Proposed Fraser Valley Secondary Catchment Area"). In that catchment area, SD34-Abbotsford operates 14 middle/secondary schools (two French immersion), SD75-Mission operates three secondary schools (one French immersion) and SD33-Chilliwack operates eight middle/secondary schools (three French immersion).

2. Conclusions

[5017] When analyzing the Abbotsford Community Claim, I will take into account the semi-urban, but agricultural nature of Fraser Valley communities. The CSF's proposed new catchment areas will overlap with the catchment areas of neighbourhood schools and a few French immersion schools in a more urban setting, as well as some smaller schools outside city limits designed to accommodate children living in agricultural communities. Thus, the new programme will compete with programmes closer to the homes of CSF students. I will also take into account that minority language education in Abbotsford has an unstable history. While minority language education has a long history in Abbotsford, the community has been served by schools outside Abbotsford proper for many years, creating a need for students to travel, sometimes great distances.

[5018] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[5019] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Rightsholders' Children

[5020] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue)

Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[5021] Dr. Landry estimated that in 2011 there were 228 elementary-age children (age 5-12) living in the Proposed Abbotsford Elementary Catchment Area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 288 such children in the catchment area: growth by about 26%.

[5022] I note that Dr. Landry also counted 625 elementary-age children of non-Francophones in the catchment area in the Knowledge Category, and 170 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in the Abbotsford area.

[5023] Dr. Landry also reported that in 2011 there were 447 secondary-age children (age 13 to 17) in the catchment area that had a Mother-Tongue Rightsholder parent. Mr. McRae forecasted that number would grow to 495 students: growth by about 11%. I do not find Dr. Landry's counts of 1,915 secondary-age children of non-Francophones in the Knowledge Category and 225 in the Regular Home Use Category to be helpful evidence.

[5024] I therefore find that a reasonable proxy for the total universe of rightsholders' children in the catchment area into the reasonably foreseeable future is about 288 elementary-age children and 495 secondary-age children. I consider it to be a proxy because it likely omits some Mother-Tongue Rightsholders' children, while inappropriately including some non-citizen rightsholders' children. It also does not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[5025] Currently, CSF elementary students from Abbotsford attend École Élémentaire Deux-Rives (Mission). The evidence suggests that 30 current École

Élémentaire Deux-Rives students in Kindergarten to Grade 6 live in the Proposed Abbotsford Elementary Catchment Area. This is about 33% of École Élémentaire Deux-Rives' 91-student enrolment in Kindergarten to Grade 6.

[5026] As I explain in Chapter XXX, École Élémentaire Deux-Rives (Mission), the CSF admitted 16 children to École Élémentaire Deux-Rives pursuant to its Expanded Admissions Policy. These students must be removed from the known demand, making known demand for Kindergarten to Grade 6 enrolment across the Current École Élémentaire Deux-Rives Catchment Area 75 students.

[5027] The evidence does not show in which proposed catchment area the non-rightsholders attending École Élémentaire Deux-Rives reside. For the purposes of my analysis, I divide them between the two catchment areas proportionately to the division of the total universe of children.

[5028] Thus, current demand from rightsholders' children in the Proposed Abbotsford Elementary Catchment Area is about 25 students in Kindergarten to Grade 6: 30 students minus 5 non-rightsholders (33% of the 16), or 33% of the current K-6 demand of 75 children of rightsholders.

[5029] Turning to current demand for secondary instruction, there is no Francophone secondary programme in Chilliwack or Mission. About 22 École Élémentaire Deux-Rives in Grades 7 and 8 would be included in the secondary component of the Abbotsford Elementary/Secondary Project if it were to go forward. In 2014/15, there were a further two children in Grade 7 attending École Élémentaire La Vérendrye in Chilliwack, for a total of 24 enrolled in those grades at CSF elementary programmes in the Proposed Fraser Valley Secondary Catchment Area.

[5030] The CSF's enrolment data suggests that a further 10 secondary students from the Proposed Fraser Valley Secondary Catchment Area attend École Gabrielle-Roy (Surrey). There is no evidence concerning the number of secondary students from Mission and Abbotsford that attend École des Pionniers (Port Coquitlam).

However, given that the CSF does not provide transportation between those two communities, I conclude that enrolment is likely minimal.

[5031] Taking all those numbers together, I conclude that the best estimate of current demand for a secondary programme (Grade 7-12) in Abbotsford is about 34 children. At the elementary level, known demand is 25 children in Kindergarten to Grade 6.

3. The Uptake Rate

[5032] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[5033] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand. Further, after taking into account the CSF's historic participation rates at the secondary level and the size of Francophone minority communities in British Columbia, I conclude that the CSF will always struggle to compete with majority secondary programmes, and will experience significant attrition as a cohort moves to the secondary school grades.

[5034] The plaintiffs say that the CSF's current plan for Abbotsford is to build a new, homogeneous school with nominal capacity for 390 students, or operating capacity for 376 students. That would give it two Kindergarten classrooms, nine elementary classrooms and seven secondary classrooms. The plaintiffs submit

there is significant known and potential demand, and argue that transportation times cause an artificial depression of enrolment in minority language education in Abbotsford.

[5035] The defendants argue that the CSF has not proven demand for the Abbotsford Elementary/Secondary programme. They suggest that based on the minimum capacity of the facility sought in the claim, the CSF would require participation of 50% of the target combined elementary/secondary population in 2023 to fill its proposed school to capacity. The defendants argue that the CSF should be required to provide some evidence to show actual demand for a programme.

[5036] I conclude that there are about 25 elementary-age children (K-6) from the Proposed Abbotsford Elementary Catchment Area attending École Élémentaire Deux-Rives. In light of the proxy universe of 288 elementary children, the CSF's current proxy participation rate at the elementary level is about 9%. Parents from the Proposed Abbotsford Elementary Catchment Area have access to neighbourhood schools and a few French immersion programmes in Abbotsford proper. Thus, the lack of a CSF school in Abbotsford proper and the prospect of transporting children to a programme in a different community undoubtedly deters some parents from sending their children to a minority language education programme. If the CSF were to open an elementary programme in the Proposed Abbotsford Elementary Catchment Area, there is ample room for the proxy participation rate to grow.

[5037] The CSF has opened a new programme to divide a catchment area and provide a local option in a neighbouring city once, in Richmond. Rightsholders' children from Richmond attended École Élémentaire Anne-Hébert (Vancouver (East)). Following demand from parents in Richmond, École Élémentaire des Navigateurs opened in leased, heterogeneous space at Diefenbaker Elementary in Richmond with 10 students in Kindergarten and Grade 1 in 2001/02. In 2003/04, with 34 students in Kindergarten to Grade 4, it moved to a leased homogeneous

facility at Kilgour Elementary. By 2007/08, it offered Kindergarten through Grade 6, and served 90 children. Its 2014/15 enrolment was 127 children in Kindergarten to Grade 7.

[5038] As I explain in Chapter XXIII, *École Élémentaire des Navigateurs* (Richmond), the proxy universe of rightsholders in Richmond is about 300 elementary-age children. Assuming that remained constant, the participation rate in Richmond grew to about 33% of the proxy universe in Kindergarten to Grade 6 in the programme's first 10 years. By 2014/15, the proxy participation rate of Richmond rightsholders at *École Élémentaire des Navigateurs* reached about 42%, in leased, homogeneous space that is generally equivalent to that of the majority subject to long travel times. I find that with construction of a new, homogeneous school facility, its enrolment could be expected to increase to about 55%.

[5039] The situation in Richmond is instructive. It shows that even where a new programme is being created to give a local community on the outskirts of a metropolitan centre a closer homogeneous school, the programme tends to grow gradually over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. This is also what the CSF proposed to do when it first considered opening a programme in Burnaby: it would begin with a few grades and progressively add more. Thus, the number of children will warrant different facilities and amenities as the Abbotsford Elementary/Secondary Project grows.

[5040] While I conclude that the growth pattern in the elementary component of the Abbotsford Elementary/Secondary Project will follow a similar pattern to that at *École Élémentaire des Navigateurs*, the absolute number of students will likely differ. In particular, there was clear demand from parents for a local elementary programme

in Richmond when the programme opened. There was likewise demand when the CSF first considered opening its Burnaby programme. In this instance, there is no evidence that parents have demanded a programme in Abbotsford proper.

[5041] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect about 10 to 30 students to attend a primary programme in Abbotsford in its first three or so years. Looking into the future, enrolment could grow as high as about 85 students in Kindergarten through Grade 6. That reflects about a 30% participation rate of the proxy universe. This is slightly higher than the 25% participation rate that the CSF has achieved at École Élémentaire Deux-Rives of students living in the Proposed Mission Catchment Area, where the CSF's only complaint is with the size of the gymnasium.

[5042] Enrolment in the elementary component of the Abbotsford Elementary Secondary Project might grow or shrink after that. As I explained in Chapter VII, The Number of Children, the evidence of population forecasting only extends to 2023, and that forecasting grows less reliable over time. Given a lack of an evidentiary basis, I cannot draw any conclusions about the anticipated future growth more than 10 years into the future, as that growth is not reasonably foreseeable.

[5043] That leaves the question of the number of children from the Proposed Fraser Valley Secondary Catchment Area likely to attend the secondary component (Grades 7 to 12) of the Abbotsford Elementary/Secondary Project. Known demand for that programme is 34 secondary students. In light of the proxy universe of 495 children, the current proxy participation rate is about 7%.

[5044] This gives considerable room for growth, particularly since École Élémentaire Deux-Rives is 58 kilometres away from École Gabrielle-Roy (Surrey), and 42 kilometres away from École des Pionniers (Port Coquitlam). École Élémentaire La Vérendrye in Chilliwack is even farther away: it is more than 80 kilometres away from École Gabrielle-Roy and 73 kilometres away from École des Pionniers. Undoubtedly, those distances deter many parents from choosing a minority language education for their children.

[5045] There are no instances in the evidence of a homogeneous minority language secondary programme opening to provide a closer option for students and parents in the community where they reside. However, given the large distances between the CSF's Fraser Valley Elementary schools and the nearest secondary schools, it is useful to examine instances where the CSF started new secondary programmes as part of a K-12 school in similar geographic regions.

[5046] The closest parallel is École Gabrielle-Roy (Surrey). Surrey is located between the Lower Mainland and the Fraser Valley. It operated out of leased, heterogeneous space until 2002/03, when it opened as a new, homogeneous school. Enrolment in the secondary grades (8-12) in Surrey grew from 54 students when the new school opened in 2002/03, to 189 students in 2014/15.

[5047] The secondary school catchment area for École Gabrielle-Roy extends all the way through Langley, Abbotsford, Mission and Chilliwack. Dr. Landry's research assistant, Ms. Guignard Noël, estimated that 584 secondary-age children in that catchment area have a Mother-Tongue rightsholder parent. Assuming that the number of children of rightsholders remained relatively constant, the participation rate grew from 9% to 32%.

[5048] The assumption that the number of children of rightsholders in Surrey remained constant is far from certain. Surrey is the fastest growing school district in the province, and among the fastest growing districts in North America, by Mr. Miller's account. Thus, I assume that the total universe of children has been growing since 2002/03. The effect is that the starting participation rate was somewhat higher, and that the growth of the participation rate was of a lesser magnitude than these numbers suggest.

[5049] On the other hand, the total catchment area for École Gabrielle-Roy includes the Proposed Fraser Valley Secondary Catchment Area. The participation rate for students from that area at École Gabrielle-Roy is very low. This would have the effect of skewing the participation rate lower than it would be if only children from Surrey, Langley, Delta and White Rock were included in the universe of students.

[5050] Taking into account the CSF's usual approach of growing its secondary programme by adding one grade each year over several years, I consider that in the first few years of the CSF's secondary programme very few children will enrol. Enrolment will likely be about 20 to 40 students for several years.

[5051] Looking into the future, enrolment will grow. Taking into account the experience at École Gabrielle-Roy, I project that enrolment could grow to about 120 children in Grades 7 through 12 within the first 10 or so years. That reflects participation by nearly 25% of the proxy universe. This is slightly lower than the participation rate at École Gabrielle-Roy to reflect the differences between the two regions and the particular factors that make it difficult to apply the École Gabrielle-Roy experience in the rest of the Fraser Valley.

D. Entitlement

[5052] After determining the number of children, the question becomes what the number is entitled to on the sliding scale. I address my approach to these issues in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[5053] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be those within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[5054] In this case, the appropriate comparator schools for the Abbotsford Elementary/Secondary Programme are those that overlap with the two proposed catchment areas. At the elementary level, those schools are the elementary schools in SD34-Abbotsford. At the secondary level, those schools are the secondary schools in SD34-Abbotsford, SD75-Mission and SD33-Chilliwack.

2. Location on the Sliding Scale

[5055] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[5056] In *Association des Parents- SCC*, the Court suggested that courts may defer to decisions in earlier litigation concerning where the numbers fall on the sliding scale (at para. 48). In *Vickers #1*, Mr. Justice Vickers concluded that the numbers in the Lower Mainland and Fraser Valley (3,848 students likely to enrol in CSF schools based on an agreed statement of fact) warranted the highest level of management and control (at paras. 44-47). As I see it, Mr. Justice Vickers was situating the numbers at the school district level for the purpose of determining what level of management and control was warranted province-wide. He was not determining entitlement to individual school facilities in specific communities. Thus, I do not consider myself bound by Mr. Justice Vickers' determination of this question.

[5057] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is also entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[5058] The Joint Fact Finder's Report did not provide evidence concerning the size of elementary schools in the Proposed Abbotsford Elementary Catchment Area. The closest comparator schools for which the Court has evidence are located in SD75-Mission and SD33-Chilliwack, the two other districts in the Fraser Valley included in the claim. While those are not the ones that would be reasonable

alternatives for parents living in Abbotsford, Chilliwack and Mission are the closest CSF communities to Abbotsford and are of a comparable size and constitution.

[5059] The Joint Fact Finder's Report provided data on 11 elementary (K-6) schools in SD75-Mission. The average operating capacities for those schools is 287 students. None of those schools is built to accommodate fewer than 100 children. The smallest of the schools was built to accommodate 157 students (Deroche Elementary). Only one other school, Dewdney Elementary, was built to accommodate fewer than 200 students.

[5060] Of the schools that the Joint Fact Finder described, the average enrolment was 248 children. Three of those schools have enrolment fewer than or proximate to that of École Élémentaire Deux-Rives: Deroche Elementary (66 students), Dewdney Elementary (73 students) and Silverdale Elementary (102 students). Each of them is operating at 50% or less of their operating capacity. Notably, those three schools appear to be the only three SD75-Mission schools that are outside the central area of Mission; they serve communities located outside town.

[5061] With respect to elementary schools in SD33-Chilliwack, the average operating capacity at comparator schools is 303 students. The smallest school was built to accommodate 111 students (Cheam Elementary). Only two other schools were built to accommodate fewer than 200 students: Greendale Elementary (158 students) and Cultus Lake Community School (180 students).

[5062] The average enrolment at the SD33-Chilliwack elementary schools the Joint Fact Finder's Report describes is 335 students. Only three schools have fewer than 200 students attending it: Greendale Community Elementary (142 students), Cultus Lake Community School (164 students) and Cheam Elementary (166 students).

[5063] I have determined that in the near-term future, in the first three or so years of the new programme, somewhere between 10 and 30 children can be expected to attend a new CSF elementary programme in Abbotsford. Given the size of comparator schools in the area, it is not financially or pedagogically appropriate for

the CSF to build a new school for that programme. Thus, in those early years, the numbers will warrant only instruction in a series of classrooms.

[5064] However, within 10 or so years of the start of the programme, its reasonably foreseeable enrolment could reach about 85 children. Even then, it is not clear that this would warrant a homogeneous school. No schools in the surrounding areas are built to that capacity. However, given that there are two elementary schools in Mission that operate with a similar enrolment, and that the CSF proposes to combine the programme with a middle school and secondary school programme, the numbers together could make it pedagogically appropriate and cost effective to educate those students. However, given the small number of students in comparison to majority schools, it is not practical in terms of pedagogy and cost for the CSF to offer or provide amenities that are fully equivalent to the facilities and amenities in much larger majority schools. I conclude that the numbers in either the Proposed Abbotsford Elementary Catchment Area could well grow to warrant a homogeneous school with core facilities that are proportionate to those at majority schools in light of the proposed school's size.

[5065] Turning to the secondary school component of the Abbotsford Elementary/Secondary Project, the Court received no evidence concerning the size of secondary schools in SD33-Chilliwack or SD34-Abbotsford. The Joint Fact Finder's Report provides data concerning three SD75-Mission secondary schools. Their enrolments are 729 students (Heritage Park Secondary), 771 students (Hatzic Secondary) and 1,028 students (Mission Secondary). Both Mission Secondary and Hatzic Secondary have capacity for 925 students in Grades 7 to 12. Heritage Park Secondary has capacity for 800 students.

[5066] I anticipate that only about 20 to 40 children are likely to participate in a secondary programme in Abbotsford in its first few years. Its enrolment could grow, though, to about 120 children in Grades 7 to 12. As with enrolment in the elementary level, I conclude that the Abbotsford secondary programme will only warrant instruction in its first few years. As enrolment grows, though, it will come to

warrant something more. I anticipate that about 120 children could be expected to participate in the Abbotsford Secondary Programme. While this is much smaller than the nearest comparator secondary schools, given the deference owed to the CSF in its determination of what is pedagogically appropriate and the presence of some small elementary/secondary schools across the Province, the numbers may warrant homogeneous secondary instruction. But again, given the much smaller number of secondary students that would take advantage of the minority programme as compared to a majority programme, the CSF cannot expect to have fully equivalent amenities to majority secondary schools.

[5067] As a result, I find that the numbers at the secondary level will also eventually fall at the middle- to high- end of the sliding scale, warranting homogeneous instruction and access to core facilities proportionate to what the majority receives given the low number of secondary students likely to participate in the programme.

3. Transportation Times

[5068] The plaintiffs argue that the numbers entitle the CSF to a school in Abbotsford because it would remedy long travel times for students in the Fraser Valley: the travel times endured by secondary students in the Fraser Valley who travel to École Gabrielle-Roy (Surrey) and École des Pionniers (Port Coquitlam), and travel times for elementary school students from Abbotsford who travel to École Élémentaire Deux-Rives (Mission).

[5069] The evidence shows that students who attended École Gabrielle-Roy from the Proposed Fraser Valley Secondary Catchment Area in 2012/13 live an average of 72 km from École Gabrielle-Roy. Students from SD33-Chilliwack live about 85 km away. Students from SD75-Mission live closer, an average of 56 km from school, as do students from SD34-Abbotsford who live about 49 km away from École Gabrielle-Roy.

[5070] The plaintiffs also prepared charts showing the average travel time (by bus) from students' primary home address to École Gabrielle-Roy. The charts show that

students from the Proposed Fraser Valley Secondary Catchment Area live, on average a 100-minute drive from École Gabrielle-Roy. Students from SD75-Mission have the longest travel times, at about 120 minutes between home and school. Students from SD33-Chilliwack live a 105-minute car ride from École Gabrielle-Roy, while students from SD34-Abbotsford live about 86 minutes away.

[5071] No secondary students from the Proposed Fraser Valley Secondary Catchment Area have a shorter travel time to school than 59 minutes. Half of all students have a longer travel time than 100 minutes.

[5072] The plaintiffs suggest that the travel times for elementary school students between Abbotsford and École Élémentaire Deux-Rives in Mission are also prohibitively long.

[5073] In 2012/13, 36 students travelled by bus from the Proposed Abbotsford Elementary Catchment Area to École Élémentaire Deux-Rives. Those students live an average of 15 km from École Élémentaire Deux-Rives. The plaintiffs' charts suggest that travel times, by bus, between those students' homes and school is about 46 minutes. The shortest travel time was 25 minutes. About half of École Élémentaire Deux-Rives' Abbotsford students live a 45-minute trip or longer from École Élémentaire Deux-Rives. About 17% have a bus trip longer than an hour.

4. Conclusion

[5074] As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities themselves (*Mahe* at 371-372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment that

shorter travel times were appropriate to prevent assimilation, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[5075] The CSF has determined that it is appropriate to establish two new programmes and catchment areas: the Proposed Abbotsford Elementary Catchment Area for elementary students and the Proposed Fraser Valley Secondary Catchment Area. The right to do so falls squarely within its right to management and control. The defendants must not stand in the way of the CSF's decision in that respect.

[5076] However, given the small numbers that can be expected in the new programme in its first few years, there is no requirement for the Province to build a new homogeneous school facility for those students. The defendants need only ensure that the baseline instructional services are provided until the numbers warrant more. It is simply not practical to expect the Province to construct a new facility for 205 children in Kindergarten through Grade 12 before any programme has taken hold in a geographic region, particularly given the lack of evidence of parent requests for any secondary programme in Abbotsford.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[5077] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. I therefore trace the history of minority language education in Abbotsford and the dealings of the CSF, the Ministry and SD34-Abbotsford in connection with it.

[5078] This history will also be relevant to the plaintiffs' argument that any rights breaches are caused by the rights-infringing effects of the Province's capital funding system. With respect to Abbotsford, I will make findings that are of particular relevance to Chapter XXXVI, Expansion Projects and the Enrolment Driver, and Chapter XXXVIII, Site and School Acquisition Projects.

1. 1997-2004: Capital Planning in the Early Days of the CSF

[5079] As I explain in Chapter XXX, École Élémentaire Deux-Rives (Mission), shortly after the CSF was created, it quickly acquired the former Windebank Elementary from SD75-Mission and consolidated its Abbotsford and Mission programmes at École Élémentaire Deux-Rives.

[5080] In the December 1997 Capital Plan Submission for 1998/99, the FEA also proposed to build a secondary school in Abbotsford to serve students in Grades 7 to 12 from Abbotsford, Mission, Maple Ridge, Langley East, Chilliwack and Sumas (the “Abbotsford Secondary Project”). That year, the CSF’s project prioritization scheme ranked every project as Priority 1, 2, 3 or 4. The Abbotsford Secondary Project was the only project to be ranked fourth, the lowest possible ranking.

[5081] At that time, the CSF envisioned building an addition or an annex on the Mouat Secondary site. According to Dr. Ardanaz, there was already a Programme Cadre at Mouat Secondary, the site seemed large and SD34-Abbotsford was open to sharing the site.

[5082] The Abbotsford Secondary Project at Mouat Secondary was included as unranked projects in the CSF’s September 1998 Capital Plan Submission for 1999/00 and its June 1999 Capital Plan Submission for 2000/01.

[5083] Ultimately, the Abbotsford Secondary Programme never went forward at Mouat Secondary because SD34-Abbotsford chose to build a “super-gymnasium” on the school site.

[5084] Thereafter, the CSF phased out its secondary programme at Mouat Secondary and phased the programme in at École Élémentaire Deux-Rives. Later, CSF secondary students from the Fraser Valley began attending École Gabrielle-Roy in Surrey.

[5085] In its Capital Plan Submissions between 2000 and 2005, the CSF ceased requesting the Abbotsford Secondary Project, focusing instead on the construction

of an addition to turn École Élémentaire Deux-Rives into an elementary/secondary school.

2. 2004-2009: Capital Planning during Mr. Bonnefoy's time at the CSF

[5086] The CSF began requesting a project for Abbotsford again with its October 2005 Capital Plan Submission for 2006/07, when the CSF began requesting the Abbotsford Elementary/Secondary Project for the first time. It was the CSF's fourth-highest priority that year, and its third-highest priority in each of its November 2006 Revised Capital Plan Submission for 2007/08 and its October 2007 Capital Plan Submission for 2008/09.

[5087] The CSF moved to ward-based capital planning with its May 2009 Capital Plan Submission for 2009/10. That year, the CSF requested the Abbotsford Elementary/Secondary Project as its second-highest ranked project in the Fraser Valley Ward, after the replacement of École des Pionniers (Port Coquitlam). The CSF sought a school with capacity for 40K/300 elementary/secondary students.

[5088] Throughout this period, which coincides with Mr. Bonnefoy's tenure as Secretary-Treasurer, the CSF considered three potential sites for the Abbotsford Elementary/Secondary Project.

[5089] The CSF considered Bakerview Elementary, an SD34-Abbotsford site. That site was centrally-located in Abbotsford and proximate to a highway, which was ideal for transportation purposes. However, Mr. Bonnefoy was told that Bakerview Elementary was unavailable because it was being used by SD34-Abbotsford for itinerant teachers and staff. Mr. Stewart confirmed he was aware SD34-Abbotsford had another use for the school.

[5090] Second, the CSF considered the site of the former Dunach Elementary, which also belonged to SD34-Abbotsford. That school was a closed facility on a small site to the west side of Abbotsford, with good access and egress.

Mr. Bonnefoy was told that the building was closed due to its age and seismic issues. Mr. Stewart's recollection was that the CSF declined that site.

[5091] The third site the CSF considered was the former Mission Sumas Hospital site ("MSA Site"). Fraser Health Authority was identifying different potential uses for the property. In 2008 or 2009, Mr. Bonnefoy met with representatives from Fraser Health Authority and expressed the CSF's interest in acquiring the site for a school.

[5092] Mr. Bonnefoy recounted some of the steps that the CSF took to investigate the MSA Site. The CSF considered how it could accommodate an elementary/secondary school on the site in light of some old growth trees that could not be removed. CSF staff contacted the administration of an adjacent SD34-Abbotsford middle school, but they were not open to sharing their playfield.

[5093] The CSF shared with the Minister its view that the MSA Site was attractive for a regional school at a November 2008 meeting. Shortly thereafter, Mr. Miller identified to Capital Branch staff areas of work arising out of the meeting. Among them, Mr. Miller directed staff to explore with the Ministry of Health whether the CSF could acquire the MSA Site.

[5094] Mr. Stewart made a telephone call to a former colleague who worked for the Fraser Health Authority and was involved in the redevelopment of the MSA Site. He was told that the site was not fully committed, but that a large portion of the site would be used for a long-term care facility so there was little likelihood that the CSF could acquire it. Nevertheless, he recalled that there was some discussion internal to the Ministry around the CSF acquiring four to five acres of the site. He could not recall following up on that idea.

3. 2010-Present: Capital Planning during Mr. Allison's time as Secretary-Treasurer

[5095] After Mr. Allison became Secretary-Treasurer in 2010, with its June 2010 Capital Plan Submission for 2010/11, the CSF again requested the Abbotsford Elementary/Secondary Project. That year, the CSF did not sequentially rank its

priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF requested the same projects, with the same form of prioritization, in its November 2012 Capital Plan Submission for 2012/13 and in its October 2013 Capital Plan Submission for 2013/14.

[5096] In support of its October 2013 Capital Plan Submission, the CSF submitted a November 2013 In-House PIR for the Abbotsford Elementary/Secondary Project. The CSF identified several potential sites: two plots of farmland and three undeveloped sites.

[5097] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects.

[5098] The CSF provided those projections by way of a secondary email. Since the CSF did not have an existing school in Abbotsford, the CSF explained that it could not provide cohort-retention enrolment forecasts for that school as it had for its other schools. Instead, based on Dr. Landry and Mr. McRae's work, the CSF wrote that it anticipated that in 2023 there would be at least 783 children age 5-17 living in the catchment area that have a Mother-Tongue Rightsholder parent. The CSF estimated that an additional 78 students might be eligible pursuant to its Expanded Enrolment Policy, without explaining how it arrived at that number. The CSF also told the Ministry that full utilization of the requested school in Abbotsford would require a take-up rate of 45% by the 2023/24 school year. The CSF suggested it could easily achieve that participation rate.

[5099] Mr. Allison provided evidence about the CSF's most recent attempts to start a Francophone programme in Abbotsford.

[5100] In November 2010, Mr. Allison received an email from Ms. Daragahi, who informed him that she had heard that Dunach Elementary was set to close in June 2011. Mr. Allison asked Mr. Bonnefoy to look at the property because he lived nearby.

[5101] It appears as though Mr. Bonnefoy's contract work extended beyond the Dunach Elementary Site. Mr. Bonnefoy recalled that in 2010 or 2011, he had discussions with the Secretary-Treasurer of SD34-Abbotsford about Bakerview Elementary. According to Mr. Bonnefoy, he suggested that if SD34-Abbotsford sold that property to the CSF, the Ministry might agree to an arrangement giving SD34-Abbotsford capital approval for a new facility for itinerant staff.

[5102] Mr. Allison had some encouraging meetings with the Secretary-Treasurer of SD34-Abbotsford. In January 2011, Mr. Cyr, the CSF's Superintendent, wrote to parents and staff at the CSF's Mission, Chilliwack and Langley schools in connection with the Abbotsford Elementary/Secondary Project. He informed them that the CSF's work toward the Abbotsford Elementary/Secondary Project was progressing, and that the CSF believed SD34-Abbotsford was open to the CSF's expansion plans. He suggested that CSF officials would meet with parents and staff by early spring of 2011 to prepare for an enrolment campaign.

[5103] According to Mr. Allison, shortly thereafter SD34-Abbotsford changed its Secretary-Treasurer. By March 2011, the new Secretary-Treasurer, Mr. Ray Velestuk, had informed Mr. Allison that in light of SD34-Abbotsford's own facilities needs, it did not expect to have space suitable for the CSF. Mr. Velestuk suggested a meeting between the two school board chairs. Mr. Allison declined that meeting.

[5104] In the spring of 2011, the CSF also looked into the MSA Site again. Mr. Allison wrote to the developer and expressed interest in acquiring a portion of the site. However, Mr. Allison was concerned that the redevelopment could take up

to 10 years. He also knew that his ability to eventually acquire a portion of the site would depend on Ministry funding.

[5105] In April 2011, Mr. Allison attended the annual meeting of his professional association. At that meeting, Mr. Miller suggested a meeting between Mr. Allison, Mr. Velestuk and the respective school board chairs to discuss Bakerview Elementary and Dunach Elementary. The result of that meeting was that the opportunity for the CSF to acquire Dunach Elementary was revived.

[5106] Mr. Ouimet, CSF President, and Mr. Allison visited Dunach Elementary. Mr. Allison observed that the school was old. However, this was not a concern to Mr. Allison because the CSF intended to build a new school on the site.

[5107] By June 2011, Mr. Velestuk had sent Mr. Allison property information about Dunach Elementary. That information led Mr. Allison to believe that the site included two adjacent parcels, totaling more than five acres.

[5108] Although the Ministry did not request Capital Plan Submissions in 2011, on October 14, 2011, Mr. Allison sent Minister Abbott a Positioning Letter to request that the Ministry begin participating in discussions between the CSF and SD34-Abbotsford, and approve capital funding for the CSF to acquire Dunach Elementary. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[5109] Deputy Minister Gorman responded to Mr. Allison on December 7, 2011. That letter informed the CSF that the Ministry had believed that the CSF's top priority at that time was a new school in Vancouver (West), and had therefore supported the Southeast False Creek Project. He suggested that the CSF advise the Ministry if it was incorrect about the CSF's priorities. He also indicated that the Ministry would require a PIR in support of the CSF's request and priority ranking of the project against the CSF's other capital project requests.

[5110] Without approved project funding, the CSF did not acquire Dunach Elementary from SD34-Abbotsford at that time.

[5111] In 2013, the CSF met with SD34-Abbotsford officials again about a different school that SD34-Abbotsford was considering closing, North Poplar Elementary. Mr. Allison and Mr. Cyr visited the school, and Mr. Allison thought it was a sufficiently large site. However, there were no further developments in connection with this site.

[5112] Throughout that time, the CSF did not offer a secondary programme in Abbotsford, even in a heterogeneous environment. While Mr. Allison was under cross-examination, he was asked why the CSF has not considered starting a heterogeneous secondary programme in Abbotsford. He admitted that he had not given much thought to the prospect, and had never raised the idea with SD34-Abbotsford.

4. Conclusion and Findings

[5113] CSF students from Abbotsford have long been accommodated outside their home community. While Abbotsford had Programmes Cadres at both the elementary and secondary levels, the CSF chose to consolidate the elementary programme into École Élémentaire Deux-Rives (Mission), and the secondary programme into École Élémentaire Deux-Rives and then École Gabrielle-Roy (Surrey).

[5114] A secondary school in Abbotsford formed part of the CSF's earliest capital plans. However, it was never a particularly high priority. In its first several capital plans, the idea was either ranked as a low priority, or was unranked. Then, the CSF shifted its plans to building a secondary school at École Élémentaire Deux-Rives to serve students from Mission and Abbotsford, before shifting back to planning a regional elementary/secondary school in Abbotsford in about 2005.

[5115] Since its October 2005 Capital Plan Submission for 2006/07, the Abbotsford Elementary/Secondary Project has been a relatively high priority project for the CSF. The project was its second and third highest priority projects in 2005 through 2008.

[5116] Unlike many other areas, it appears as though there has been some opportunity for the CSF to acquire a former school in Abbotsford.

[5117] In 2008, the CSF developed an interest in the MSA Site, a provincially-owned site that was in the course of being redeveloped. The CSF told the Minister about its interest in the site. Ministry staff were directed to explore with the Ministry of Health whether there would be an opportunity for the CSF to build a school on the site. Ministry staff simply made an inquiry, and, despite there being a small prospect, did not follow up.

[5118] Of course, the MSA Site is one that is not controlled by the Ministry. It is under the auspices of the Ministry of Health. However, the evidence shows how Ministry staff left it in the hands of the CSF to identify and secure sites for itself, without providing much in the way of assistance concerning provincially-owned assets.

[5119] In 2011, there was an opportunity for the CSF to acquire Dunach Elementary from SD34-Abbotsford. That project did not go forward because of a lack of Ministry funding. The Ministry chose to support the Southeast False Creek Project for Vancouver (West) when funding became available. Like the situation in Richmond, this provides an example of the tension that exists between the CSF projects that are most easily realized, and those where there is the greatest need.

[5120] On the other hand, the CSF has been hurt by its insistence on moving immediately to an owned, homogeneous school. Mr. Allison's evidence was that he never considered opening a heterogeneous secondary programme in Abbotsford. There is also no suggestion in the evidence that the CSF ever considered entering into a leasing arrangement with SD34-Abbotsford.

[5121] I conclude that rightsholders are not receiving the instructional facilities that are currently warranted because the CSF has insisted on acquiring homogeneous rather than heterogeneous space. On the other hand, I find that there was an opportunity for the CSF to acquire a site that would have responded to rightsholders' needs into the longer term in about 2011. That project did not go forward because of the lack of funding for Expansion Projects between 2005 and 2011, and very limited funding for those projects thereafter. Thus, that lack of funding materially contributed to the situation that exists in Abbotsford.

F. Justification

[5122] I have concluded that rightsholders in Abbotsford are not receiving the baseline instructional services that the numbers warrant. While the CSF is in part to blame for seeking more than what the numbers currently warrant, the Ministry's funding system also materially contributed to the situation. In particular, the continuing breach is caused by the fact that the Province has not been putting sufficient funding toward Expansion Projects to move forward with all of the CSF's planned projects. The remaining question is whether the breach is justified.

[5123] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". In my view, the particular infringing measure that did not fund Expansion Projects during a period of declining enrolment is likewise intended to further the fair and rational allocation of public funds.

[5124] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I find that there is a rational connection between fairly and rationally expending public funds and the lack of funding to build new spaces for students between 2005 and 2011. Given that the

Province had constructed tens of thousands of new spaces for students between the 1990s and 2005, it was rational to decide not to devote further public funds to that purpose when enrolment across the Province was declining.

[5125] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[5126] In my view, the lack of funding for Expansion Projects for the CSF between 2005 and 2011, to the detriment of the position of rightsholders in Abbotsford, was not minimally impairing of Abbotsford rightsholders' position. The Province essentially implemented a blanket prohibition of Expansion Projects in that period. It did not devote any funds to remedying the CSF's position or need for Expansion Projects in Abbotsford or elsewhere. In those circumstances, it is entitled to less deference. In my view, the Ministry could have achieved its goal of fairly and rationally allocating limited public funds while still funding CSF Expansion Projects in some limited way. The Minister was not carefully weighing which capital projects ought to go forward and which should not. It simply decided not to fund any Expansion Projects, at the expense of its constitutional obligations. Here, the s. 1 justification test fails at the minimal impairment stage.

[5127] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[5128] At the local level, the salutary effects of the Expansion Project freeze are primarily cost savings-- the savings the Ministry was able to generate by not funding the CSF's project requests for Abbotsford. The Province's most recent estimate is that the project would cost about \$21 million not including the cost of site acquisition.

[5129] The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[5130] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[5131] The deleterious effects, at the local level, concern the inferior educational experience afforded to the minority in Abbotsford and across the Fraser Valley. Secondary students from the Fraser Valley endure lengthy travel times to receive secondary instruction at École Gabrielle-Roy in Surrey. The average student travels by bus for 100 minutes. As a result, very few secondary students from the Fraser Valley receive minority language instruction. A similarly low proportion of elementary-age children choose to attend École Élémentaire Deux-Rives, likely because of the long transportation times.

[5132] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[5133] Weighing those effects together, I find that the deleterious effects outweigh the salutary effects. The cost savings to the Ministry of remedying the situation does not justify the deleterious effects on the global educational experience for rightsholders. While the system as a whole has resulted in generally fair outcomes for the CSF, that does not outweigh the low cost of remedying the situation and the poor global educational experience afforded to rightsholders' children in the Fraser Valley. I therefore conclude that the Province has failed to show proportionate effects.

G. Remedy

[5134] The plaintiffs argue that the appropriate and just remedy for the breach of s. 23 is to immediately construct a homogeneous French-language K-12 school for the CSF in Abbotsford. They suggest the Court can order the Minister to exercise his powers under s. 74(1) of the *School Act* to effect a transfer of Dunach Elementary to the CSF. Further, given the length of time that the CSF has been waiting for a school in Abbotsford, they argue that *Charter* damages are a particularly appropriate and just additional remedy.

[5135] I address my approach to remedies in Chapter X, Remedies. There, I explain that I do not consider that the Minister has the power to order the transfer of Dunach Elementary as the plaintiffs suggest that it does.

[5136] As I outline in Chapter X, Remedies, the most appropriate and just remedy for the plaintiffs' Community Claims will typically be a declaration of the positive rights of rightsholders. Generally, I will not make orders requiring the government to act in a certain manner because the Province should have some latitude with respect to how it responds to constitutional breaches. With reference to Abbotsford, the Ministry could remedy the situation in a number of ways. It could fund the transfer of Dunach Elementary, then fund renovations to the school to provide proportionate secondary school facilities. Or it could fund a full replacement. Or, it could arrange for the CSF to have leased space of some sort.

[5137] In the circumstances, I find that an appropriate remedy is to issue a declaration. I declare that:

- a) Rightsholders under s. 23 of the *Charter* living in the Central Fraser Valley (Abbotsford, Mission and Chilliwack) are entitled to have their secondary-age children (age 13-17) receive a minority language education in facilities that provide them with space for 29 to 40 students in the short term and up to 120 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language secondary schools in the Fraser Valley.
- b) Rightsholders under s. 23 of the *Charter* living in Abbotsford are entitled to have their elementary-age children (age 5-12) receive a minority language education in facilities with space for 10 to 30 students in the short term and 85 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language elementary schools in SD34-Abbotsford.
- c) The lack of minority language school facilities in Abbotsford prevents the CSF from offering a global educational experience that is proportionate to the educational experience offered at majority-language secondary

schools in the Fraser Valley and at elementary schools in SD34-Abbotsford.

[5138] The CSF and the Ministry will need to work together to ensure that rightsholders in Abbotsford receive the facilities to which they are entitled. As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards. This should prevent circumstances from arising like that with the MSA Site, where the Ministry did not actively pursue the CSF's interests with other ministries.

[5139] Further, given that several *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[5140] The plaintiffs also argue that *Charter* damages ought to be granted concerning the breach in Abbotsford. I describe my approach to *Charter* damages in Chapter X, Remedies. There, I explain that in many instances where the government is acting in good faith pursuant to an unconstitutional law or policy, countervailing factors concerning the "public good" will tend to negate the plaintiffs' claims for *Charter* damages. This ensures that government actors will continue to enforce laws without fear of retribution if they are later found to be invalid.

[5141] In this instance, I am satisfied that the Minister was always acting in good faith in connection when implementing its capital funding system in connection with the CSF's needs in Abbotsford. There are many competing needs for capital projects in the Province. Awarding damages in this instance could have a chilling effect by leading Government to allocate a disproportionate amount of funding to the CSF out of fear of retribution.

H. Conclusion

[5142] I conclude that the best estimate of the number of children likely to attend an elementary/secondary school in Abbotsford is about 10 to 30 elementary students and 29 to 40 secondary students in the near future, and about 85 elementary students and 120 secondary students in the first 10 years or so of the programme's existence.

[5143] I find that those numbers fall at the low end of the sliding scale in the first few years at both the elementary and secondary levels, warranting instruction in a series of classrooms. Even after enrolment grows, I find that at the elementary level, the numbers could grow to warrant a homogeneous school with core facilities that are proportionate, but not equivalent, to those at majority schools. After some time, secondary students in the Fraser Valley will become entitled to instruction in core facilities proportionate to what the majority receives given the low number of secondary students likely to participate in the programme.

[5144] I find that the numbers in Abbotsford are not receiving what they are entitled to. The numbers are entitled to instruction in the local community in the short term. However, the numbers do not currently warrant a newly built homogeneous school. It is simply not practical to expect the Province to construct a new K-12 facility for 205 children before any programme has taken hold in a geographic region. Once that school is built, it should have facilities proportionate to what the majority has in light of the school's small population, particularly given the lack of evidence of parent requests for any secondary programme in Abbotsford.

[5145] I find that one aspect of the Ministry's capital funding system materially contributed to the situation in Abbotsford: the lack of funding for Expansion Projects between 2005 and 2011, and only limited funding for Expansion Projects thereafter. On the other hand, the CSF has also been hurt by its insistence on moving immediately to an owned, homogeneous school instead of considering a leasing arrangement until the numbers warrant more.

[5146] In my view, the defendants have not shown that the breach is justified: the decision not to fund any Expansion Projects between 2005 and 2011 was not reasonably tailored to the objective of ensuring the fair and rational allocation of public funds while still meeting the Province’s constitutional obligations. Further, the deleterious and salutary effects of the measures are not proportionate.

[5147] I find that declarations are the most appropriate remedy. As I develop in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF, to ensure that the declaration has an impact, the Province will be required to establish a separate rolling Capital Envelope to respond to the CSF’s needs. The Province will also be required to establish a policy or law to assist the CSF to identify sites and resolve disputes with majority school boards, as I outline in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation.

XXXII. BURNABY FRENCH-LANGUAGE EDUCATION AND ÉCOLE DES PIONNIERS (PORT COQUITLAM)

[5148] Burnaby and Port Coquitlam are located in the Lower Mainland region of British Columbia. There is no minority language education programme in Burnaby. In Port Coquitlam, the CSF operates École des Pionniers de Maillardville (“École des Pionniers”), a homogeneous, French-language elementary/secondary school serving children in Kindergarten to Grade 12. École des Pionniers is housed in the former Terry Fox Secondary, a facility owned by the CSF. The Province acquired École des Pionniers for the CSF from SD43-Coquitlam in 2000. In 2014/15, there were 486 students enrolled at École des Pionniers.

[5149] The CSF proposes to acquire a site and build an owned, homogeneous elementary school in or around Burnaby to accommodate children in Kindergarten through Grade 6 (the “Burnaby Elementary Project”). In 2014, the CSF estimated that project would cost more than \$10 million, excluding the cost of acquiring a site and preparing it for construction.

[5150] The Community Claim for Port Coquitlam is unique because the Ministry has approved a project for the CSF in Port Coquitlam to replace École des Pionniers on

the same site (the “École des Pionniers Replacement Project”). Presumably, this will remedy any breach of s. 23 arising out of the quality of the school facilities.

[5151] When the trial concluded, there were two ongoing disputes concerning the École des Pionniers Replacement Project. First, the plaintiffs contended that the Ministry refused to fund a sufficiently large replacement facility to accommodate the number of children likely to attend the programme. Second, the plaintiffs argued that the Province ought to be required to fund some off-site development charges being levied by the City of Port Coquitlam.

[5152] On July 15, 2016, the Court received a letter from counsel for the plaintiffs abandoning those claims. The letter advised that in May 2016, two months after the conclusion of the trial, the CSF and the Ministry agreed to an amendment to the Project Agreement for the École des Pionniers Replacement Project that expanded the school’s planned capacity. The CSF also successfully negotiated a reduction to the off-site development charges levied by the City of Port Coquitlam, and the Ministry agreed to fund the remaining fees. The tender process for the École des Pionniers Replacement Project closed in June 2016.

[5153] As a result, the only remaining element of the claim concerning École des Pionniers relates to long transportation times and the CSF’s claim for a new French-language school in Burnaby. The plaintiffs also maintain a claim for *Charter* damages relating to the state of affairs at École des Pionniers prior to the construction of the new school facility, and for special costs. I also note that some of the evidence concerning École des Pionniers is relevant to the CSF’s claim concerning Site and School Acquisition Projects and some of the administrative requirements related to the Ministry’s capital planning process.

A. Evidence

[5154] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all described their dealings with École des Pionniers and French-language education in Burnaby on behalf of the

plaintiffs. For the defendants, Mr. Miller, Mr. Stewart and Mr. Palmer all provided evidence about the CSF's arrangements in Port Coquitlam and Burnaby.

[5155] The Court also heard from one educator, Ms. Chagnon, the current principal at École Élémentaire Rose-des-Vents (Vancouver (West)). She served as one of the early principals at École des Pionniers after it opened at Terry Fox Secondary, and described the school at that time.

[5156] The Joint Fact Finder's Report does not discuss comparator schools in Coquitlam, but it does report on some Burnaby comparator schools that fall in the current catchment area for École Élémentaire Anne-Hébert.

B. History and Context

1. The CSF's Port Coquitlam Catchment Area

[5157] Dr. Kenny explained that Burnaby has historically been an attractive settlement location for French speakers in the Lower Mainland. The Francophone community grew rapidly in the 1930s, and started a social club in 1978.

[5158] In Dr. Kenny's explanation, however, there have been limited opportunities for minority language education in Burnaby. Beginning in 1975, Burnaby had a French-language daycare that catered to both French and English speakers. After successful lobbying by parents of children in the daycare, SD41-Burnaby opened a French immersion programme in 1977. Burnaby also had a short-lived Programme Cadre class at Morley Elementary, but that programme closed after École Élémentaire Anne-Hébert (Vancouver (East)) opened near the Burnaby border, attracting students from Burnaby.

[5159] The CSF's Port Coquitlam catchment area is unique in that it includes British Columbia's sole historic homogeneous Francophone community. Dr. Kenny advised that the Francophone community of Maillardville (in Coquitlam) was exceptional in the province, since it maintained Francophone linguistic homogeneity until the 1960s and 1970s.

[5160] Maillardville had two parochial schools, which initially provided instruction in French. Both schools became anglicized by the 1970s, at which point only Kindergarten classes were taught in French.

[5161] According to Dr. Kenny, Coquitlam's first Programme Cadre began in 1985, with a single class spanning Kindergarten to Grade 5. The programme grew to 100 students by 1994, strengthening calls for a homogeneous Francophone school, ideally at Maillardville.

[5162] Before the CSF was created, SD43-Coquitlam had Programmes Cadres at three schools. Elementary Programme Cadre students attended Millside Elementary, a triple-track (English/French/French immersion) school with what Dr. Ardanaz described as a "vibrant" French immersion programme. Middle school students were also housed in a triple track school, with the Programme Cadre classrooms dispersed throughout the building. Secondary students attended a dual-track (English/French) secondary school. In 2000, the CSF acquired Terry Fox Secondary and consolidated those programmes at École des Pionniers.

[5163] Today, there is no minority language education programme in Burnaby, east New Westminster, west Coquitlam or southwest Port Moody. Currently, students living in those areas attend either École des Pionniers or École Élémentaire Anne-Hébert.

[5164] In Port Coquitlam, the CSF owns and operates École des Pionniers as a homogeneous French-language elementary/secondary (K-12) school. École des Pionniers has also offered a French-language preschool and Strong Start for many years.

[5165] The CSF proposes to build a new school in Burnaby to serve a new catchment area carved out of the eastern portion of the current École Élémentaire Anne-Hébert catchment area and the western portion of the École des Pionniers catchment area (the "Proposed Burnaby Catchment Area"). École des Pionniers will continue to serve east Coquitlam, east and north Port Moody, Port Coquitlam, Pitt

Meadows and Maple Ridge (the “Proposed Coquitlam Catchment Area”).

Secondary students from both proposed catchment areas would attend École des Pionniers.

[5166] École des Pionniers currently serves children living in east Burnaby, east New Westminster, Coquitlam, Port Moody, Belcara, Port Coquitlam, Pitt Meadows and Maple Ridge (the “Current École des Pionniers Catchment Area”). It therefore overlaps with the Eastern territory of SD40-New Westminster (which operates four elementary schools, one middle school and one secondary school), SD41-Burnaby (which operates 12 elementary schools and two secondary schools in the Current École des Pionniers Catchment Area), SD42-Port Moody (which operates 17 elementary schools and four secondary school in the Current École des Pionniers Catchment Area) and SD43-Coquitlam (which operates 45 elementary schools, 13 middle schools and eight secondary schools in the Current École des Pionniers Catchment Area. Majority school boards offer French immersion at four SD40-New Westminster schools, four SD41-Burnaby schools, six SD42-Port Moody schools and 15 SD43-Coquitlam schools.

[5167] The defendants argue that the Proposed Burnaby Catchment Area “lacks sufficient definition to warrant the relief sought”. Having reviewed the plaintiffs’ maps, which set out the proposed catchment area, I do not find that the Proposed Burnaby Catchment Area lacks definition. The CSF is simply showing flexibility about the location of its proposed school within its proposed catchment area given the problems the CSF has finding locations for new schools in the Lower Mainland.

2. Conclusions

[5168] When analyzing the Burnaby and Port Coquitlam claims, I will take into account the catchment areas’ urban setting, and that they will overlap with the catchment areas of many neighbourhood and French immersion schools. Thus, the Burnaby Elementary Project and the École des Pionniers Replacement Project will compete with programmes closer to the homes of CSF students. I will also take into account that minority language education has yet to take hold within the Proposed

Burnaby Catchment Area. While students from Burnaby had the option of attending École Élémentaire Anne-Hébert or École des Pionniers since the Programme Cadre days, they have always had to travel to access those programmes. I will also take into account the long history of Francophones in Coquitlam, and the strong need for remediate measures given the historic homogeneous Francophone community in Maillardville.

[5169] Together with that information, I will take into account the conclusions that I draw in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia: that the force of assimilation in British Columbia is very strong, at more than 70%. The rate of transmission of the French language in British Columbia is very low, at only about 26%. Moreover, while Francophone schools create important institutions for Francophone communities and perpetuate better bilingualism for attendees, they are unlikely to have any great impact on the assimilation rate in British Columbia.

C. The Number of Children

[5170] In Chapter VII, The Number of Children, I explain that my task is to anticipate what proportion of the total universe of eligible children are likely to enrol in a given programme: a participation rate. The number is estimated, and falls somewhere between the known demand and the universe of rightsholders' children.

1. The Universe of Eligible Children

[5171] I ground my analysis of the appropriate universe of rightsholders' children in Dr. Landry's estimate of the total universe of s. 23(1)(a) (Mother-Tongue) Rightsholders' children. I use this number as a proxy for the total number of rightsholders (as was done by Statistics Canada in *Minorities Speak Up*) to avoid placing an undue burden on the plaintiffs to account for every possible child.

[5172] The evidence concerning the universe of eligible students is broken down by catchment area for the CSF's proposed new schools.

[5173] Beginning with the Proposed Burnaby Catchment Area, Dr. Landry estimated that in 2011 there were 356 elementary-age children (age 5-12) living in the Proposed Burnaby Catchment Area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023 there would be 507 such students in the catchment area: growth by about 42%.

[5174] I note that Dr. Landry also counted 1,595 children of non-Francophones living in the catchment area in the Knowledge Category, and 430 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in the Burnaby area.

[5175] With respect to the Proposed Coquitlam Catchment Area, Dr. Landry estimated that in 2011 there were 516 elementary-age children (age 5-12) in the catchment area that have a Mother-Tongue Rightsholder parent. Using Dr. Landry's estimates, Mr. McRae forecasted that by 2023, there would be 614 such children in the catchment area: growth by about 19%.

[5176] With reference to the Current École des Pionniers Catchment Area, which includes some (but not all) of the children who live in the Proposed Burnaby Catchment Area, Dr. Landry counted 817 elementary-age children with a Mother-Tongue Rightsholder Parent. Mr. McRae forecasted that those numbers would grow to about 920 children by 2023: growth by about 12%.

[5177] Dr. Landry also provided evidence suggesting that 1,710 children in the Proposed Coquitlam Catchment area fall in the Knowledge Category, and 440 fall in the Regular Home Use Category. He also counted 3,040 in the Current École des Pionniers Catchment Area in the Knowledge Category, and 805 in the Regular Home Use Category. I do not find these numbers to be a reliable proxy for the number of children of Education or Sibling Rightsholders in the Coquitlam area.

[5178] Turning to secondary students in the Current École des Pionniers Catchment Area, Dr. Landry counted 531 secondary-age children (age 13-17) in the catchment area with a Mother-Tongue Rightsholder parent. Mr. McRae forecasted a

slight retraction of that number to 511 children by 2023. I do not find Dr. Landry's counts of 3,315 children in the Knowledge Category or 420 in the Regular Home Use Category to be helpful evidence.

[5179] I therefore find that a reasonably proxy for the total universe of rightsholders' children into the reasonably foreseeable future is about 500 elementary-age children (age 5-12) in the Proposed Burnaby Catchment Area, 615 elementary-age children in the Proposed Coquitlam Catchment Area, 920 elementary-age children in the Current École des Pionniers Catchment area, and 515 secondary-age children in the Current École des Pionniers Catchment Area. I consider these numbers to be a proxy because they likely omit some Mother-Tongue rightsholders' children, while inappropriately including some non-citizen rightsholders' children. They also do not account for the children of Education and Sibling Rightsholders who are not also Mother-Tongue Rightsholders.

2. Known Demand

[5180] The evidence shows that enrolment at École des Pionniers grew from 104 students in Kindergarten through Grade 7 in 1996/97, to 486 students in Kindergarten through Grade 12 2014/15.

[5181] After the CSF acquired Terry Fox Secondary in 2000, enrolment grew steadily until about 2007/08. Thereafter, enrolment was relatively stable at around 400 students from 2008/09 through 2012/13. Then, about one year after the announcement of the École des Pionniers Replacement Project, enrolment showed large increases of about 10% in each of 2013/14 and 2014/15.

[5182] The CSF's records show that École des Pionniers admitted five children of non-rightsholders pursuant to its Expanded Admissions Policy between 2013 and 2015. That number makes up a negligible proportion of École des Pionniers' current enrolment.

[5183] Current secondary demand is 148 students. That will not change if the catchment areas are split. For the past 10 years or so, secondary students (Grade 7-12) have typically made up one-third of the school's population.

[5184] At the elementary level, demand from across the entire Current École des Pionniers Catchment Area is 338 students. However, some of the elementary students live in the Proposed Burnaby Catchment Area. The evidence suggests that 244 current École des Pionniers students in Kindergarten through Grade 6 live in the Proposed Coquitlam Catchment Area.

[5185] The plaintiffs' evidence suggests that a total of 82 children in Kindergarten through Grade 6 enrolled at École Élémentaire Anne-Hébert and École des Pionniers (combined) live in the Proposed Burnaby Catchment Area.

[5186] Unfortunately, there appear to be some problems with the catchment area-specific enrolment evidence for the Lower Mainland. The catchment-area specific enrolment data suggests that 326 children in Kindergarten to Grade 6 attend École des Pionniers and École Élémentaire Anne-Hébert from the proposed Burnaby and Port Coquitlam Catchment Areas combined. Thus, when all the Burnaby students are taken together with all the Coquitlam students, the total enrolment count falls short of total École des Pionniers' 338-student elementary enrolment by 12 students.

[5187] Similarly, there appear to be about 25 students missing from the count of students living in the two new proposed catchment areas in Vancouver (East), and a further 15 students missing from the estimated number of children living in each of the two new Vancouver (West) catchment areas. Overall, the catchment-area specific enrolment data from across the CSF's proposed Lower Mainland catchment areas falls short of actual K-6 enrolment by 52 students.

[5188] It is impossible to know in what catchment areas the omitted students reside because all the proposed new catchment areas border one another. As a result, I deal with the discrepancy by equally apportioning the 52 students between catchment areas by adding nine students to the known demand for each proposed

programme. This overstates enrolment across the six catchment areas by two students total, but appears to be the most fair way of dealing with the problem.

[5189] As a result, I conclude that the known demand for elementary (K-6) education in the Proposed Burnaby Catchment Area is 91 students, and known demand in the Proposed Coquitlam Catchment Area is 253 students.

3. The Uptake Rate

[5190] When determining the number of children likely to take advantage of a programme, I consider the potential for growth, with regard to the historic uptake rate, the size and concentration of the minority language community, other educational programmes in the community and the experience in communities with similar characteristics.

[5191] I consider that evidence together with the general findings of fact that I make concerning the uptake rate in Chapter VII, The Number of Children: There, I find that the CSF can generally expect some modest enrolment increases on construction of a new, homogeneous school. However, due to the high rates of assimilation and Exogamy in BC, compounded by the dispersion of BC's Francophone communities and the low rate of transmission of the French language to children, in most instances the CSF cannot expect significant enrolment increases over and above current demand.

[5192] In the plaintiffs' submission, the numbers warrant two facilities in Burnaby and Port Coquitlam. The CSF envisions building a school in Burnaby with nominal capacity for 260 students and operating capacity for 243 elementary (K-6) students. That would give the CSF space for two Kindergarten and eight elementary classrooms. Additionally, they say that the numbers warrant a K-12 school in Port Coquitlam with nominal capacity for 650 students. That would provide École des Pionniers with space for 3 Kindergarten divisions, 14 elementary divisions and 10 secondary divisions. As I outline below, after some negotiation, the Province agreed to build the École des Pionniers Replacement Project to that capacity.

[5193] Currently, an estimated 91 students in the Proposed Burnaby Catchment Area attend École Élémentaire Anne-Hébert and École des Pionniers. Based on the proxy universe of 500 eligible children age 5-13, the proxy participation rate of students living in the Proposed Burnaby Catchment Area is about 18%, which is quite low. Parents from the Proposed Burnaby Catchment Area have access to neighbourhood schools and French immersion programmes in the communities where they reside. The distance between many student homes and CSF programmes likely deter many parents from choosing minority language education. If the Burnaby Elementary Project goes forward, the participation rate will likely grow.

[5194] The CSF has opened a new programme to divide a catchment area and provide a local option in a neighbouring city once, in Richmond. Rightsholders' children from Richmond attended École Élémentaire Anne-Hébert. Following demand from parents in Richmond, École Élémentaire des Navigateurs opened in leased, heterogeneous space at Diefenbaker Elementary in Richmond with 10 students in Kindergarten and Grade 1 in 2001/02. In 2003/04, with 34 students in Kindergarten to Grade 4, it moved to a leased homogeneous facility at Kilgour Elementary. By 2007/08, it offered Kindergarten through Grade 6, and served 90 children. Its 2014/15 enrolment was 127 children in Kindergarten to Grade 7.

[5195] As I explain in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), the proxy universe of rightsholders in Richmond is about 300 elementary-age children. Assuming that remained constant, the participation rate in Richmond grew to about 33% of the proxy universe in grades Kindergarten to Grade 6 in the programme's first 10 years. By 2014/15, the proxy participation rate of Richmond rightsholders at École Élémentaire des Navigateurs reached about 42%, in leased, homogeneous space that is generally equivalent to that of the majority subject to long travel times. I find that with construction of a new, homogeneous school facility, its enrolment could increase to about 55%.

[5196] The situation in Richmond is instructive. It shows that even where a new programme is being created to give a community access to a local option in a metropolitan centre, the programme tends to grow gradually over time. This makes sense and is consistent with other evidence: parents are reluctant to withdraw their children from a school where they are happy and secure to move them to a new school, even if the new programme is closer to home. Similarly, when the CSF adds a secondary programme to its schools, it adds a few grades each year, knowing that secondary students would be reluctant to leave their school near the end of their education. Thus, the number of children will warrant different facilities and amenities as the Burnaby Elementary Project grows.

[5197] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect about 15 to 40 students to attend a primary (Grades 1-3) programme in Burnaby in its first three years. Looking into the future, the Burnaby Elementary Programme will grow. I project that the programme will grow to about 175 children in Kindergarten to Grade 6 within the first 10 or so years of the programme's existence. That reflects about a 35% participation rate of the proxy universe, which is similar to the growth that was experienced at École Élémentaire des Navigateurs. Enrolment might grow or shrink after that. As I explained in Chapter VII, The Number of Children, the evidence of population forecasting only extends to 2023, and that forecasting grows less reliable over time. Given a lack of evidentiary basis, I cannot draw any conclusions about the anticipated future growth more than 10 years into the future, as that growth is not reasonably foreseeable.

[5198] Turning to the number of children likely to attend the elementary component of the École des Pionniers Replacement Project from the Proposed Coquitlam Catchment Area, I conclude that about 253 of the 615-child proxy universe attend École des Pionniers. The proxy participation rate at École des Pionniers of students from that catchment area is therefore 41%. This is a relatively high participation rate as compared to some others, but it leaves some room for the participation rate to grow. Given the nature of the community in Port Coquitlam, I infer that the CSF is likely to achieve a strong participation rate.

[5199] The CSF has replaced an existing owned homogeneous elementary/secondary school once, in Victoria. École Victor-Brodeur was announced for replacement in about 2004, and opened as a newly-built elementary/secondary school in January 2007. École Victor-Brodeur re-opened in January 2007, with 272 students in Kindergarten to Grade 7. In 2014/15, it had 531 children enrolled in those grades. Its elementary enrolment grew by 259 children, or 95% in those years.

[5200] Dr. Landry found that in 2011, there were 1,075 elementary-age children (age 5-13) with a Mother-Tongue Rightsholder parent living in the Greater Victoria region. Assuming that universe remained constant, École Victor-Brodeur's participation rate grew from 25% of elementary-age children in 2006/07 to 49% of elementary-age children in 2014/15. This represents growth in the participation rate by about 24%.

[5201] There are some parallels between École Victor-Brodeur and École des Pionniers. Both are elementary/secondary schools that are owned by the CSF. Both exist in predominantly urban areas while serving some communities from outlying areas. There are strong French-language communities in both regions. Both schools are being rebuilt to offer better amenities in buildings that once posed many health and safety problems.

[5202] École Victor-Brodeur's catchment area includes a Canadian Forces Base with a strong Francophone presence, which likely leads to higher participation rates than can be expected in most areas in the province. Similarly, École des Pionniers is home to the only historic homogeneous Francophone community in the province, Maillardville. This suggests that École des Pionniers might also experience a higher participation rate than the CSF sees elsewhere in the province.

[5203] Taking into account all the surrounding circumstances, I conclude that the CSF can reasonably expect about 370 elementary-age children from the Proposed Coquitlam Catchment Area to attend École des Pionniers. This reflects a participation rate of about 60%: growth to the participation rate by 19%, a lower

magnitude of growth than occurred in Victoria, but reflecting a higher ultimate participation rate than the CSF was able to achieve in Victoria.

[5204] Thus, by my calculation, about 560 students are eligible to attend École des Pionniers, not including those students that live in the Proposed Burnaby Catchment area who would attend the CSF's Proposed Burnaby Elementary Programme.

[5205] At the secondary level, I find that a reasonable proxy for the universe of secondary-age children is about 515 children. 148 secondary-age children attend École des Pionniers' secondary component. As a result, École des Pionniers' current proxy participation rate of secondary students from the Current École des Pionniers Catchment Area is about 29%. This allows some room for the proxy participation rate to grow. This is particularly so given that École des Pionniers serves a historic Francophone community, and has traditionally seen strong cohort retention and a high participation rate. However, the CSF will always struggle to retain students through secondary grades.

[5206] École Victor-Brodeur, too, was rebuilt with better secondary amenities than were previously available. Its enrolment in Grades 8 through 12 was 123 students when the new school opened in 2006/07. Its enrolment in those grades grew to 183 by 2014/15. That reflects growth of about 60 students, or by nearly 50%.

[5207] Dr. Landry provided evidence about the potential number of secondary-age rightsholders living in the Greater Victoria area. His evidence is that there are a total of 503 secondary-age children in the catchment area with a Mother-Tongue Rightsholder parent. Assuming the total universe of secondary-age rightsholders remained stable over time, the participation rate grew from about 24% in 2006/07 to 36% in 2014/15. In other words, the participation rate at the secondary level grew by 12%.

[5208] Taking into account all the surrounding circumstances, I consider that the CSF can reasonably expect about 190 children to participate in the secondary component of a combined elementary/secondary programme in a newly-built École

des Pionniers. That reflects a participation rate of about 37%, which is similar to what the CSF was able to achieve in Victoria, while reflecting enrolment growth of about 15%, just more than the growth at the secondary level at École Victor-Brodeur.

D. Entitlement

[5209] I conclude that about 560 students in Kindergarten to Grade 12 are likely to attend a newly-constructed École des Pionniers on its current site. There does not appear to be any dispute that this number falls at the upper end of the sliding scale, warranting homogeneous instruction in a newly-constructed facility. Indeed, the Province has approved a newly-constructed facility for the CSF in Coquitlam.

[5210] There is a question, though, whether a new school is warranted for Burnaby in addition to the school that is being built in Port Coquitlam. I address my approach to the entitlement question in Chapter VIII, Entitlement.

1. Appropriate Comparator Schools

[5211] Because of the local focus of the entitlement analysis, as a general rule, the appropriate comparator schools will be schools within the catchment area of the minority language school. Those are the schools that are reasonable alternatives for rightsholder parents.

[5212] In this instance, the appropriate comparator schools for the Burnaby Elementary Project are all those that overlap with the Proposed Burnaby Catchment Area in SD41-Burnaby, SD40-New Westminster and SD43-Coquitlam. The maps show that there are a number of rightsholder parents sending their children to École Élémentaire Anne-Hébert and École des Pionniers from all of those areas.

2. Location on the Sliding Scale

[5213] As I explain in Chapter VIII, Entitlement, the entitlement question begins by placing the number of children on a sliding scale of entitlement that ranges from instruction (at the low end) to distinct, equivalent homogeneous facilities (at the high

end). When situating the numbers on the sliding scale, the concern is what is appropriate and practical to provide to the number of students given considerations of pedagogy and cost.

[5214] Enrolment at comparator schools is a useful measure for assessing whether it is pedagogically appropriate and cost-effective to operate a distinct, equivalent homogeneous school. The operating capacity of comparator schools also gives insight into the number of children for which it is financially appropriate to build a new school in a given region. The CSF is entitled to some deference to its determination of whether it is pedagogically appropriate to operate a programme.

[5215] The Court does not have evidence about comparator schools specific to the Proposed Burnaby Catchment Area's geographic region. The schools are not marked on the map of the proposed catchment area.

[5216] The Proposed Burnaby Catchment Area overlaps with the Current École Élémentaire Anne-Hébert and École des Pionniers Catchment Areas, and will carve off a portion of each of them. The Joint Fact Finder visited some of the schools in the Current École Élémentaire Anne-Hébert Catchment Area and reported on their capacities. The Court also received evidence concerning enrolment at those schools. However, the Fact-Finding Team did not study schools in SD43-Coquitlam, which will form a significant portion of the Proposed Burnaby Catchment Area.

[5217] As a result, I will consider only a subset of comparator schools: those schools in the Current École Élémentaire Anne-Hébert Catchment Area that form part of SD41-Burnaby and SD40-New Westminster, and therefore clearly fall within the Proposed Burnaby Catchment Area. I recognize, though, that this provides a limited portrait of the enrolment and capacity at the comparator schools.

[5218] The Joint Fact Finder provided evidence concerning 19 comparator schools in SD40-New Westminster and SD41-Burnaby. The average operating capacities for those schools is 353 children. However, three schools were built to accommodate fewer than 200 children in Kindergarten through Grade 7: Connaught

Heights Elementary (88 students); Glenwood Elementary (158 students) and Brantford Elementary (158 students).

[5219] At those comparator schools, the average enrolment was 392 students. Two schools had enrolment of fewer than 200 students: Glenwood Elementary (105 students) and Connaught Heights Elementary (132 students). A further four schools have enrolment of fewer than 250 students.

[5220] I have determined that in the near-term future, in the first three years of the programme, somewhere between 15 and 40 children can be expected to attend the Burnaby Elementary Project. Generally, the Province does not build new schools in the Proposed Burnaby Catchment Area-- or elsewhere in the Province-- with operating capacity for 15 to 50 children, nor do majority school boards in the area operate schools with capacities that low. Given the size of comparator schools in the area, it is not financially or pedagogically appropriate for the CSF to build a new school for that programme. Thus, in those early years, the numbers will fall at the bottom of the sliding scale and warrant only instruction in a series of classrooms

[5221] However, within 10 or so years of the start of the programme, the numbers will warrant something else. As the Burnaby Elementary Project grows, its reasonably foreseeable enrolment could reach about 175 children. At least three comparator schools have been built to a smaller capacity, two of which have lower enrolment. Thus, it is pedagogically and financially appropriate for the CSF to have a new school in the area once it has grown its programme to a size comparable to those schools. Given the similarities in size between comparator schools and the Burnaby Elementary Project, I conclude that within 10 years of the start of a CSF programme in Burnaby, the numbers will fall at the high end of the sliding scale, warranting distinct, homogeneous facilities that offer a global educational experience equivalent to what is offered at small majority schools in the community where the rightsholders live.

3. Transportation Times

[5222] The plaintiffs suggest that the Burnaby Elementary Project is warranted to reduce long travel times for students in the Proposed Burnaby Catchment Area. The defendants' point of view is that the needs of rightsholders in the Proposed Burnaby Catchment Area are being met at École Élémentaire Anne-Hébert and École des Pionniers. They take the position that transportation times to those schools from the Proposed Burnaby Catchment Area are not overly long. I take this to be an argument that rightsholders' children already have access to a school "in their community".

[5223] The evidence shows that of those students who attend École Élémentaire Anne-Hébert or École des Pionniers and live in the CSF's Proposed Burnaby catchment Area, students live on average about 12.16 km away from school. About 60% of those students children live less than 12 km from school. About 4% live more than 20 km from school. Those same children live, on average 1.7 km away from the nearest majority school.

[5224] The plaintiffs prepared charts showing the average travel time (by car) from students' primary home address to École Élémentaire Anne-Hébert or École des Pionniers as compared to the nearest majority school. That chart shows that students live, on average, a 19-minute drive from the CSF school, as compared to about a 3-minute drive from the nearest majority school. About 28% of students live a 15 minute drive or shorter from the CSF school that they attend. About 7% live a 25 to 26 minute drive from the nearest CSF school; none live further than 26 minutes away. The argument does not show bus ride times specific to students in those areas.

[5225] The Court also heard evidence concerning transportation times from Ms. Claire Bossavit, a parent of two Francophone children aged six and three. She testified about the reasons underlying her choice of schools and daycare for her children.

[5226] Ms. Bossavit explained that her son attended English-language preschool and daycare at Simon Fraser University before attending Forest Road Elementary, an SD41-Burnaby school near her home. Her daughter attended daycare at Simon Fraser University, then daycare at Forest Road Elementary.

[5227] Ms. Bossavit chose to enrol both her children in daycare at Simon Fraser University because of its proximity to her work, and the absence of Francophone daycare services near her home. Later, Ms. Bossavit's daughter began attending full-time daycare at Forest Grove Elementary because it is close to her home, and to allow her to save time dropping her children in the morning.

[5228] After learning about the CSF from colleagues, Ms. Bossavit enrolled her children at the École des Pionniers Strong Start. However, the drive to the programme was 30 minutes in each direction. She only attended the Strong Start programme a few times.

[5229] When her son approached Kindergarten, Ms. Bossavit attended an open house for the École des Pionniers Kindergarten programme. Although she was impressed by the school, she was concerned that her son would not be able to behave on a bus trip of 45 to 50 minutes. She was also concerned she would not be able to fully participate in the school community because it was distant from her home. As a result, she decided not to enrol her son at École des Pionniers.

[5230] Ms. Bossavit also considered enrolling her son in a local French immersion programme, about a 10-minute drive from her home. That school offered neither transportation services, nor before- or after-school care. Ms. Bossavit also lacked confidence in the level of French spoken in immersion programmes. She decided an immersion education was not worth the complexity of finding after-school childcare.

[5231] Ms. Bossavit testified that she wanted for any school bus trip for her children to be 30 minutes or less, and also to have arrangements for before- and after-school

care. She stated that she would consider a minority school if it had those services, but even then she would not be sure.

[5232] According to Ms. Bossavit, it was not possible for her family to move closer to École Élémentaire Anne-Hébert due to the cost.

[5233] Overall, I find that Ms. Bossavit decided against a CSF school -- as well as an immersion school -- because of convenience, which is understandable for a working parent. As a result, I am not entirely persuaded that Ms. Bossavit would have chosen a CSF programme in Burnaby if one existed. It would depend entirely on where that programme was located and whether it offered after-school care.

4. Conclusion

[5234] As I see it, students living in the Proposed Burnaby Catchment Area live a significant distance from the nearest CSF school. Given the very low rate of participation of Burnaby families in minority language education, the distance to the nearest CSF school seems to deter some parents from enrolling their children in a minority language school.

[5235] As I explain in Chapter VI, *The Respective Roles of the Province and the CSF*, the CSF has a right to management and control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. This includes a measure of management and control over facilities themselves (*Mahe* at 371-372) and the right to establish programmes of instruction (*Mahe* at 377). In *Arsenault-Cameron*, the Court held that minority language boards have the right to determine the location of minority language instruction and facilities. The Minister was held to owe some deference to the school board's judgment that shorter travel times were appropriate to prevent assimilation, and to the geographic boundaries for assembly of students (at paras. 48-50, 57).

[5236] The CSF has determined that it is appropriate to accommodate children from the Proposed Burnaby Catchment Area in a new elementary school programme to reduce travel times. The right to do so falls squarely within its right to

management and control. The defendants must not stand in the way of the CSF's decision in that respect.

[5237] However, this does not mean that the Province is obliged to fund the Burnaby Elementary Project in the early years of that programme. There is a temporal aspect to the number of children likely to take advantage of a programme. Given the small numbers that can be expected in the early years of the new programme, the Province is not required to build a new homogeneous school facility for those students immediately. The defendants need only ensure that baseline instructional services are provided until the numbers warrant more. It is simply not practical to expect the Province to construct a new facility for 175 children before any programme has taken hold in a geographic region. Once the programme exists and the numbers grow, a new school may be warranted to ensure educational equivalence between the minority and majority.

[5238] The situation in Burnaby is complicated by the École des Pionniers Replacement Project. The CSF's planning in Port Coquitlam for many years centred on the idea of operating a single regional elementary school. École des Pionniers is being reconstructed with space for 660 students. Only 560 students can reasonably be expected to attend that school from the Proposed Coquitlam Area. It is therefore being overbuilt by about 110 students, which provides ample room to accommodate current demand in Burnaby in the immediate future. If the CSF were to acquire instructional space in Burnaby for up to 175 students, École des Pionniers would be under-enrolled.

[5239] While the CSF could ultimately become entitled to space for 735 students across the Proposed Burnaby Catchment Area and the Proposed Coquitlam Catchment Area, if the CSF wants to add space for 175 elementary students in Burnaby, the CSF must find a way to use or dispose of its excess capacity at the newly-built École des Pionniers. Alternatively, it can start a smaller programme in Burnaby, which might warrant something less than a distinct, equivalent homogeneous school. The CSF will have to make the hard decisions about where

and how much space to add in Burnaby to reduce travel times while making effective use of its regional school.

E. Causation, Responsibility and Findings Relevant to the Systemic Claims

[5240] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that the Province and the CSF have overlapping jurisdiction over minority language education. Either or both can cause a breach of s. 23. As a result, I trace the history of minority language education in Burnaby and Port Coquitlam and the dealings of the CSF, the Ministry and majority school boards in connection with it.

[5241] The claim for Port Coquitlam differs from others because the plaintiffs abandoned their claims in connection with Port Coquitlam except for the claim concerning long transportation times and education in Burnaby, as well as a claim for *Charter* damages related to the facilities at École des Pionniers prior to the construction of the École des Pionniers Replacement Project. They also maintain their claim for special costs.

[5242] However, I begin by tracing the CSF's early history in Coquitlam with a view to making findings relevant to the plaintiffs' claims concerning the capital funding system. The findings I make here are particularly relevant to Chapter XXXVII, Building Condition Projects and the Building Condition Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

[5243] Previously, the CSF also maintained a claim related to the scope of the École des Pionniers Replacement Project. I review that evidence because it remains relevant to responsibility for the situation in Burnaby. It is also relevant to the plaintiffs' systemic claim that it is disadvantaged by the Ministry's enrolment projection practices, contrary to s. 23, which I address in Chapter XL, Administrative Requirements of the Capital Funding System.

[5244] Then I review the history of Francophone education in Burnaby, making findings concerning responsibility and the plaintiffs' claims concerning the capital

funding system. Those findings are relevant to Chapter XXXV, Leases; Chapter XXXVI, Expansion Projects and the Enrolment Driver; and Chapter XXXVIII, Site and School Acquisition Projects.

1. Port Coquitlam Capital Planning History

[5245] In the CSF's earliest plans, it envisioned acquiring a school from SD43-Coquitlam and using it to house elementary and secondary students from Coquitlam, New Westminster, east Burnaby, Port Moody and Port Coquitlam. At the time of its December 1997 Capital Plan Submission for 1998/99, the CSF was focused on SD43-Coquitlam's Alderson Elementary site. In negotiations, SD43-Coquitlam suggested a preference for a long-term lease, joint-use agreement or the sale of a footprint on the site.

[5246] In the September 1998 Capital Plan Submission for 1999/00 and June 1999 Capital Plan Submission for 2000/01, the CSF's plan changed to building a new elementary/secondary school on a footprint at a different SD43-Coquitlam site, Millside Elementary. That project was the CSF's third-highest ranked priority in September 1998, and second highest in June 1999. The CSF did not proceed with a project at Millside Elementary because soil conditions were prohibitive.

[5247] The CSF's attention shifted to the former Terry Fox Secondary, a school that was slated for demolition by SD43-Coquitlam. The Ministry funded the acquisition of Terry Fox Secondary by way of an arrangement that allowed SD43-Coquitlam to retire a loan it had taken to build a replacement secondary school.

[5248] Dr. Ardanaz confirmed that École des Pionniers opened at Terry Fox Secondary in September 2000. The CSF was able to house all of its students in the area there, and had space for community functions and full-day kindergarten.

[5249] According to Dr. Ardanaz, École des Pionniers was in need of serious renovations, which were executed in a number of steps. In its June 2000 Capital Plan Submission for 2001/02, the CSF's top priority was health and safety upgrading to École des Pionniers at Terry Fox Secondary. Further renovation projects at École

des Pionniers were ranked as the CSF's fifth-, sixth-, eleventh-, twelfth-, thirteenth-, fifteenth-, sixteenth-, nineteenth-, twentieth- and twenty-second ranked priorities.

[5250] The CSF included capital renovations to École des Pionniers in its Capital Plan Submission from 2001 through 2007. Beginning in 2006, though, the CSF began seeking a seismic renovation to École des Pionniers. That project was the CSF's highest priority in its November 2006 Revised Capital Plan Submission for 2007/08 and its October 2007 Capital Plan Submission for 2008/09.

[5251] With its May 2009 Capital Plan Submission for 2009/10, the CSF moved to a ward-based approach to its Capital Plan Submissions. That year, the CSF requested the École des Pionniers Replacement Project for the first time, as its highest-priority project in the Fraser Valley ward. Mr. Bonnefoy recalled that seismic reports showed it would be prohibitively expensive to renovate the building, necessitating a full replacement. Due to the building condition, the CSF requested accelerated funding for the project beginning in the first year of the Ministry's capital budget. The CSF also submitted a June 2009 PIR in support of its request.

[5252] Mr. Allison became Secretary-Treasurer in 2010. In its June 2010 Capital Plan Submission for 2010/11, the CSF proposed the École des Pionniers Replacement Project again. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, the project was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The Echo Report suggested the CSF considered it to be its eighth-highest priority. From the Ministry's perspective, the project was a high priority.

[5253] The CSF updated its 2009 PIR for the École des Pionniers Replacement Project in January 2011, and submitted it to the Ministry. The CSF requested a school with a capacity for 80K-475 Grade 1-12 students. The update suggested a total project cost of \$23.2 million.

[5254] On May 11, 2012, the Ministry announced \$122 million in new funding for 14 seismic projects, including a project at École des Pionniers.

[5255] Although the École des Pionniers Replacement Project had already been approved, in its November 2012 Capital Plan Submission for 2012/13, the CSF requested the École des Pionniers Replacement Project again, but with increased capacity. The CSF sought space for 660 students instead of the 555 students it had originally requested.

[5256] CSF staff and Ministry staff had a dispute about the capacity for the École des Pionniers Replacement Project, which I discuss in some detail. The final Project Agreement for the École des Pionniers Replacement provided for a school with a capacity for 560 students, while indicating that planning should allow for a future addition to accommodate up to 660 students.

2. Acquiring École des Pionniers

a) Acquisition of Terry Fox Secondary

[5257] Acquiring a homogeneous school in Coquitlam was one of the CSF's earliest priorities. The CSF worked with SD43-Coquitlam toward the acquisition of two schools: Alderson Elementary and Millside Elementary. The proposal for Alderson Elementary did not go forward because SD43-Coquitlam did not want to give the CSF that school. The site at Millside Elementary made it inappropriate for the construction of a new school.

[5258] Dr. Ardanaz eventually learned that SD43-Coquitlam planned to demolish and sell Terry Fox Secondary. According to Dr. Ardanaz, this option was not ideal, since Terry Fox Secondary was located in Port Coquitlam, at some distance from the Francophone community in Maillardville. On the other hand, Terry Fox Secondary was significantly larger than the other sites the CSF had examined. Dr. Ardanaz imagined that the CSF could centralize all of its programmes in that school, and perhaps construct a second school elsewhere.

[5259] Mr. Miller advised that he first heard of Terry Fox Secondary from Dr. Ardanaz around the fall of 1999. Mr. Miller was aware the school was closed, as SD43-Coquitlam had built a replacement school on a different site. SD43-Coquitlam had funded the replacement project by way of a \$10 million loan that would be repaid from the proceeds of the sale of Terry Fox Secondary. However, Mr. Miller confirmed that it later seemed that SD43-Coquitlam would only be able to realize \$2.5 to \$5 million from the sale of Terry Fox Secondary by way of a private sale.

[5260] After Mr. Miller and Dr. Ardanaz visited Terry Fox Secondary, Dr. Ardanaz called an emergency meeting of the CSF Board of Trustees. While the trustees were concerned about moving the school outside Maillardville, they resolved to explore the opportunity further.

[5261] Dr. Ardanaz confirmed the CSF's interest to the Ministry in about November 1999, and Mr. Miller began arranging the transfer. The arrangement provided that SD43-Coquitlam would transfer Terry Fox Secondary to the CSF, less a portion of the site that SD43-Coquitlam would retain for an elementary school. Terry Fox Secondary would be renovated for the CSF's use at an estimated cost of \$1 million. As compensation, the Ministry retired SD43-Coquitlam's \$10 million loan.

[5262] As the CSF was preparing to occupy Terry Fox Secondary in the summer of 2000, Dr. Ardanaz received a letter from SD43-Coquitlam staff, who explained that the City of Port Coquitlam had expressed serious concerns upon learning that Terry Fox Secondary would not be demolished because the building did not have adequate fire protection. The CSF also engaged experts to report on the condition of Terry Fox Secondary, who identified a number of health and safety deficiencies.

[5263] Dr. Ardanaz explained that upon receiving the report, the Board took the view that students could not occupy the school unless it was brought up to code. Dr. Ardanaz brought the concerns to the attention of Ministry staff, who assured Dr. Ardanaz that the Ministry would help correct the issues.

[5264] Mr. Miller advised that the Ministry funded renovations for health and safety improvements to allow the CSF to occupy Terry Fox Secondary Site, some on an emergent basis. The CSF then occupied the school beginning in September 2000.

[5265] Dr. Ardanaz confirmed that the old Terry Fox Secondary re-opened as École des Pionniers in the second week of September 2000. Ms. Chagnon served as one of the early principals at École des Pionniers after it opened at Terry Fox Secondary. She explained that the CSF used one wing for primary grades, another for intermediate, and a secondary wing for Grades 6 through 10. Secondary students had access to a theatre and specialty classrooms for cooking, music and art. The school hosted sport tournaments with other Francophone schools in the Lower Mainland. It also provided space for a preschool programme and worked with the Maillardville Francophone Association on cultural events like a Festival du Bois.

[5266] In Ms. Chagnon's time, transportation at École des Pionniers was problematic. She lived in North Burnaby to the west of the Current École des Pionniers Catchment Area, and it took her 40 minutes to drive to work. Her son attended École des Pionniers as a student and travelled to school by bus for about an hour. Buses were occasionally late due to traffic.

[5267] École des Pionniers was large for the CSF's enrolment. According to Dr. Ardanaz, the Ministry's encouragement, the CSF leased some space on the second floor of the school to the BC Christian Academy. In Dr. Ardanaz's view, the arrangement was always temporary to generate revenue, as the CSF would have preferred homogeneity.

[5268] Ms. Chagnon explained that the B.C. Christian Academy was located in a separate wing on the second floor of the school, but shared the École des Pionniers gymnasium and cafeteria. The two schools shared the gymnasium and cafeteria. Ms. Chagnon recalled issues coordinating recess, lunches and bus pick-up and drop-off at different times to prevent overcrowding the schoolyard. There were also occasional conflicts between BC Christian Academy students and École des

Pionniers students. Every year, École des Pionniers took a bit more space from the independent school to serve its own population.

b) Delay in Transfer of Ownership

[5269] In late 2004 or early 2005, the B.C. Christian Academy wanted to place a portable on the École des Pionniers site. In the course of investigating that idea, Mr. Bonnefoy discovered that title to Terry Fox Secondary had not been properly transferred to the CSF.

[5270] In February 2005, Mr. Bonnefoy wrote to SD43-Coquitlam and expressed his view that SD43-Coquitlam ought to have transferred the entire Terry Fox Secondary site to the CSF, subject to SD43-Coquitlam's right to retain part of the property for an elementary school. He asked SD43-Coquitlam to proceed with its disposal process so title could be transferred to the CSF. Thereafter, he spoke with SD43-Coquitlam officials by telephone on several occasions, but the transfer did not go forward.

[5271] By May 2008, SD43-Coquitlam still had not transferred title to the CSF. Mr. Bonnefoy and representatives from the Ministry and SD43-Coquitlam discussed the issue through a series of meetings and letters around that time. The CSF argued that SD43-Coquitlam no longer had any rights to a portion of the site because it had built its elementary school elsewhere and its loan had been retired.

[5272] Having seen no progress by December 2008, Mr. Bonnefoy wrote to the Secretary-Treasurer of SD43-Coquitlam and suggested that the CSF might issue a Notice to Mediate as required under the *Education Mediation Regulation*. Mr. Bonnefoy explained that SD43-Coquitlam transferred title to Terry Fox Secondary to the CSF about a month later.

c) Conclusions

[5273] Since the FEA's earliest days, it has sought space for an elementary/secondary programme in Coquitlam. That project was consistently one of its highest-ranked capital project requests prior to 2000.

[5274] The evidence shows that SD43-Coquitlam was reluctant to dispose of a site to the CSF, and preferred a long-term lease or shared-use arrangement. The CSF initially pursued that type of arrangement. The first potential arrangement fell through because of a lack of interest from SD43-Coquitlam; the second fell through for logistical and engineering reasons.

[5275] After those proposals, the CSF pursued the acquisition of Terry Fox Secondary, a vacant school that by all accounts was in poor condition, and had been replaced on a different site. It was not in an ideal location for the CSF. However, the CSF pursued the project anyway because the school was a very large one-- larger than the CSF needed-- and presented an opportunity for the CSF to consolidate several programmes under one roof. This shows that in its early years, the CSF was willing to endure longer travel times to have larger, homogeneous Francophone schools instead of smaller facilities closer to students' homes.

[5276] The Ministry funded the CSF's acquisition of Terry Fox Secondary in 2000. SD43-Coquitlam had always planned to fund its replacement of the school by disposing of Terry Fox Secondary. SD43-Coquitlam had taken out a \$10 million loan and planned to pay the loan off once it had sold off the school. The Ministry paid off that loan as part of the transaction, even though the school likely would have been worth less if it were sold to a developer for a private sale.

[5277] As the transfer was being negotiated, the CSF received information that Terry Fox Secondary required serious health and safety upgrades. At the time of the transfer, the Ministry approved \$1 million in funds for the CSF to renovate the school. These allowed the CSF to occupy the building in the fall of 2000.

[5278] Although Terry Fox Secondary was ostensibly transferred to the CSF in 2000, SD43-Coquitlam did not pass title to the school to the CSF until many years later. The problem seems to have arisen out of the fact that the parties originally envisioned that SD43-Coquitlam would retain a parcel of the site for an elementary school. SD43-Coquitlam elected not to build the elementary school there, and built its new elementary school elsewhere.

[5279] Mr. Bonnefoy discovered the problem in 2005 and brought it to SD43-Coquitlam's attention. The problem was discussed again in 2008. When the issue was not resolved after two meetings, in December 2008, Mr. Bonnefoy told the Secretary-Treasurer for SD43-Coquitlam that the CSF was prepared to issue a Notice to Mediate as required under the *Education Mediation Regulation*. One month later, SD43-Coquitlam transferred Terry Fox Secondary to the CSF.

[5280] École des Pionniers was arguably larger than the CSF needed when the CSF acquired it. The Ministry supported the transfer anyway. It provided space for the Francophone community to congregate. The CSF was also able to lease some of its surplus space to an independent religious school for a profit. This created a heterogeneous environment, which the CSF was willing to endure at the time for financial reasons.

[5281] However, the school was also in poor condition. After the CSF acquired the building, the CSF requested a number of further health and safety renovations to École des Pionniers, which the Province funded over a number of years. The CSF consistently requested renovations to École des Pionniers through 2007. Beginning in 2006, the CSF also began requesting a seismic upgrade to École des Pionniers.

[5282] In 2009, the CSF requested the École des Pionniers Replacement Project for the first time, and considered moving the school to a different location. The CSF prepared a PIR for the École des Pionniers Replacement Project in about June 2009, which evaluated different options. By 2010, though, it had ceased asking to replace École des Pionniers on a different site.

3. The Scope of the École des Pionniers Replacement Project

[5283] In May 2012, the Ministry announced support for the École des Pionniers Replacement Project as a seismic project, with capacity for 555 students, as requested by the CSF. The Project Agreement was signed in November 2012, allowing space for 550 students with space for a future addition to bring capacity to 660 students.

[5284] The plaintiffs initially argued that the Ministry had breached s. 23 by failing to build sufficient space to accommodate its anticipated enrolment at École des Pionniers. Since then, the Project Agreement has been amended to reflect the CSF's desired capacity for 660 students. I describe that evidence here, as it is relevant to responsibility for the situation in Burnaby as well as the CSF's claim that the Province's enrolment projection practices are contrary to s. 23.

a) 2012 Ministry Work on CSF Enrolment Projections

[5285] In about 2012, the Ministry developed a new approach to dealing with enrolment projections for the CSF. I discuss this approach in detail in Chapter XL, Administrative Requirements of the Capital Funding System, in connection with the plaintiffs' claim that the Ministry's enrolment projection processes breach s. 23.

[5286] In June 2011, Mr. Ouimet, the CSF President, wrote to the Minister and requested enrolment projections from the Ministry. That request was refused by way of a letter to Mr. Allison in December 2011.

[5287] Despite Deputy Minister Gorman's initial refusal, shortly after his letter to Mr. Allison, staff in the Capital Branch began working with BC Stats on enrolment projections for the CSF. To Mr. Stewart's recollection, this was the first time that Ministry staff looked at projecting enrolment specifically for the CSF.

[5288] Mr. Stewart advised that the Ministry engaged BC Stats to estimate the number of students eligible to attend CSF schools in specific geographic areas and the number of children likely to attend a CSF programme. According to Mr. Stewart, the work that BC Stats did was not particularly helpful because it undercounted the number of eligible children and because the Ministry was prepared to accept that the CSF could expect better participation rates than the work suggested.

b) Projections for the École des Pionniers Replacement Project

[5289] When the Province announced support for the École des Pionniers Replacement Project in May 2012, the CSF had requested an 80K/475

elementary/secondary capacity school. By November 2012, the CSF had changed its requested capacity to 60K/600 elementary/secondary students.

[5290] In October 2012, Mr. Allison sent Mr. Cavelti and Mr. Stewart a draft PDR, which showed that a replacement would be the most cost-effective option for responding to the CSF's need. The draft PDR also set out the CSF's enrolment forecasts and intended capacity for the École des Pionniers Replacement Project. The CSF wrote, and Mr. Allison confirmed, that École des Pionniers' enrolment at the times was 395 students: 39 Kindergarten, 233 Grade 1-6 and 123 Grade 7-12 students. Another 70 children were enrolled in daycare, pre-school and Strong Start. The CSF wrote that it was targeting a design capacity for 60 full-day Kindergarten students, 350 Grade 1 to 6 and 250 Grade 7 to 12 students, for a total of 660 students. The CSF also sought space for early childhood education programmes.

[5291] Mr. Palmer reviewed and discussed the PDR with Mr. Cavelti, as was their usual practice on receiving a draft PDR. He acknowledged there was no question that the Ministry would fund a full replacement project. The Ministry's main issue was with the CSF's identified scope, particularly the capacity of the proposed school. He was concerned that the CSF was projecting a jump from 395 students to 660 students without a detailed rationale. The CSF did not use the Ministry's standard format projecting enrolment by grade level into the future. While the Ministry was prepared to accept that enrolment at École des Pionniers would increase with a new school, it wanted to see some methodology to quantify the anticipated growth. Without a detailed rationale, it would be challenging for the Minister to justify the project scope before Treasury Board.

[5292] As a result of his concerns, Mr. Palmer asked Mr. Cavelti to respond to Mr. Allison with specific questions, as is their typical practice. On October 12, 2012, Mr. Cavelti wrote to Mr. Allison and asked for the CSF's enrolment projections by year up to the 2021/22 school year, and asked how those projections would be affected if the CSF moved forward with its Burnaby programme.

[5293] Mr. Allison responded to part of Mr. Cavelti's concerns on October 23, 2012. He wrote that the CSF did not have reliable enrolment projections for École des Pionniers. He explained that although the CSF had relied on cohort-retention enrolment data in the past, the method was unsatisfactory because it did not account for the number of students that "could enrol" in a CSF school if better-quality facilities were available. He noted that the CSF was working on a methodology that it hoped would allow it to produce more reliable projections by early 2013.

[5294] Mr. Allison provided Mr. Cavelti with several tables that identified the universe of eligible children based on 2006 census data, both including and excluding Burnaby. The CSF's first table, showing the children of Mother Tongue Rightsholders in Coquitlam, excluding Burnaby, was the most conservative. It projected that the universe of eligible children in the area would grow to 73 five-year olds, 456 children age 6-12, and 520 children age 13-17 by 2021.

[5295] Mr. Palmer testified that this data was not satisfactory from the Ministry's point of view because it focused on the universe of children rather than the number of children that would actually enrol in a CSF programme. Mr. Palmer was also concerned the CSF was planning to reconsider its enrolment projection methodology without Ministry involvement: a difficult prospect because both the Ministry and the CSF would need to find the methodology acceptable.

[5296] Mr. Palmer testified, though, that he was open to having a conversation with the CSF about its enrolment projection methodology. His first instinct was to take as a starting point the experience in other communities where the CSF had built new schools, and to try to calculate a participation rate from there. He discussed this view with Mr. Cavelti.

[5297] After discussing the issue with Mr. Palmer, Mr. Cavelti responded to Mr. Allison on October 25, 2012. Using the CSF's data concerning the universe of eligible children in Coquitlam (excluding Burnaby), he suggested to Mr. Allison that the CSF had an average participation rate of about 37%. Mr. Cavelti acknowledged that, as Mr. Allison had suggested, the participation rate might not adequately reflect

the effect of a new school. Accordingly, he asked Mr. Allison to provide him with the same demographic information and enrolment data for North Vancouver, Surrey and Victoria, where the CSF had built new schools, to help forecast enrolment for École des Pionniers.

[5298] In response, Mr. Allison wrote to Mr. Cavelti on October 30, 2012, and expressed his view that participation rates were not appropriate or helpful for determining the scope of the École des Pionniers Replacement Project. He emphasized that Mr. Cavelti had calculated a participation rate at the CSF's old facility, and had used the most conservative of Mr. Allison's demographic projections. He also stressed that the CSF "entirely disagrees with a methodology that bases its expectations for future enrolment only on its past rate of success in attracting and retaining students."

[5299] In response to Mr. Cavelti's request for information about North Vancouver, Surrey and Victoria, Mr. Allison wrote that it would not be useful for the CSF to provide that information. While under cross-examination, he maintained that those schools already had facility condition issues. He suggested in his testimony that even where the CSF had built new schools - such as École Élémentaire Mer et Montagne (Campbell River) - the CSF did not offer equivalent education, so participation rates were unhelpful.

[5300] In his evidence, Mr. Palmer expressed disappointment with Mr. Allison's response. Mr. Palmer knew that the Ministry could not defend the scope of the École des Pionniers Replacement Project before Treasury Board if it relied on the total universe of children rather than market share. He elaborated that Treasury Board is very concerned with ensuring projects are efficient and well defended.

[5301] Since Mr. Allison resisted the idea of using participation rates, Mr. Palmer and Mr. Cavelti performed their own assessment of the CSF's enrolment projections with the assistance of BC Stats. They relied on the number of children with a Mother-Tongue Rightsholder parent, even though they were aware that would undercount the number of rightsholders in an area. Mr. Palmer believed that it might

not matter what population was used as the denominator for the participation rate so long as the Ministry arrived at the proper number of children that would attend the programme.

[5302] Using the information from BC Stats the Ministry collected in 2012, Mr. Cavelti calculated proxy participation rates for North Vancouver and Surrey to be 28% and 31% of Mother-Tongue Rightsholders' children. He also considered how the participation rates had increased on construction of a new school. That analysis led Mr. Cavelti and Mr. Palmer to conclude that the CSF could likely expect to achieve a 50% participation rate in Coquitlam. Mr. Palmer acknowledged while under cross-examination that it would likely be helpful to add a qualitative lens to that analysis.

[5303] Mr. Cavelti responded to Mr. Allison on November 14, 2012. He suggested that past participation rates could provide useful information in addition to census data. He asked Mr. Allison once again for census information for North Vancouver, Surrey and Victoria because those were newly-constructed and well-established schools. Mr. Cavelti did not inform Mr. Allison that he had already received that type of information from BC Stats for North Vancouver and Surrey. Mr. Palmer's only explanation was that the Ministry wanted to use only the CSF's numbers to ensure consistent denominators.

[5304] Mr. Cavelti provided Mr. Allison with the analysis of participation rates he performed for École des Pionniers, but not for the CSF's other schools. He wrote that the current enrolment supported a school with a capacity for about 400 students, and asked Mr. Allison to provide a better rationale to support his request for a larger school. Mr. Palmer advised that the Ministry did not intend to suggest that the CSF had reached its highest enrolment potential. To the contrary, Mr. Cavelti had stated to Mr. Allison several times that the Ministry accepted the CSF could expect increased enrolment with a new school.

[5305] While he was under cross-examination, Mr. Allison was questioned about his view of what Mr. Cavelti was requesting. Mr. Allison refused to admit that

Mr. Cavelti was attempting to assist him by requesting the information he did. He maintained that Mr. Cavelti ought to find the information for himself, suggesting that the Ministry does that work for majority-language school districts. He admitted, however, that Mr. Cavelti did not have information about the CSF's catchment areas, making it difficult for him to project enrolment at CSF schools.

[5306] Mr. Allison also suggested that he did not have the information Mr. Cavelti provided for all areas of the province; it only had census data for communities in this claim. That is not what Mr. Allison told Mr. Cavelti.

[5307] Mr. Allison responded on November 15, 2012, that, in order to move the École des Pionniers Replacement Project along, he would provide a summary of the data that Mr. Cavelti had requested about the CSF's other schools. Because École André-Piolat (North Vancouver) was in part a renovation, he maintained that it was not relevant, and provided no information about that school. He provided selective information that indicates that the enrolment at École Victor-Brodeur, École Gabrielle-Roy, École Au-cœur-de-l'île and École Élémentaire Mer et Montagne had increased. He gave no information about the demographics in those areas or the amount by which enrolment had increased.

[5308] Mr. Palmer commented that the information that Mr. Allison provided did not correspond with Mr. Cavelti's request. Mr. Allison only provided information about the gross increase in enrolment, and no information on the market of students eligible to enrol, making it impossible to calculate a participation rate. Mr. Palmer also did not understand why École André-Piolat was not included, as Mr. Allison provided no explanation.

[5309] Mr. Palmer advised that he and Mr. Cavelti eventually decided that, based on the information Mr. Allison provided, it seemed to him and Mr. Cavelti that they could justify before Treasury Board a school with capacity for 560 students.

[5310] Mr. Allison reported that after the email exchanges, he spoke to Mr. Cavelti by telephone. Mr. Cavelti suggested to Mr. Allison that the school would be

approved immediately if Mr. Allison accepted a school with capacity for 560 students. If the CSF refused to resile from its request for a 650-student capacity, the project would never go forward. While Mr. Allison was under cross-examination, he conceded that Mr. Cavelti likely used softer language than saying that the school would never be built. He also agreed that he never considered complaining about being told that the Ministry would never build the École des Pionniers Replacement Project to a 660-student capacity.

[5311] Mr. Allison wrote to Mr. Cavelti on November 19, 2012, in connection with their conversation. He suggested that Mr. Cavelti told him it was more likely that the Province would immediately fund a 560-student capacity school than a 660-student capacity school. (While he was under cross-examination, he refused to admit that was closer to what Mr. Cavelti said in conversation). He wrote that in order to move ahead with the project, the CSF would modify its request and seek a school with capacity for 560 students. He conceded in his evidence that he was willing to forego space to move the project forward.

[5312] Mr. Palmer advised that once the PDR for the École des Pionniers Replacement Project was complete, the Ministry prepared a submission to Treasury Board. A Treasury Board analyst reviewed the project in detail and posed questions, then the Ministry was tasked with defending the project. Mr. Palmer could not recall whether Treasury Board staff asked the Ministry to specifically defend the scope of the project.

[5313] In December 2012, while the PDR was under review, Mr. Cavelti wrote to Mr. Allison and asked what portion of the students enrolled at École des Pionniers lived in the CSF's Proposed Burnaby Catchment Area. Mr. Allison responded in an email where he stressed that the numbers he submitted, and that the Ministry used, did not include students in Burnaby.

[5314] While the École des Pionniers Replacement Project Agreement was being finalized, Mr. Allison continued to update Mr. Cavelti and Mr. Palmer about enrolment at École des Pionniers. In December 2012, he sent the Ministry new data

concerning the universe of eligible children based on 2011 census data. That information showed that the universe of eligible children exceeded what the CSF had projected.

[5315] The Project Agreement for the École des Pionniers Replacement Project (the “École des Pionniers Replacement Project Agreement”) was complete on April 13, 2013. Mr. Allison signed it with a view to moving the project forward expeditiously.

[5316] Pursuant to the École des Pionniers Replacement Project Agreement, the school would be built to a design capacity of 560 students, with room for an addition to accommodate up to 660 students. It also allowed for a 15% increase in space for community purposes pursuant to the Ministry’s NLC programme.

[5317] The École des Pionniers Replacement Project Agreement sets out a schedule for cash flow to maintain the project schedule. The project was expected to proceed to tender in about April 2014, which Mr. Palmer stated to be a reasonable amount of time to tender a project. Construction would then begin almost immediately, and end in July 2015, with occupancy and final project completion for September 2015.

[5318] As of the time Mr. Allison testified in December 2014, the École des Pionniers Replacement Project was running about a year behind schedule.

c) Requests to Expand the Scope of the École des Pionniers Replacement Project

[5319] According to Mr. Allison, enrolment at École des Pionniers increased by more than 90 students after the École des Pionniers Replacement Project Agreement was signed. Only five of those students were admitted pursuant to the CSF’s Expanded Admissions Policy.

[5320] In October 2013, Mr. Allison asked Mr. Palmer and Mr. Cavelti to immediately increase the scope of the École des Pionniers Replacement Project

from 560 to 660 students due to the increased enrolment. According to Mr. Allison, Mr. Palmer's response was a "clear no".

[5321] Mr. Palmer explained that if the Ministry wanted to increase the scope of the École des Pionniers Replacement Project, staff would have to justify the increase to Treasury Board. Since Mr. Allison had not provided the Ministry with any new methodology to explain its enrolment projections, Mr. Palmer was not prepared to accede to Mr. Allison's request.

[5322] In light of that response, Mr. Allison reiterated his request by way of a Positioning Letter to Mr. Stewart. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made. Mr. Stewart suggested that the CSF's request to increase capacity would have to be made in a future Capital Plan Submission and be evaluated in light of enrolment in surrounding schools and available capacity in the school area. He specifically pointed to the CSF's request for a new school in Burnaby.

[5323] In his evidence, Mr. Stewart confirmed Mr. Palmer's account that expanding the scope of the project would require a fresh approval from Treasury Board. Like Mr. Palmer, he did not see a good case for justifying the additional space, particularly in light of the work that had been done by BC Stats. He thought the agreed-to scope was reasonable. Further, he confirmed that the Ministry never has sufficient funds to build for maximum potential enrolment; excess enrolment is routinely dealt with through the use of portable classrooms.

[5324] Mr. Allison sent another Positioning Letter to Mr. Stewart on January 23, 2014, this time requesting funding to purchase and install four portables at École des Pionniers to accommodate projected enrolment increases. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made. Mr. Stewart responded on February 27, 2014, reaffirming his prior position. Unsatisfied, the CSF took its complaints to the Minister by way of an April 28, 2014, Positioning Letter, seeking \$350,000 from

the CSF's Restricted Capital to purchase portables for École des Pionniers. Minister Fassbender, too, refused that request.

[5325] Mr. Palmer confirmed that the Ministry did not think the portables were necessary in light of Terry Fox Secondary's more than 700-student capacity, which far exceeded the CSF's enrolment at the time. Furthermore, by Mr. Palmer's account, the Ministry's mandate at that time did not include the provision of preschool and daycare, so the use of four rooms for those purposes would not contribute to the capacity utilization for the entire school.

[5326] In the end, the CSF purchased one portable for École des Pionniers because, in Mr. Allison's view, he had "no choice". The CSF also created an additional classroom in the library, and subdivided a special education space to create a new room. The CSF used AFG funds for the renovations, and operating funding to purchase the portable.

[5327] While under cross-examination, Mr. Allison conceded that the CSF was also using four rooms in École des Pionniers for preschool. He agreed that the effect of requesting portables was effectively to ask the Ministry to subsidize the preschool.

[5328] In December 2014, the CSF submitted to the Ministry a PIR requesting immediate funding for an addition to École des Pionniers to accommodate 100 more students. Mr. Allison hoped the project would be approved so he could construct the addition along with the rest of the École des Pionniers Replacement Project.

d) Expansion of the Scope of the École des Pionniers Replacement Project

[5329] In July 2016, the Court received a letter from counsel for the plaintiffs abandoning the claim for increased capacity at École des Pionniers. The letter reveals that the Province and the CSF agreed to immediately expand the scope for the École des Pionniers Replacement Project to include space for 660 students. There is no evidence concerning the Ministry's reasons for agreeing to expand the scope of the project, or what enrolment projections the Ministry relied on.

e) Conclusion

[5330] The plaintiffs initially argued that the CSF was “forced to accept a lower capacity than required, in order to move the project along”. The defendants argued that the CSF had signed the École des Pionniers Replacement Project Agreement, thus settling the initial capital request. The plaintiffs replied that the CSF’s acceptance of a lower-capacity school, under protest, did not estop the CSF from seeking a higher capacity school. Now, the CSF has abandoned its claim because its school is being built to its desired capacity of 660 students.

[5331] The dispute is relevant to the CSF’s claim for Burnaby. Currently, CSF students from Burnaby attend École des Pionniers or École Élémentaire Anne-Hébert. The extent to which the École des Pionniers Replacement Project is being built to accommodate students from Burnaby is relevant to whether students in Burnaby are receiving all that they are entitled to.

[5332] The events giving rise to the dispute and the capacity are as follows: in November 2012, the CSF began asking for increased capacity to the École des Pionniers Replacement Project, proposing that the school be built with space for 660 students. Its enrolment at the time was 395 students. In support of its request, the CSF pointed to Dr. Landry’s estimate of potentially eligible students living in the Proposed Coquitlam Catchment Area in 2006. That universe excluded children from Burnaby. The CSF indicated to the Ministry that it was devising a new enrolment forecasting methodology for itself, but did not explain what that methodology was. Mr. Allison also defied the Ministry’s request that it provide projections by grade level.

[5333] The Ministry considered that one way of forecasting enrolment for the CSF involved considering participation rate by taking as a starting point the experience in other communities. The Ministry attempted to persuade the CSF to look at enrolment forecasting in that way. Mr. Cavelti began a conversation with Mr. Allison on the topic, and pointed out where the CSF’s participation rate sat. Acknowledging

where the participation rate might grow, Mr. Cavelti asked for information concerning participation rates in other communities to facilitate a dialogue.

[5334] Mr. Allison's responses to Mr. Cavelti's questions were defensive and aggressive. Mr. Allison refused to engage in any discussion about participation rate, and suggested that the Ministry was wrong to look at the experience in other communities where the CSF had built new schools. When Mr. Allison eventually acceded to the Ministry's requests for data, he provided only partial information. He pointed to overall increases to enrolment, with no information about demographics, details of enrolment increases, or data concerning the eligible market of students.

[5335] Having considered all the evidence, I infer that the CSF took this position because it hoped to achieve in Coquitlam a higher participation rate than it had achieved in other areas where it had built new schools. It is my view that the Ministry's approach made it clear to Mr. Allison that Ministry staff were open to discussing the extent to which enrolment might increase. Mr. Cavelti remained calm and reasonable, and was clearly trying to engage in a dialogue with Mr. Allison. Mr. Allison displayed total unwillingness to work collaboratively with the Ministry to justify his demanded capacity as one that was efficient, rational and well-defended.

[5336] Mr. Palmer and Mr. Cavelti undertook their own analysis of the participation rates in Surrey and North Vancouver, focusing on the universe of children with Mother-Tongue Rightsholder parents. They did so even though they were aware that number would tend to undercount the number of eligible children. For the reasons I gave in Chapter VII, The Number of Children, I am satisfied that approach is a logical one. Mr. Palmer and Mr. Cavelti did not tell Mr. Allison they had performed this analysis, and instead continued to press him for census data on those communities to ensure a consistent denominator.

[5337] As the CSF took no steps to justify its desired capacity to the Ministry, the Ministry settled on a 550-student capacity as a reasonable one. Notably, this is consistent with what the CSF originally requested.

[5338] Mr. Allison confirmed that in order to move the project ahead expeditiously, the CSF modified its request to one for a 560-capacity school. The Project Agreement was signed with a view to providing a school of that capacity, with space for an addition to 660 students in the future.

[5339] After the École des Pionniers Replacement Project Agreement was signed, starting in about October 2013, the CSF began requesting an immediate increase to the school's capacity to 660 students. Mr. Allison did not attempt to persuade the Ministry of why that increase was necessary except by pointing to enrolment increases. He did not, for example, point out that the increase was related to a failure to include potential enrolment from students living in Burnaby, likely because the CSF did not want to detract from its chances of opening a new school in Burnaby. The Ministry refused the CSF's requests because it would have required a fresh application to and approval by Treasury Board, and the CSF had not demonstrated its need.

[5340] When that request was refused, Mr. Allison asked for approval to use Restricted Capital to purchase portables. At the time, even accepting the CSF's argument that École des Pionniers' capacity is 679 students, École des Pionniers was operating at about 200 students below its capacity, and used four rooms for preschool. Even taking into account the shop building on the site and early childhood rooms, I am satisfied the CSF had sufficient space for its enrolment.

[5341] Overall, as I see it, prior to the expansion to 660 students, the École des Pionniers replacement project was being built to an appropriate capacity for the number of students likely to attend the programme from the Proposed Coquitlam Catchment Area. Taken together, I conclude that based on its proposed grade configuration, the CSF can expect about 560 children to attend École des Pionniers in a newly-constructed homogeneous school. This is proximate to the number that the Ministry arrived at and the CSF agreed to as a capacity for the École des Pionniers Replacement Project: 550 students. As a result, the École

des Pionniers Replacement Project was being built to accommodate the number of students that are likely to enrol in the proposed programme.

[5342] I find that the project was being built to a lesser capacity because Mr. Allison refused to engage in a dialogue with the Ministry to justify a school with greater capacity, and because he chose to forego space to move the project ahead faster. The Ministry and the CSF must work collaboratively to ensure that the needs of students are met. While the Ministry had access to much of the information that it requested from the CSF, it needed assistance to interpret it. The CSF, under Mr. Allison's leadership, refused to engage in dialogue about the CSF's needs.

[5343] Notably, the universe of children that the Ministry worked from did not include any students from the Proposed Burnaby Catchment Area. Because Mr. Allison would not engage in a dialogue with the Ministry, this was not pointed out to Ministry staff. As a result, the capacity was originally set in such a manner that it only reflected the number of children likely to attend École des Pionniers from the Proposed Coquitlam Catchment Area, not those students from the Current École des Pionniers Catchment Area that live in the Proposed Burnaby Catchment Area. I attribute this to Mr. Allison's negotiation tactics.

[5344] Now that the CSF and the Ministry have agreed to increased capacity for the École des Pionniers Replacement Project, the school is being overbuilt. With space for 660 students, the school will have room for 100 students more than the CSF needs. This provides room to accommodate about 100 students from the Proposed Burnaby Catchment Area.

4. Burnaby

a) Capital Planning History

[5345] In Mr. Bonnefoy's time with the CSF (between 2004 and the end of 2009), the CSF made no capital project requests for Burnaby or New Westminster. Mr. Bonnefoy explained that the CSF did not receive any requests from parents for a

programme in Burnaby. Further, the CSF prioritized École des Pionniers, and considered a Burnaby school to be a long-term prospect.

[5346] Despite the lack of capital requests for Burnaby, the idea of such a programme has been in the back of CSF officials' minds for many years. As I develop in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), in about 2001 the CSF changed its capital project request for Vancouver (West) from a combined elementary/secondary school to a standalone, homogeneous secondary school to be built on the Oakridge Site in Vancouver to serve "the two Vancouver elementary schools as well the Richmond elementary school and the future Burnaby school."

[5347] The Ministry accepted that proposal, leading to the construction of École Secondaire Jules-Verne. However, it is far from clear that projections for Burnaby or a plan to build a Burnaby school formed part of the Ministry's reasons for accepting that proposal. While Mr. Miller stated the Ministry agreed with the logic of the proposal, the proposal he was referring to concerned a new CSF plan to accommodate elementary students on the Oakridge Site pending construction of École Secondaire Jules-Verne, while searching for a site to construct a new school in Vancouver (West). Indeed, Burnaby never formed part of any of the discussions concerning the construction of École Secondaire Jules-Verne.

[5348] Mr. Allison testified that when he started working for the CSF, there was frequent discussion about the "gap" in service between École des Pionniers in Port Coquitlam and École Élémentaire Anne-Hébert in Vancouver (East). After he became Secretary-Treasurer in 2010, he determined it would be appropriate to fill the gap by creating the Proposed Burnaby Catchment Area and starting a new programme there. Deviating from its normal approach, the CSF began planning for a school there without receiving any requests from parents.

[5349] The CSF made its first request for the Burnaby Elementary Project in its June 2010 Capital Plan Submission for 2010/11. The CSF asked to acquire a site large enough to add a secondary wing if one became necessary. That year, the

CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF sought accelerated funding for it in the first two years of the Province's capital budget, contrary to the Province's direction to only seek capital funding starting in the third year of the capital plan. The CSF requested the same projects, with the same form of prioritization, in its November 2012 Capital Plan Submission for 2012/13 and in its October 2013 Capital Plan Submission for 2013/14.

[5350] In support of its September 2013 Capital Plan Submission for 2013/14, the CSF submitted an In-House PIR for the Burnaby Elementary Project dated November 2013. The CSF identified one potential site, a former independent school located at the centre of the Proposed Burnaby Catchment Area.

[5351] In the Echo Report for the September 2013 Capital Plan Submission for 2013/14, the Ministry ranked the Burnaby Elementary Project as NPIR. In an email explaining his concerns with the CSF's PIRs, Mr. Cavelti asked whether the CSF could use the former independent school pending construction of a new school. As the CSF had not listed existing school sites in the PIR, he suggested that the CSF consider acquiring and renovating an existing school. He also requested some analysis of the anticipated impact the Burnaby Elementary Project would have on enrolment at École des Pionniers and École Élémentaire Anne-Hébert.

[5352] In its letter responding to Mr. Cavelti's concerns, Mr. Allison wrote that the CSF had learned that the former independent school was no longer available. In its revised In-House PIR, the CSF did not respond to Mr. Cavelti's concern that it had not considered potential surplus school sites in Burnaby. In relation to the enrolment questions, Mr. Allison simply advised that the Burnaby Elementary Project would have minimal impact on enrolment at École Élémentaire Anne-Hébert and École des Pionniers because the CSF foresaw an independent community of potential students in Burnaby.

[5353] In his feedback to Mr. Allison, Mr. Cavelti was primarily concerned with the CSF's enrolment projections as stated in the PIRs, particularly because the CSF

focused on the number of potentially eligible students rather than the number of students that would actually attend a new school. In the CSF's October 2014 updated PIRs, the CSF again focused on eligible students while explaining that it had engaged Mr. McRae to provide cohort-retention enrolment projects. The CSF provided those projections by way of a secondary email.

[5354] Since the CSF did not have an existing school in Burnaby, the CSF explained that it could not provide cohort-retention enrolment forecasts for that school as it had for its other schools. Instead, based on Mr. McRae's and Dr. Landry's work, the CSF suggest that by 2023 there would be a total of at least 507 elementary-age children of Mother-Tongue Rightsholders in the catchment area. Mr. Allison also estimated there would be at least 51 additional eligible students, with no explanation of how he arrived at that number. Mr. Allison wrote that a take-up rate of 47% of those children would allow the CSF to fully occupy a completed Burnaby Elementary Project, and suggested it could easily achieve that participation rate.

b) Burnaby and Port Coquitlam Site Searches

[5355] Between 2004 and the end of 2009, Mr. Bonnefoy engaged in a search for sites in Coquitlam and Burnaby that were in a better location than École des Pionniers. The CSF commissioned a report in 2008 that identified several commercial sites that the CSF did not seriously consider.

[5356] The report also identified several elementary schools that had been closed by SD43-Coquitlam in recent years: Burquitlam Elementary, Cedarbrook Elementary, Millside Elementary, Lincoln Elementary, Ioco Elementary, Vanier Coronation Park Elementary and College Park Elementary. Mr. Bonnefoy explained that Cedarbrook Elementary and Vanier Coronation Park Elementary were too small, and Burquitlam Elementary was not in a good location. Millside Elementary was close to the highway, but was on a small site and had some environmental and land restrictions. Lincoln Elementary was being leased by the BC Christian Academy, the former tenant at École des Pionniers. College Park Elementary was on a small site

that was not conducive to an elementary/secondary school. Ioco Elementary, too, was too small and not well situated.

[5357] The report went on to identify the Riverview Hospital Lands, which were owned by the Provincial Government. Mr. Bonnefoy understood that site was being developed, and anticipated a prolonged process.

[5358] The CSF's Business Committee continued to discuss options in the Coquitlam and Burnaby areas. At one point, a site at the base of Burnaby Mountain was considered. However, the school appeared to have been built to serve a specific residential area, and was not ideally located for the CSF. The CSF also viewed a building on Burnaby Mountain, which was likewise not in an ideal location.

c) Parent Requests for a Burnaby Programme

[5359] Parents made their first requests for a programme in Burnaby near the end of 2012, several years after the CSF made its first capital request for the Burnaby Elementary Project. Ms. Bossavit was involved in that process. In the fall of 2012, she attended several meetings with parents from about 10 Burnaby families who were interested in minority language education. Like other parents, she used her personal network to recruit other parents who might be interested in sending their children to a CSF school. A larger group of interested parents met with Mr. Cyr, the CSF's Superintendent, and Mr. Allison in Maillardville in December 2012. The parents then sent application forms to the CSF.

[5360] Mr. Allison confirmed that he and Mr. Cyr met with a group of 20 to 25 parents from Burnaby who had expressed interest in opening a minority language school in the Proposed Burnaby Catchment Area. In January 2013, the parents sent the CSF a collection of 20 application forms, along with a letter officially requesting a Francophone school in Burnaby. Mr. Allison advised that the CSF Board of Trustees approved the application February 2013, with the intent to open a school in Burnaby for the 2013/14 school year.

[5361] Also in February 2013, Mr. Miller received an email from Mr. Tom Grant of SD43-Coquitlam related to Burquitlam Elementary. Mr. Grant advised that he was aware the CSF might be interested in acquiring a school site in Burnaby or Coquitlam. He advised that SD43-Coquitlam wanted to participate in that discussion as soon as possible.

[5362] Mr. Miller responded that the Ministry would follow up with the CSF to confirm the CSF's interest in Burquitlam Elementary, then arrange a meeting between the districts with Ministry participation. Mr. Miller could not specifically recall how the Ministry followed up with the CSF or SD43-Coquitlam. He expected Mr. Palmer, Mr. Cavelti, Mr. Woycheshin or Mr. Stewart to follow up, as he copied them on his response.

[5363] In late February and early March 2013, Mr. Grant gave Mr. Stewart basic information about Burquitlam Elementary, as well as information about its ongoing lease arrangement. Based on that information, Mr. Stewart wrote to Mr. Palmer and Mr. Cavelti, suggesting the Ministry might advise the CSF about the site and encourage the two districts to connect with a target date of 2015 if the CSF began to experience enrolment pressure at École des Pionniers.

[5364] Mr. Palmer could not recall whether he ever informed Mr. Allison about the possibility of leasing or purchasing Burquitlam Elementary. He explained that the Ministry was focused on the replacement of École des Pionniers at the time, and believed that it might have an impact on the CSF's needs in Burnaby going forward.

[5365] Mr. Stewart's evidence was that it would have been left up to Mr. Cavelti to follow up with Mr. Allison about Burquitlam Elementary. He recalled being told that the CSF was not interested in the property. Mr. Cavelti did not testify.

[5366] In April 2013, Mr. Allison met with the parents again. At that point, the parents had nine Kindergarten students planning to enrol in the Burnaby Elementary Project, and several other children that would enrol in primary grades. The parents also shared with Mr. Allison their estimates of the number of children of rightsholders

in the area that were younger than elementary school age, and might attend a CSF school in future years.

[5367] The CSF Board of Trustees met again in May 2013. At that meeting, the Board resolved to delay its plans because no site had been identified. The CSF informed parents of the decision at a June meeting, but assured them the CSF would continue searching.

[5368] The CSF focused its site search on SD40-New Westminister, SD41-Burnaby and SD43-Coquitlam and local municipalities.

[5369] Mr. Allison contacted SD41-Burnaby and wrote to the City of Burnaby to notify city officials of the CSF's search for space. He asked the mayor of Burnaby to meet with him. Mr. Allison eventually met with city staff, but no sites were identified as a result of that meeting.

[5370] Mr. Allison also contacted the City of New Westminister and SD40-New Westminister. Mr. Allison specifically referred to potentially acquiring Hume Elementary because parents had mentioned it to him as a possible option. However, SD40-New Westminister informed him that Hume Elementary was not available.

[5371] Mr. Allison also met with the Mayor of Coquitlam and representatives of the Francophone Association in Maillardville in September 2013. The mayor informed Mr. Allison that he would assist with finding a site. Mr. Allison explained that nothing came of the great deal of discussion about possible options.

[5372] The CSF saw more progress working with SD43-Coquitlam, where Mr. Bonnefoy was the acting Secretary-Treasurer in 2013. Mr. Bonnefoy pointed Mr. Allison to Burquitlam Elementary. Mr. Allison described it as being very old, and located in a "funny area" in Coquitlam. I take from Mr. Allison's comments and the fact that the CSF did not pursue the option that the CSF was not interested in that school.

[5373] Mr. Allison also considered College Park Elementary, which was located in Port Moody. Mr. Allison thought this site was accessible, but parents refused the idea, preferring a more central location.

[5374] Ms. Bossavit counted herself among the parents who favoured College Park Elementary. She thought that site was an appropriate distance from her home. A review of the location of that school shows that the site was close to Ms. Bossavit's home, but not central to the Proposed Burnaby Catchment Area.

[5375] According to Ms. Bossavit, by January 2014, she thought that the CSF ought to pursue privately-owned sites. She sent an email to Mr. Allison, requesting a new school in the Maillardville area, to the west side, nearer to Burnaby, to maximize access from both Burnaby and New Westminster. She emphasized the importance of accessibility by public transit, and the need for three to four classrooms, one of which could be used for a daycare. Ms. Bossavit confirmed that she was not concerned about sharing space with majority schools, so long as there was separate space for the Francophone programme to create its own identity.

[5376] Ms. Bossavit also invited Mr. Allison to attend the next parents' meeting in February 2014. Ms. Bossavit recalled that meeting was the parents' last. The parents lost interest given the lack of success over two years.

[5377] According to Mr. Allison, when he testified in December 2014, the CSF still planned to open a school in Burnaby in September 2015. A real estate agent was assisting the CSF, but as of December 2014, nothing had been identified. In November 2014, Mr. Allison heard about plans to build a new school at the SFU campus in Burnaby, and planned to look into including the CSF in that plan.

[5378] By September 2014, though, the Ministry had taken a decision to freeze the CSF's lease funding "in response to a number of recent requests the [CSF] has made to the Ministry for increased funding for leased space, including in ... Burnaby/Coquitlam". Assistant Deputy Minister Fayad commented that if the CSF wanted to increase its leased spaces, it could fund any lease costs in excess of the

amount provided by the Ministry using its operating funds. I elaborate on this decision in Chapter XXXV, Leases.

d) Conclusions and Findings

[5379] The Burnaby Elementary Project is a new idea for the CSF. While the idea was in the back of CSF officials' minds from at least 2001, it was not formally discussed or requested from the Ministry for another 10 years.

[5380] The CSF performed a preliminary search for a Burnaby site in about 2008. However, those site searches primarily related to an idea that it might be appropriate to move École des Pionniers to a more central location. The plan in 2008 was not to build an additional school to serve a new catchment area. Mr. Bonnefoy's testimony confirms that the CSF would have only considered that once it had finalized plans for École des Pionniers, since the placement of one school would have an impact on the catchment area for the other.

[5381] The Burnaby Elementary Project only became a priority project for the CSF when Mr. Allison became Secretary-Treasurer and started this litigation in about 2010. The CSF determined it would be a priority without any requests from parents for a programme. The CSF also failed to consider or address how the new programme would impact enrolment and the capital requests for École Élémentaire Anne-Hébert and École des Pionniers. While the CSF maintained in communications to the Ministry that it foresaw an independent community of rightsholders eligible to attend the programme, it had no requests from parents to justify that belief.

[5382] Parents only began requesting a programme in Burnaby some time later, in late 2012 and early 2013. The CSF did not begin a serious site search for Burnaby until after it received those parent requests, in the spring of 2013. It contacted the relevant municipalities and school districts and made general inquiries about potential sites. None of those discussions resulted in the identification of any sites that were of interest to the CSF.

[5383] The CSF does not seem to have considered starting a minority language school in a heterogeneous environment. The CSF was exclusively interested in a homogeneous school. Notably, the total identified enrolment at the time was only about 15 students in primary grades. Ms. Bossavit pointed to a need for three to four classrooms, including one for early childhood programming.

[5384] The Ministry was not involved in the discussions concerning potential sites for a Burnaby programme. The CSF did not ask Ministry staff to intervene to assist it to find space. At one point the CSF mentioned an interest in a surplus site in Burnaby, among other sites, to the Deputy Premier as part of a letter related to the Province's RAEG Programme. However, the CSF never asked the Ministry to help it negotiate with school districts or secure space in Burnaby.

[5385] The Ministry was contacted by SD43-Coquitlam about the CSF potentially using Burquitlam Elementary. No one from the Ministry could recall how they followed up, except that Mr. Stewart recalled hearing the CSF was not interested in the site. This is consistent with Mr. Allison's evidence, which demonstrated a lack of interest in that school. Since I did not find Mr. Allison to be a credible witness, I conclude that it is likely that Ministry staff did follow up, but did not press the issue because the CSF was not interested in Burquitlam Elementary.

[5386] Even so, the Ministry had knowledge by September 2014 that the CSF was hoping to lease new space in the Proposed Burnaby Catchment Area for a new programme. It was in that context that the Ministry chose to freeze the CSF's lease funding at then-current levels. The Ministry left it to the CSF to fund additional lease costs from its operating budget. This change in policy shifted the financial burden for starting a new programme from the Ministry to the CSF, placing the CSF in the difficult position of having to choose between existing programmes and services and starting a new programme to better accommodate rightsholders.

[5387] Overall, I find that responsibility for the lack of the basic instruction that the numbers in the Proposed Burnaby Catchment Area will warrant in the first few years lies with the CSF. The CSF was insistent on starting its programme with a

homogeneous facility when the numbers would not warrant anything more than instruction for several years. The CSF also did not plan in advance for a school in Burnaby, and insisted on increasing the scope of the École des Pionniers Replacement Project based on current enrolment, which includes students from Burnaby.

[5388] The Ministry had no information from which to conclude that opening a programme in Burnaby was a priority for the CSF until 2010, after this litigation started. The Ministry also was unaware that the CSF was having problems finding a site in Burnaby. In those circumstances, the CSF could not reasonably expect the Ministry to intervene.

[5389] However, the Ministry has now implemented a policy of not funding any new CSF leases. This decision interferes with the CSF's ability to create a new catchment area in Burnaby, which is within its right to management and control over aspects of education related to language and culture. This is relevant to my discussion of the funding freeze in Chapter XXXV, Leases.

F. Justification

[5390] I conclude that the numbers across the Proposed Burnaby and Port Coquitlam Catchment Areas will eventually come to warrant space for a total of 735 students, which exceeds the 660-student capacity for the École des Pionniers Replacement Project. The outstanding need is caused by decisions taken by the CSF, particularly the CSF's decision not to offer a small programme in heterogeneous space, and insistence of building École des Pionniers to a larger capacity than is warranted based on the numbers in the Proposed Coquitlam Catchment Area. The remaining question is whether the breach is justified.

[5391] As I outline in Chapter IX, Justification, the s. 1 justification test focuses on whether the "infringing measure" can be justified. I do not find that current situation in Burnaby arises out of the Ministry's capital funding regime. Instead, the "infringing measure" seems to be the decision taken by the CSF. There was no argument that

the CSF's decision ought to justify any rights breach. In light of that, I cannot say whether the breach in Burnaby is justified.

G. Remedy

[5392] The plaintiffs submit that the appropriate and just remedy is to immediately construct a homogeneous French-language K-6 school in Burnaby. They say that such a remedy would increase the level of pride and French-language identity of Burnaby's French-language community, citing the evidence of Dr. Martel. They ask that the orders be made without delay to prevent assimilation.

[5393] The plaintiffs also suggest that if a site cannot be found, then the Court should order the Minister to exercise his powers under s. 74(1) of the *School Act* to effect a transfer of the former Sapperton Elementary to the CSF. For the reasons I gave in Chapter X, Remedies, I do not consider that the Minister has such a power.

[5394] In my view, given that the CSF is responsible for the breach in Burnaby, no orders should issue against the defendants for the situation in there. The appropriate remedy is a declaration confirming the CSF's ability to act within its jurisdiction to remedy the situation.

[5395] As a result, I declare as follows:

- a) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary programme in Burnaby with heterogeneous instructional space for about 15 to 40 students in the short term and homogeneous instructional space for up to 175 students in the long term (or such other numbers and facilities as the parties agree to).

[5396] The CSF and the Ministry will need to work together to achieve that objective and the CSF must first make effective use of the École des Pionniers Replacement Project's 660-student capacity. As I develop further in Chapter XXXV, Leases, in due course, the Ministry must fund the CSF's reasonable lease costs for

the Burnaby programme provided that the CSF complies with the provincial conditions for securing that funding.

[5397] As I describe in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, the Province must also craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards.

[5398] Further, given that several *Charter* breaches were caused, in part, by the fact that the CSF's project proposals were being compared to those of the majority and that funds were not available to the CSF for many years, I will also make an order requiring the Province to establish a Capital Envelope for the CSF, to be expended over a number of years, to respond to the rights breaches identified in this decision and the CSF's other capital priorities. I discuss this remedy in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[5399] The plaintiffs also seek *Charter* damages against the Province for the situation in Burnaby. In light of the fact that the Province is not responsible for the breaches in Burnaby, *Charter* damages are not an appropriate and just remedy.

[5400] With connection to École des Pionniers, the plaintiffs seek *Charter* damages "relating to the state of affairs at École des Pionniers prior to the construction of the new school facility." However, they abandoned their claim that the condition of École des Pionniers was in breach of s. 23. As I see it, *Charter* damages are only available as a remedy once a breach of s. 23 has been proven. Since the plaintiffs do not argue any breach of s. 23, there is no basis on which it would be appropriate to grant *Charter* damages as a remedy.

[5401] The question of costs is different, and will be resolved at a later date following submissions by counsel.

H. Summary

[5402] I conclude that about 560 elementary and secondary students from the Proposed Coquitlam Catchment Area are likely to attend the École des Pionniers

Replacement Project. That number falls at the upper end of the sliding scale, warranting homogeneous facilities equivalent to those afforded to the majority in the area.

[5403] In May 2012, the Ministry announced support for the École des Pionniers Replacement Project as a seismic project, with capacity for 555 students, as requested by the CSF. In November 2012, the CSF began asking for increased capacity to the École des Pionniers Replacement Project, proposing that the school be built with space for 660 students. As the CSF took no steps to justify its desired capacity to the Ministry, the Ministry settled on a 550-student capacity as a reasonable one. To move the project ahead expeditiously, the CSF modified its request to one for a 550-capacity school. The Project Agreement was signed with a view to providing a school of that capacity, with space for an addition to 660 students in the future. After some lobbying by Mr. Allison, following the conclusion of trial, the Ministry agreed to increase the capacity for the École des Pionniers Replacement Project to 660 students as requested by Mr. Allison.

[5404] In my view, prior to the expansion to 660 students, the École des Pionniers replacement project was being built to an appropriate capacity for the number of students likely to attend the programme from the Proposed Coquitlam Catchment Area. I conclude that based on its proposed grade configuration, the CSF can expect about 560 children from the Proposed Coquitlam Catchment Area to attend École des Pionniers in a newly-constructed homogeneous school. This is proximate to the number that the Ministry arrived at and the CSF agreed to as a capacity for the École des Pionniers Replacement Project: 550 students.

[5405] Notably, the universe of children that the Ministry worked from did not include any students from the Proposed Burnaby Catchment Area. Because Mr. Allison did not engage in a dialogue with the Ministry, this was not pointed out to Ministry staff until after the Project Agreement was signed. As a result, the capacity was set in such a manner that it only reflected the number of children likely to attend École des Pionniers from the Proposed Coquitlam Catchment Area, not those

students from the Current École des Pionniers Catchment Area that live in the Proposed Burnaby Catchment Area. I attribute this to Mr. Allison's negotiation tactics.

[5406] I find that the number of children likely to attend a CSF school in Burnaby is about 15 to 40 children in the near future, and up to about 175 children in the first 10 or so years of the programme's existence. I also conclude that number falls at the low end of the sliding scale in the first few years, warranting instruction in a series of classrooms. As enrolment grows, within 10 years or so, the numbers could grow to fall at the high end of the sliding scale, warranting facilities that are equivalent to small majority schools in the community where the rightsholders live.

[5407] To date, there are no facilities in Burnaby. CSF students from Burnaby endure long travel times. The CSF is entitled to some deference to its decision that it is appropriate to reduce travel times by adding a new programme in Burnaby.

[5408] Responsibility for the lack of the basic instruction that the numbers in the Proposed Burnaby Catchment Area will warrant in the first few years lies with the CSF. The CSF insisted on starting its programme a homogeneous facility when the numbers will not warrant anything more than instruction for several years. The Ministry had no information on which to conclude that opening a programme in Burnaby was a priority for the CSF until 2010, after this litigation started. The CSF did not seek the Ministry's assistance identifying sites or responding to its needs.

[5409] Given that the CSF is responsible for the breach at the elementary level, no orders should issue against the Ministry for the breach in Burnaby. As a remedy, I find that the appropriate remedy is a declaration confirming the CSF's jurisdiction to start a programme in Burnaby.

[5410] Now that the CSF and the Ministry have agreed to increased capacity for the École des Pionniers Replacement Project, the school is being overbuilt. With space for 660 students, the school will have room for 100 students more than the CSF needs. This provides room to accommodate about 100 students from the Proposed

Burnaby Catchment Area; the CSF will be required to make effective use of that space to accommodate students from Burnaby or elsewhere.

XXXIII. BOARD OFFICE

[5411] The CSF operates a school board office in leased space in Richmond. When this trial started, the CSF's board office was located in an executive park on Shellbridge Way in Richmond (the "Executive Park Office"). Some staff worked out of an outbuilding at École des Pionniers (the "Pionniers Annex Office"), and others out of surplus space at École Élémentaire des Navigateurs (Richmond) and École André-Piolat (North Vancouver).

[5412] In January 2014, while this trial was underway, the CSF began leasing a new office in Richmond (the "New CSF Board Office"), which allowed it to consolidate its district-level staff in one location. The plaintiffs concede that the New CSF Board Office meets the CSF's needs and is comparable to other board offices in the Lower Mainland.

[5413] Until recently, the Ministry specifically funded the CSF's lease of its school board office. In 2014, the Ministry ceased funding the CSF's school board office lease, and moved to a system whereby it provides the CSF with a frozen block of funding for its leases of educational and school board office space.

[5414] The plaintiffs argue that s. 23 guarantees the school board office space as both an incident of its right to management and control and because s. 23 guarantees it facilities equivalent to those afforded to the majority. They also claim that three policies impinge on those rights: the Area Standards for board office space; the deprioritization of school board office capital projects in Capital Planning Cycles and corresponding policy of funding leased rather than owned board office space of the CSF; and the frozen lease block funding. The defendants counter that the CSF's school board office space is opulent, and suggest the Province should not be required to fund it.

[5415] I begin with an overview of the evidence concerning school board offices and the background context of school board offices in British Columbia. Then, I consider whether the numbers warrant school board office space, and whether the New School Board Office provides the CSF with appropriate minority language educational facilities. Against that backdrop I turn to the arguments concerning the Ministry's policies.

A. Evidence

[5416] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all spoke to their experiences with the CSF's school board office. A number of CSF educators also commented on their experience with the CSF's school board offices. For the defendants, Mr. Miller provided evidence about school board offices across the Province, while Mr. Stewart and Mr. Palmer both spoke to their experience dealing with the CSF's recent requests for school board office space and the lease of the New CSF Board Office.

[5417] The plaintiffs also tendered the affidavit of Mr. Pierre Claveau, the CSF's Director of Public Relations. He was also cross-examined before the Court. In his affidavit, Mr. Claveau described the CSF's Executive Park Office, the Pionniers Annex Office, and the space used for administrative purposes at CSF schools. He compared those facilities to 13 majority-language school board office spaces across the Province. He concluded that all of the offices he visited were more visible and accessible than the CSF's former board office spaces, with more functional amenities. In every respect, they mirror the parent affidavit evidence discussed in Chapter XVI, Introduction to Part 3, the Community Claims.

[5418] Mr. Claveau advised that he prepared his comparison affidavit because he was the member of the CSF's executive team with the most time to devote to the project. He has no expertise in buildings or facilities.

[5419] There are problems with Mr. Claveau's evidence. For one, his affidavit predates the CSF's lease of the New CSF Board Office. It is therefore not relevant to the extent that it tries to point out deficiencies with the CSF administrative space

that are not present in majority school board offices. Since the substance of the affidavit is primarily comparative, the affidavit is of extremely limited use.

[5420] Mr. Claveau's affidavit also focuses on a small and selective subset of majority school board offices. He conceded that the CSF chose to describe the better school board offices in the Province. He stated the CSF was looking for examples of newer school board offices for established school boards that ran well. He confirmed that the CSF was looking to present the "success stories" of school board offices, where everything had been thought of.

[5421] Notably, Mr. Claveau visited a number of school board offices that he does not describe in his affidavit, specifically those for SD79-Cowichan Valley, SD23-Central Okanagan, SD61-Greater Victoria and SD43-Coquitlam. He could not say why those board offices did not find their way into his affidavit.

[5422] Mr. Claveau's evidence on cross-examination suggested that he was searching for positive aspects of majority school board offices and negative aspects of the CSF offices. He explained that he prepared a report that informed his affidavit because the CSF was not satisfied with their administrative facilities. He thought that his report proved that the CSF did not have basic amenities that were offered in majority school board offices. Given his goal, he was not concerned that all the offices he visited be represented in his affidavit.

[5423] Mr. Claveau also conceded that many of the school board offices he visited would not be appropriate for the CSF given its small size. He agreed that given the much greater size of SD36-Surrey, its board office facilities cannot be properly compared to those for the CSF.

[5424] Mr. Claveau's affidavit also follows an identical structure and uses nearly identical language to those in the parent comparison affidavits; Mr. Claveau agreed that was the case.

[5425] I cannot give Mr. Claveau's affidavit any weight. Its substance is comparative, and is not useful because it compares facilities for much larger districts to the facilities that the CSF no longer occupies. The evidence is also weighted toward the best school board offices in the Province, and is skewed toward finding positive aspects of majority-language facilities and negative aspects of the CSF facilities. The evidence is also of a generic nature, and therefore of very little help.

[5426] The Joint Fact Finder's Report also describes school board offices in about 30 school districts, including maintenance facilities. In total, members of the Fact-Finding Team visited 24 of 46 board office facilities located in school districts where the CSF operates schools included in this claim, and three of 26 board office facilities in districts where the CSF does not operate schools included in the claim. The Fact-Finding Team also relied on District Data. I find this to be a highly reliable source of evidence.

B. School Board Offices in British Columbia

[5427] According to Mr. Miller, all 60 school districts in British Columbia operate some form of school board office of varying quality. Most school boards own their school board offices, although a subset leases their school board offices.

[5428] By Mr. Miller's description, school board offices typically house district-level administrative staff and provide space for trustee work and meetings. Some board offices also provide space for maintenance staff. However, administrative staff and maintenance facilities may be distributed throughout a school district at the discretion of the school board.

[5429] Mr. Miller suggested that a school board office is an important point of contact between a school board and the community that it serves. Trustee space is important because trustees have frequent, often lengthy meetings to which the public is invited. Public participation is particularly important because school boards are publically-elected bodies that make decisions that receive significant public attention. Parents and members of the public frequently want to express their views

about school board decisions. Trustee rooms therefore often have a gallery for public observation.

C. Entitlement

[5430] The plaintiffs argue that s. 23 protects the right to school board offices. The Province takes the position that it does not.

[5431] The plaintiffs argue that, as an incident of the CSF's right to management and control, the CSF is entitled to adequate space to carry out activities related to its functions under s. 23 of the *Charter*: a school board office.

[5432] The plaintiffs point to requirements in the *School Act* that they say necessitate a school board office. They point to ss. 22 and 23 of the *School Act*, which require school boards to appoint a superintendent of schools responsible for educational programmes and the operation of schools in the district, as well as a Secretary-Treasurer to serve as the board's Corporate Financial Officer. Further, they point to s. 15, which allows a school board to employ persons considered necessary for the conduct of its operation. The CSF also relies on s. 96(2) of the *School Act*, which gives school boards the discretionary power to acquire and hold land for educational purposes, including school board offices.

[5433] The plaintiffs' position is that when the number of s. 23 rightsholders warrants the creation of a Francophone school board, then s. 23 must also include a right to operating and capital funding necessary to acquire facilities to exercise that degree of management and control. The plaintiffs argue that s. 96(2) of the *School Act* explicitly recognizes that board offices can be held for educational purposes.

[5434] The plaintiffs also say that the CSF is entitled to a school board office to ensure substantive equivalence between the CSF and majority school boards. Thus, they say that the CSF is entitled to "a board office that is substantively equivalent to those of the majority, visible in the community, functional, and appropriate for a school district of the complexity and geographical reach of the Conseil."

[5435] The plaintiffs suggest that the *School Act* effectively requires districts to operate a school board office. In light of these requirements, the plaintiffs argue that if its school board office is not substantively equivalent to those of the majority-language districts, there has been an infringement of s. 23 of the *Charter*.

[5436] I agree with the plaintiffs that the right to minority language education facilities equivalent to those afforded to the majority requires that the CSF have school board office facilities equivalent to those afforded to the majority. In BC, all school boards operate some form of school board office. Most were built pursuant to a prior funding regime whereby the Ministry funded school board offices. Some operate board offices out of surplus space in schools; some have leased school board offices. All of them have a space for their Superintendent, Secretary-Treasurer and district-level staff to work. Most also have space for trustees to work and to host meetings. If the minority is to have an education equivalent to that offered to the majority, then the CSF must also have access to school board office facilities.

[5437] The plaintiffs also argue that a school board office has symbolic value to a community. They point to the evidence of Dr. Landry, who wrote that an institution can serve as a symbol of continuity for a group. Dr. Landry points to institutions like schools, churches and hospitals as institutions that are symbols of perpetuity, and to which individuals and groups may form great emotional attachment. The plaintiffs say that symbols and rallying points are particularly important to BC's linguistic minority. They liken the CSF's board office to the Parliament Buildings in Ottawa, and say that a school board office has an important impact on members of B.C.'s Francophone community, from Richmond to Prince George. The defendants admit that school board offices play a limited symbolic role.

[5438] Against this argument, I observe that several of the parents that testified admitted to having never visited the CSF board offices. None of them gave evidence about the symbolic importance of the school board office to them; their evidence focused on the importance of schools to their communities.

[5439] In my view, while institutions can be important symbols to a community, given the CSF's provincial mandate, the CSF's school board office does not play an essential symbolic role. Most parents and children will never have any contact with the CSF's school board office. They will, however, have contact with the minority language school. In my view, the CSF's schools are the most important symbols of continuity to minority language communities across the Province. In light of the little interaction the community will have with the school board office, the CSF's board office does not fill that symbolic role.

1. The Numbers and the Sliding Scale

[5440] As I describe at the outset of Chapter XII, Public Funds, in *Association des Parents- SCC*, the Court suggested that courts may defer to decisions in earlier litigation concerning where the numbers fall on the sliding scale (at para. 48). In *Vickers #1*, Mr. Justice Vickers concluded that the numbers in the Lower Mainland and Fraser Valley (3,848 students likely to enrol in CSF schools based on an agreed statement of facts) warranted the highest level of management and control (at paras. 44-47). As I see it, Mr. Justice Vickers was situating the numbers at the school district level for the purpose of determining what level of management and control was warranted province-wide.

[5441] Now, the CSF has jurisdiction over the entire province, including substantially more rightsholders. The CSF had 5,382 students enrolled in 2014/15: more than several small school districts. In light of that, I find no reason to depart from Mr. Justice Vickers' decision. CSF's entitlement to The CSF is entitled to the highest district-level rights to management and control: distinct facilities provided on a standard of equivalence to the facilities afforded to the majority.

2. Entitlement

[5442] The plaintiffs concede that the New CSF Board Office provides facilities that are comparable to those that have been constructed by majority-language districts in recent years. The defendants, however, say that the New CSF Board Office is more than equivalent. They say it is opulent and goes far beyond what other districts

have. To evaluate the defendants' argument, I will consider the appropriate comparator schools and how the New CSF Board Office compares to them.

a) Appropriate Comparators

[5443] The plaintiffs argue that the appropriate comparators for the CSF school board office are the offices of SD39-Vancouver, SD36-Surrey, SD35-Langley, SD37-Delta, SD38-Richmond and SD44-North Vancouver. The plaintiffs acknowledge that those districts have larger enrolment than the CSF. However, since those districts are also in the Lower Mainland, where the CSF chooses to operate its office, they say that the quality of the CSF board office should be comparable to those facilities.

[5444] Notably, the plaintiffs' argument concerning the appropriate comparator schools omits many of the more modest comparator school board offices in the Lower Mainland. They focus on the most attractive board offices, serving the largest populations. Even Mr. Claveau admitted while under cross-examination that "nobody in his right mind would believe that -- or would think or would want to have a school board facility that would be identical to the Vancouver School Board, to the Surrey School Board, to the North Vancouver School Board" for the CSF due to its smaller size. The plaintiffs omitted some of the more modest school board offices in the Lower Mainland. For example, the school board office for SD40-New Westminster, which has 7,417 students enrolled, is located in leased space.

[5445] Additionally, in my view, it is appropriate to take into account what school districts with comparable populations to the CSF have in the way of school board offices. This is particularly so because some rural school boards with populations comparable to the CSF must serve widely-dispersed populations, much like the CSF.

[5446] Accordingly, I will take into account how the CSF fares in comparison to two different comparator groups. First, I will consider how the CSF's space compares to other schools in the Lower Mainland: SD33-Chilliwack, SD34-Abbotsford, SD35-Langley, SD36-Surrey, SD37-Delta, SD38-Richmond, SD39-Vancouver, SD40-New

Westminster, SD41-Burnaby, SD42- Maple Ridge, SD43-Coquitlam, and SD44-North Vancouver (the “Regional Comparator Districts”). Those districts have average enrolment of nearly 26,000 students: more than quadruple the CSF’s enrolment.

[5447] To ensure that the focus on much larger districts does not skew the analysis, I will also consider how the CSF fares compared to the districts explored in the Joint Fact Finder’s Report that have enrolment of less than 10,000 students each: SD8-Kootenay Lake, SD20-Kootenay-Columbia, SD28-Quesnel, SD40-New Westminster, SD46-Sunshine Coast, SD48-Sea-to-Sky, SD53-Okanagan Similkameen, SD60-Peace River North, SD62-Sooke, SD67-Okanagan Skaha, SD69-Qualicum, SD72-Campbell River, SD75-Mission and SD82-Coast Mountain (the “Small Comparator Districts”). The Small Comparator Districts have an average of 5,072 students enrolled, making them comparable to the CSF.

b) The New CSF Board Office

[5448] The CSF currently leases board office space in a business park. It is more visible and easier to find than the CSF’s former office space in the Executive Park Office. The CSF also planned to install a sign that would be visible from the street. There is ample parking for the CSF’s needs.

[5449] The New CSF Board Office is one story, and has about 2,271 m² of space. The CSF’s previous location in Richmond was 747 m², making it about 35% of the size of the New CSF Board Office.

[5450] The New CSF Board Office has high ceilings, with dropped ceilings and lighting that Mr. Allison described as “stylish”. He stated that the corridors have beautiful walls and carpets.

[5451] Mr. Allison described the entrance to the building as having a purpose-built reception with natural light, room for deliveries, a waiting area and storage for the receptionist’s materials. The CSF did not have a waiting area at the Executive Park Office.

[5452] The New CSF Board Office also has functional rooms for staff use, including a photocopy and supply room, a smaller photocopy space, and several storage rooms that provide more storage space than the CSF had at its previous location. There are also several meeting rooms, a room for safe storage of personnel files, and a first-aid room. The washrooms have showers for staff use.

[5453] CSF staff have access to a large lounge with a kitchen. According to Mr. Allison, the staff room can seat up to 60 people, which accommodates most of the 65 staff who work at the board office. There is an additional coffee nook on the opposite side of the building.

[5454] Adjacent to the staff room is a Board of Trustees meeting room, which, according to Mr. Allison, is much larger than what the CSF used for Board meetings at its previous location.

[5455] Mr. Allison explained that the board room is multifunctional, and the tables are easily reconfigured into different shapes and groups for training. The wall between the staff lounge and the Board meeting room can be retracted, to create one large space. The CSF has used that space to easily accommodate all of the CSF's principals from around the province in a way the CSF could not have done in the Executive Park Office.

[5456] The balance of the New CSF Board Office is used to accommodate CSF staff. The CSF has designated offices and cubicles for the staff in each of its departments: educational services; human resources; information technology; and finance and operations. Many of those staff members were previously located at the Pionniers Annex Office. CSF itinerant staff have a base in cubicles and travel from there to provide services to students around the province. Staff who deal with confidential matters have closed spaces. The CSF also has some empty space that it intends to use for future growth by installing cubicles to accommodate new staff. Mr. Allison and the CSF Superintendent have large offices with meeting tables that staff use when they are free.

[5457] In light of the importance of the CSF's technology programme, the CSF has a large space devoted to information technology. Technicians work in cubicles in a large area with storage for laptops. That area also has a Help Desk and a loading dock that can take pallets of laptops in and out for shipping. The area also has an anti-static floor, which the CSF funded with a tenant improvement allowance it negotiated. The server room is air conditioned, and according to Mr. Allison, poses less risk than the CSF's former server room at the Pionniers Annex Office.

[5458] The CSF has also created a large new resource centre. According to Mr. Allison, it is much nicer and therefore hard to compare to the CSF's previous resource centre. It was described as resembling a library with books and kits for teachers and principals to use with their students.

[5459] The New CSF Board Office consolidates the CSF's employees in one place. Mr. Allison described some of the benefits of the consolidation. Mr. Allison is able to collaborate with the IT department without the added step of coordinating meeting times. Staff can have their computer problems addressed immediately. More board office staff are able to sit on district committees, which was more difficult when some staff were at the Pionniers Annex Office. According to Mr. Allison, the New CSF Board Office is creating a new culture of collaboration for board office staff.

[5460] Only the CSF archives were not consolidated into the New CSF Board Office. They remain at École Élémentaire du Bois-joli (Delta). According to Mr. Allison, this was a financial decision. The CSF plans to digitize its archives then remove them.

[5461] Some CSF principals testified about their experiences at the New CSF Board Office. Ms. Gilbert, the assistant principal for École Élémentaire La Vérendrye (Chilliwack), worked for the CSF's technology department at the Pionniers Annex Office before returning to work as an educator at École Élémentaire La Vérendrye (Chilliwack). She explained that at the Executive Park Office, there were problems using projectors when training teachers. The new projection systems

are much better suited to the CSF's technology training. She also found the space much more amenable to training all CSF administrators at once than the old space.

[5462] Ms. Chagnon, the current principal at École Élémentaire Rose-des-Vents (Vancouver (West)), described the New School Board Office as "beautiful", "airy" and "contemporary". She explained that the large space easily accommodates all the CSF principals, and provides them with the flexible spaces they need for training.

[5463] While Mr. Allison saw many benefits to the New CSF Board Office, there have been some criticisms of the CSF's administrative set up. The CSF's strategic plan was evaluated by an independent panel in October 2010. Part of the critique suggested that the CSF's administrative structure is cumbersome, and can grow quickly and spread out of control. The panel suggested a review of the CSF's ratio of teachers/ principals/ administrators to deploy more administrators on the ground instead of at the central office. Since that time, the CSF has further consolidated its employees in defiance of the panel's recommendations.

[5464] Mr. Allison explained his reaction to the review of the strategic plan. He disagreed there were benefits to having less staff at the CSF's Board Office, and could not see how the CSF could function with more of its staff deployed to schools. He agreed, however, that the CSF's administration is top heavy, and that the CSF could simplify its operations. He disagreed the CSF administration is cumbersome.

c) Comparative Evidence

[5465] Mr. Miller explained that over the course of his tenure with the Ministry, he visited 25 to 30 school board office facilities around the Province. Many school board offices are relatively modest. In his view, with few exceptions, they provide a reasonable accommodation for staff, while not being ostentatious.

[5466] According to Mr. Miller, the high water mark of school board offices is SD44-North Vancouver. He described it as being a very impressive building structure; a "palace". At the lower end, Mr. Miller placed the SD44-North Vancouver school board office prior to its reconstruction; that facility, he advised, was very modest.

[5467] Mr. Miller also discussed the spectrum of school board offices in the Lower Mainland. Mr. Miller placed the SD39-Vancouver office at the better end of that spectrum. He described it as a large, “very fine” facility. He also described the SD35-Langley office as being of high quality. At the lower end, Mr. Miller placed the SD41-Burnaby office, which is modest, in an old school, and not central in the community. The SD43-Coquitlam office has a comfortable but small meeting facility.

[5468] Mr. Miller went on to give some general information about the range of locations for district offices. While some districts have stand-alone buildings, others have offices in a cluster of local government buildings. Some offices are outside the centre of town-- SD41-Burnaby, for example, has an office that Mr. Miller finds to be remote, and challenging to access because it is located in a residential neighbourhood. SD44-North Vancouver’s new school board office is located centrally, but its former facility was not.

[5469] Further, by Mr. Miller’s account, not all districts have offices that allow all staff to be located on the same site. Mr. Miller recounted that for many years, school district staff for SD36-Surrey were widely distributed in extra space around the district.

[5470] Mr. Miller also advised that while most school board offices are owned by school districts, some districts, like SD40-New Westminister, lease their administrative space. However, the Ministry only funds the board office leases for the CSF, and since 2002 has expected SD40-New Westminister to fund the lease of its board office out of its operating allocation.

[5471] The data in the Joint Fact Finder's Report tends to support Mr. Miller’s assertions. The board offices that Mr. Miller visited range from a low of 302 m² (SD40-New Westminister) to a high of 11,600 m² (SD36-Surrey). On average, they are about 2,486 m².

[5472] The New CSF Board Office is 2,271 m². The average Small Comparator District board office is about 1,161 m²: about half the size of the New CSF Board

Office. The average Regional Comparator District board office is larger, measuring about 3,726 m².

[5473] On a per student basis, the CSF fares better. The CSF has about 0.42 m² per student. The Small District Comparators have only about 0.25 m² of Board Office Space per student. The Regional Comparator Districts have even less: about 0.15 m² per student.

[5474] The CSF also houses more staff at its Board Office than comparator school boards. The CSF has 65 staff members at its Board Office, and has about 35 m² per employee. This is on par with the amount of space per employee at the Regional Comparator Districts (37 m² per employee) and less space per employee than at the Small Comparator Districts (55 m² per employee). However, the CSF has more than double the staff per student of Small Comparator Districts and Regional Comparator Districts. In my view, the CSF administration appears to be top-heavy, as Mr. Allison admitted. Even taking into account the CSF's additional staffing needs to deliver cultural programming and increased transportation services, it seems to operate an unnecessarily cumbersome operation.

[5475] I have also considered the amount of meeting space in the New CSF Board Office in comparison to majority school board offices. The average Small Comparator District has a meeting room of about 90 m²-- about 10 m² larger than a typical classroom. The average Regional Comparator District has about 113 m² for its central meeting room. The evidence does not specify the size of the CSF's meeting room. The staff lounge alone, though, can hold 60 people, and it opens by way of a sliding wall onto an even larger central meeting room. I infer that it is therefore much larger than the size of an average classroom, and sizable compared to the meeting space in comparator districts.

[5476] Moreover, the floor plan reveals that the CSF has a number of additional meeting rooms, something that only some of the largest school boards are able to offer.

[5477] Taking all the evidence together, I find that the CSF's school board office is extravagant. It goes well beyond the modest school board facilities at comparator districts. This is particularly so given the CSF's small size. Even taking into account that the CSF must employ staff to provide cultural programming and operates a provincial school district, the CSF has far more space and greater amenities than it actually needs. Thus, in my view, the New CSF Board Office provides amenities that exceed what the minority is entitled to in light of its numbers.

D. Analysis

[5478] The plaintiffs challenge several aspects of the Ministry's school board office funding policies. They take issue with the Area Standards for school board offices, and argue they should not apply to the CSF. They also challenge the Ministry's policy against funding school board office capital projects, and the related decision to provide the CSF with leased rather than owned school board office space. Finally, they challenge the Ministry's policy of funding the CSF's school board office space using a frozen block of funding.

[5479] I begin by outlining the Ministry's policies for capital funding for school board offices. Then I outline the history of the CSF's board office leases, before addressing each of the plaintiffs' claims.

1. Ministry Policy

[5480] The Province typically does not fund capital projects to construct school board office space. Due to the high demand for Building Condition and Expansion Projects, the Ministry does not view capital funding for school board offices as a high priority. In the Ministry's view, it is difficult to justify significant expenditures on school board offices when schools are in less than perfect condition.

[5481] Although the Ministry does not fund board office capital projects, it has consistently funded the lease of the CSF's board office facilities. Additionally, the Ministry has funded a few school board offices out of its capital budget since 1990,

on an exceptional basis. Mr. Miller gave evidence about the few school board office projects that he could recall.

[5482] Mr. Miller explained that in 1989/90, the Province approved a board office project for SD35-Langley. That involved some \$2.9 million funding from the Ministry's capital budget.

[5483] In the 1990s, SD37-Delta requested approval to acquire a maintenance facility in the Tilbury area. SD37-Delta asked for permission to fund the acquisition using \$1,379,410 funding that had been approved in the 1993/94 capital budget for the conversion of an elementary school to that purpose. SD37-Delta planned to contribute some additional capital reserve funds to bring the total project budget to \$1.5 million. The capital approval was not proven before the Court, and Mr. Miller could not recall whether this project proceeded or not. However, the Joint Fact Finder's Report indicates that SD37-Delta has a maintenance facility in the Tilbury area that was said to have been constructed in about 1994.

[5484] The Ministry also approved about \$300,000 from a capital budget to allow SD77-Summerland (since amalgamated with another district) to take advantage of a tenancy-in-common with a new municipal city hall. Mr. Miller could not recall if those funds came from a capital budget or from SD77-Summerland's capital reserve accounts.

[5485] The Area Standards apply to school board office projects that are funded with Capital Planning Cycle funding or school board Restricted Capital Reserves. Those standards have not been updated since 1994. If a district chooses to build a space larger than the Area Standards allow, the additional space would need to be funded from a Local Capital Reserve account.

[5486] Mr. Miller testified that the Area Standards, while meager, allow sufficient space to accommodate basic school board functions. Typically, though, school boards request more than what the Area Standards allow. I also observe that, as

Mr. Shypitka confirmed while he was under cross-examination, technology and its role in the education system have evolved considerably since that time.

[5487] Since capital funding for school board office projects is not readily available from the Ministry, Mr. Miller advised that school boards can fund board office projects using their Local Capital Reserve at their own discretion, or their Restricted Capital Reserve with ministerial approval. Some districts have also taken advantage of public private partnerships.

[5488] SD36-Surrey built a new school board office using Local Capital Reserves. Mr. Miller described that SD36-Surrey had administrative staff distributed through a number of offices across the district. Because of the fragmented nature of the spaces, SD36-Surrey wanted to construct a new office to consolidate its operations. By setting aside some operating funds as Local Capital for a number of years - dating back to 1988- and selling a few assets, SD36-Surrey was recently able to build a significant school board office.

[5489] Some projects have gone forward using districts' Restricted Capital Reserves as well. In about 1992/93, the Minister approved some funding for a school board office for SD37-Delta ("Delta School Board Office Project"). This project is different from the maintenance project I discuss above. Mr. Miller maintained that the primary rationale for the project was that the building was extremely deteriorated, and among the worst in the province. Part of the office was a collection of portables. However, when SD37-Delta proposed its project, it focused on the then-board office's space shortfall in comparison to the Area Standards, and the district's desire to consolidate staff that were dispersed at satellite locations.

[5490] Mr. Miller recalled that the Delta School Board Office Project was funded by a mix of Local Capital and Minister-approved use of Restricted Capital Reserve. The total cost of the project came to \$2.2 million from Restricted Capital Reserve, and about \$100,000 in Local Capital. According to the Joint Fact Finder's Report, the Delta School Board Office was built with an area of 1,875 m². This is larger than

the space originally approved by the Ministry based on its Area Standards, likely because it was based on enrolment projections 10 years into the future.

[5491] Some districts have funded projects using Restricted Capital generated by the sale of surplus land. SD44-North Vancouver built its board office by selling the former Lonsdale Elementary to a private developer who constructed the board office on the front portion of the site, and developed townhomes to the rear of the site. The sale of the townhomes funded the new school board office.

[5492] Mr. Miller also recalled some approval to use Restricted Capital Reserves to build school board offices as a result of the transfer of some assets to the CSF in the late 1990s. According to Mr. Miller, the Minister approved projects for SD75-Mission, SD35-Langley and SD33-Chilliwack would not have been approved but for the transfer of assets to the CSF.

[5493] SD75-Mission received funding approval for a school board office in exchange for the transfer of Windebank Elementary to the CSF. The Ministry agreed to compensate SD75-Mission for the Local Capital share of the asset at a value of \$750,000, but the funds would flow into its Restricted Capital Reserve account. Additionally, the Ministry agreed to allow SD75-Mission to apply the \$750,000 to a new school board office as an emergent project in the 1998/99 Capital Plan. The remaining \$390,000 for that project was to be funded by SD75-Mission using local borrowing authority. Miller could not recall the project going forward, but Mr. Bonnefoy, who worked for SD75-Mission at the time, recalled that it did.

[5494] SD33-Chilliwack likewise received funding approval for new maintenance facilities in exchange for the transfer of Atchelitz Elementary to the CSF. SD33-Chilliwack received about \$420,000 in proceeds from the disposition, which represented about 70% of the \$574,200 overall project cost. SD33-Chilliwack funded the remaining 30% of the project cost from Local Capital resources.

[5495] When SD35-Langley transferred Topham Elementary to the CSF, it received funding that it used to finish the floor of its school board office.

[5496] Mr. Miller confirmed that in his experience, every time the Ministry approved a school board office, with the exception of the 1989/90 project for SD35-Langley and the SD77-Summerland project, school boards always provided some consideration in the form of capital reserve or a transfer to the CSF. He conceded that all of those offices exceeded Area Standards in some way.

[5497] Finally, school districts have used public private partnership arrangements to construct school board offices. Mr. Miller offered that the classic public private partnership model involves a private developer building private amenities, such as an office tower or a hotel, on the same piece of land as the school board office. The private amenities create a revenue stream that offsets the cost of the public facilities.

[5498] SD39-Vancouver took this approach when it constructed its current school board office. SD39-Vancouver partnered with a private developer to redevelop a site it owned at the intersection of Granville Street and Broadway in Vancouver. SD39-Vancouver transferred the site to the developer by way of a 99-year lease. The developer built retail stores along the street fronts. It also developed a park and a tower that now serves as the SD39-Vancouver school board office. There was no cost to SD39-Vancouver.

[5499] Mr. Miller conceded that this type of arrangement is not possible for most school districts, as SD39-Vancouver is unique in its possession of sites with significant value in strategic locations.

[5500] Although not strictly a public private partnership, school boards have also developed board office facilities in conjunction with local government. SD69-Qualicum, for example, developed a new school board office in conjunction with the municipality of Parksville and Vancouver Island University. The organizations combined to construct a civic centre containing a City Hall, the SD69-Qualicum school board office, a public library and space for the college. SD69-Qualicum funded its portion of the project by subdividing and selling part of a former middle school site.

2. History of the CSF's Administrative Spaces

a) History of Capital Requests

[5501] The CSF did not make any capital requests for its school board office until 2010. In the CSF's June 2010 Capital Plan Submission for 2010/11, the CSF requested a new school board office project in Richmond (the "New CSF Board Office Project") as a project in the Greater Vancouver ward. That year, the CSF did not sequentially rank its priorities. Instead, like most other project proposals, this was said to be the CSF's #1 priority. The CSF requested the same projects, with the same form of prioritization, in its November 2012 Capital Plan Submission for 2012/13 and in its October 2013 Capital Plan Submission for 2013/14.

[5502] In support of its September 2013 Capital Plan Submission for 2013/14, the CSF prepared an In-House PIR for the New CSF Board Office Project, which is dated November 2013. The CSF stated that the purpose of the project would be to house all board office employees in a visible and accessible location close to the Vancouver International Airport in Richmond.

[5503] On January 7, 2014, Mr. Cavelti wrote to Mr. Allison in connection with the CSF's capital requests. He advised that since the New CSF Board Office Project did not fall within any of the eligible project categories listed in the Capital Plan Instructions, the Ministry considered it to have a low threshold priority.

[5504] Mr. Allison did not follow up again with the Ministry in connection with the New CSF Board Office Project. Instead, Mr. Allison focused on leasing a new facility, and seeking reimbursement for that lease.

b) Early Board Office Space

[5505] When the CSF was first established, it leased its school board office from the Maison de la Francophonie, located at the intersection of Granville Street and 7th Avenue in Vancouver. According to Dr. Ardanaz, the CSF quickly outgrew that space and decided to move its office to Richmond to facilitate travel using the airport and ferry terminal.

[5506] The CSF eventually moved into the Executive Park Office. Mr. Allison and Mr. Bonnefoy confirmed that the Province funded the CSF's lease of the Executive Park Office. Miller testified that the Ministry agreed to fund the lease without looking closely at how that space related to the Area Standards.

[5507] According to Dr. Ardanaz, there was no signage to identify the location of the Executive Park Office. Mr. Bonnefoy confirmed that the CSF was not permitted to add signage beyond a small sandwich board. On top of that, the office was hard to find because it was located in an executive park and did not have an entrance off the main street. Visitors had trouble distinguishing between the main entrance and the staff entrance. Visitor parking was located some distance from the office.

[5508] The Executive Park Office had two meeting rooms. When all the school principals met in the larger meeting room, they were "shoulder to shoulder". The room for school board meetings was very small, and few members of the public attended. The CSF also occasionally rented an adjacent empty meeting room that was not included in its lease. From time to time, the CSF also rented a conference room at a nearby hotel for large meetings.

[5509] As the CSF grew, it moved some of its staff to surplus space in its schools.

[5510] For one, the CSF began using surplus space at École Élémentaire du Bois-joli (Delta). École Élémentaire du Bois-joli began as a Programme Cadre at the former Weaver Elementary in Delta. To persuade the Ministry to allow the CSF to acquire the property, the CSF suggested it would use some of the school as board office space.

[5511] Mr. Miller explained that the Minister relied on that representation and supported the project with the idea that it would reduce the lease costs paid by the Ministry. He could not recall if there was, in the end, a significant reduction in CSF lease costs as a result of the arrangement. In any event, the Ministry expended no Capital Planning Cycle funds in connection with the project because it was funded through a subdivision and sale of part of the École Gabrielle-Roy (Surrey) site.

[5512] Mr. Miller recounted that the CSF also received an additional \$1.3 million in Federal Government funds toward the purchase of Weaver Elementary. The plaintiffs take the position that École Élémentaire du Bois-joli was therefore meant to include significant community uses, and any surplus space should be treated as NLC space rather than board office space.

[5513] When Mr. Bonnefoy arrived at the CSF in 2004, the CSF housed itinerant staff in one classroom at École Élémentaire du Bois-joli in Tsawwassen. The staff had three desks in the classroom, with partitions between them. Another classroom at École Élémentaire du Bois-joli was used to store school board records.

[5514] By 2004, the CSF also housed some learning support and information technology staff at École Victor-Brodeur (Victoria). Once École André-Piolat (North Vancouver) was complete, some itinerant staff worked out of that school. According to Mr. Bonnefoy, when the CSF began leasing Kilgour Elementary for École Élémentaire des Navigateurs (Richmond) in July 2004, some information technology staff and some itinerant teachers moved to surplus space in that school.

c) The Pionniers Annex Office

[5515] Mr. Bonnefoy explained that the number of staff working out of the Executive Park Office grew from between 15 and 18 persons in 2004, to between 25 and 30 employees in 2009. Further, the CSF's strategic plan envisioned bringing staff in each department together under one roof.

[5516] In about 2006, the CSF identified other space in the executive park that would accommodate most CSF district-level staff. In December 2006, Mr. Bonnefoy wrote to Mr. Jack, the CSF's Planning Officer at the time, and asked how the CSF should go about requesting a larger school board office. Mr. Jack responded by pointing out that the CSF had more space than would be allowed pursuant to the Area Standards. Mr. Bonnefoy countered that the CSF could not operate out of a space as small as the Area Standards allowed. The CSF remained at the Executive Park Office.

[5517] In 2007 or 2008, the CSF identified the Pionniers Annex Office as space to accommodate more district-level staff. The Pionniers Annex Office had previously been used as instructional space for shop classes at École des Pionniers. The CSF ultimately spent \$250,000 or more on renovations to convert that space to an office. The renovations consisted of cosmetic and lighting work, repairs to the heating system, and the addition of a washroom.

[5518] Mr. Allison suggested the Pionniers Annex Office resembled a warehouse and had problems with heating and cooling. Most staff worked out of cubicles. None of the offices had windows, and the building had limited natural light.

[5519] The Pionniers Annex Office had a single meeting room for 40 staff, which was smaller than the meeting room at the Executive Park Office. One staff member could not access her office without passing through the meeting room.

[5520] Ms. Gilbert worked at the Pionniers Annex Office as a Teacher Educator between January 2008 and June 2010. She found the building to be cold, with very little lighting. Each office used its own space heater in the winter. It was also very inconvenient for staff in one area to access the washroom.

d) Renovations to the Executive Park Office and the Pionniers Annex Office

[5521] Over the years, the CSF and the Province invested in many improvements to the Executive Park Office and the Pionniers Annex Office.

[5522] Mr. Bonnefoy described two renovations to the Executive Park Office. The first created a dedicated information technology space at the centre of the Executive Park Office, surrounded by glass. The second created new staff offices. During Mr. Allison's tenure, the CSF painted the interior of the Executive Park Office, and created new staff offices out of a storage closet and by dividing a larger office.

[5523] In May 2013, with Ministry approval, the CSF also added an additional meeting room to its lease of the Executive Park Office. Mr. Palmer testified that some Ministry staff had visited the Executive Park Office, and saw that CSF staff

were meeting in an adjacent room. CSF staff explained that the room was not actually included in the CSF's lease. Mr. Allison asked if the Ministry could help fund that aspect of the lease so the room could be used for professional development. This became an official request, and was approved in May 2013.

[5524] Mr. Allison advised that the CSF did minimal maintenance and some cosmetic and heating/cooling renovations to the Pionniers Annex Office because the building was targeted for demolition as part of the Pionniers Replacement Project.

e) CSF's Plan to Consolidate its Operations

[5525] By 2010, the CSF wanted to consolidate its district-level staff in a single location. At that time, the CSF's district-level staff were spread between the Executive Park Office and the Pionniers Annex Office. According to Mr. Allison, the Executive Park Office amounted to 35% of the space used by the CSF for its district-level staff. The remaining 65% of the CSF's space was located at the Pionniers Annex Office. The CSF used the Pionniers Annex Office to house its entire IT department, many counsellors, and as storage for the laptop programme.

[5526] Mr. Allison advised that many challenges arose out of the distribution of CSF staff across the Lower Mainland. It was difficult to coordinating meetings with the IT department, many of whom were housed at the Pionniers Annex Office. He found it challenging to involve managers at the Pionniers Annex Office in general meetings due to a one-hour drive between the two locations. Counsellors based at the Pionniers Annex Office had to drive to Richmond to access the airport and ferry terminals.

[5527] Ms. Gilbert gave some concrete evidence about the challenges of being located at the Pionniers Annex Office. As part of her work, Ms. Gilbert developed training programmes at the Pionniers Annex Office. She delivered the programmes out of the Executive Park Office or a hotel board room in Richmond. She also frequently travelled the Province to train teachers. She said it caused her some stress to gather her supplies from the Pionniers Annex Office before going to

Richmond to deliver training sessions or to access the airport. She eventually gave up her position and returned to teaching because she found the travel too difficult.

[5528] In early 2011, the CSF began pursuing the idea of building a new school board office co-located with a replacement for École Élémentaire des Navigateurs at the former Steveston Secondary in Richmond. In Chapter XXIII, École Élémentaire des Navigateurs (Richmond), I explain that Steveston Secondary was a very expensive site that was sold to a private developer after the Minister considered the CSF's interest and approved the disposal.

[5529] In July 2013, Mr. Allison sent Mr. Stewart a Positioning Letter seeking his intervention in the sale. He asked Mr. Stewart to act immediately to purchase part of the Steveston Secondary Site for the construction of a homogeneous elementary/secondary school and a school board office. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[5530] Mr. Stewart responded in September 2013 by confirming that the Minister had approved the disposal of Steveston Secondary to a private developer. As I explain in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), the Minister was justified in refusing the CSF's request because it has always been clear to all involved that Kilgour Elementary represented the best long-term solution for the CSF in Richmond.

f) The New CSF Board Office

[5531] As I explain in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam), in May 2012 the Province announced support for the École des Pionniers Replacement Project. As the design of that project proceeded, it was determined that the Pionniers Annex Office would need to be demolished to make room for the new school's footprint. The CSF could not build on the existing footprint because École des Pionniers students would lose their

instructional space while the project was underway. The CSF planned to demolish the old school on completion of the new one to create playfields.

[5532] The CSF began actively pursuing new office space for its Pionniers Annex Office employees. With the assistance of a real estate professional, the CSF identified a potential office at Odlin Crescent in Richmond.

[5533] The CSF proceeded to raise the issue with Mr. Stewart in about October 2013. Mr. Palmer stated that he was surprised by the request, because he was unaware the CSF had been using space at École des Pionniers for school board administrative purposes. While the CSF made passing reference to the Pionniers Annex Office in the PDR for the Pionniers Replacement Project, the CSF did not actively lobby for replacement space or funding for a move as part of the negotiation of the Pionniers Replacement Project Agreement. The CSF likewise did not refer to its impending need when the Province approved the CSF's request to add an additional meeting room to the lease of the Executive Park Office.

[5534] Mr. Stewart asked Mr. Allison to provide the CSF's forecasted lease costs for the next year, and to present a business case for New CSF Board Office. Mr. Allison recalled that Ministry staff suggested several times that they would need to carefully review lease cost increases.

[5535] Mr. Stewart gave evidence about the importance of a business case from the Ministry's perspective. His view was that presenting a business case was standard practice for justifying new funding requests. Moreover, he recalled that the CSF had justified the acquisition of École Élémentaire du Bois-joli in part by agreeing to use part of it as administrative space. He also believed that both École Élémentaire du Bois-joli and École Élémentaire des Navigateurs were relatively close to the Executive Park Site, and that neither was operating at capacity. Thus, he expected the CSF to justify its need.

[5536] In November 2013, Mr. Allison sent Mr. Palmer and Mr. Cavelti (copying Mr. Stewart) an estimate of the CSF's lease costs for the current and following year

to help them determine whether to fund additional space. In response, Mr. Cavelti asked Mr. Allison to prepare a business case that evaluated whether the CSF could use surplus space at École Élémentaire des Navigateurs or École Élémentaire du Bois-joli.

[5537] Mr. Allison sent another Positioning Letter to Mr. Stewart on November 27, 2013, which he intended to stand as the CSF's business case. He wrote that "[g]iven the disappointing conclusion to that meeting on October 24, 2013, notably that the Ministry of Education refused to grant the Conseil the support and funding required to lease sufficient satisfactory board office space in Richmond," he wanted to renew the CSF's request for support and funding for new board office space. This is a misstatement of what occurred: the evidence is clear that the Minister was open to receiving and considering the CSF's request, and had yet to refuse it.

[5538] Mr. Allison suggested in his Positioning Letter that the CSF did not have space at École Élémentaire des Navigateurs or École Élémentaire du Bois-joli to accommodate the staff that had been located at the Pionniers Annex Office: a proposition Mr. Stewart disagreed with.

[5539] In his letter, Mr. Allison also advised the Ministry that he had begun negotiating the lease of a different facility at Vanier Place in Richmond (the "Vanier Site"). Mr. Allison explained in his evidence that he had visited three potential sites, and the Vanier Site was in an ideal location and at that time seemed to have an attractive price. Mr. Allison set out the anticipated lease costs for the Vanier Site, which amounted to about \$425,500. He also asked the Ministry to pay for property taxes and maintenance costs the CSF would pay at the Vanier Site, which amounted to \$205,850.

[5540] Mr. Stewart considered that the CSF's request roughly amounted to a quadrupling of what the Ministry paid for the lease of the Executive Park Office. He thought that request was unreasonable because the CSF only planned to relocate 35 to 40 employees whose functions were not tied to being at a particular location. He was also concerned the CSF had failed to show it had considered the range of

possible options. However, the Minister was still open to funding a new lease if the CSF could justify it.

[5541] Accordingly, on December 23, 2013, Mr. Stewart wrote to Mr. Allison and specifically requested a business case that considered and evaluated the potential use of surplus space at École Élémentaire des Navigateurs and École Élémentaire du Bois-joli, confirming how space is used in those schools, and the design parameters for the requested space. Mr. Stewart suggested the Ministry would consider the request subject to the eligible board office space in the Area Standards.

[5542] Meanwhile, Mr. Allison explained, the landlords of the Vanier Site tried to negotiate a lease rate that was higher than others. Mr. Allison's attention shifted away from the Vanier Site to a site on Commercial Parkway in Richmond (the "Commercial Parkway Site"). That site was particularly attractive because the CSF was allowed about \$375,000 in tenant improvements, and a 10-year lease.

[5543] On January 16, 2014, Mr. Allison sent to Mr. Stewart, Mr. Palmer and Mr. Cavelti a business case for a new leased board office facility for CSF employees. Mr. Allison informed the Ministry that his attention had shifted to the Commercial Parkway Site. Notably, he told the Ministry that his focus had shifted because the Vanier site was "no longer available for the CSF", not that the potential rent had increased.

[5544] In the business case, Mr. Allison set out the square footage of each of the spaces the CSF used as board office space across its locations. He also provided colour-coded floor plans of the Pionniers Annex Office and the Executive Park Office to show how the CSF used the space.

[5545] The business case also stated that the CSF had no surplus classrooms or other workspaces available for board office employees at École Élémentaire des Navigateurs or École Élémentaire du Bois-joli. Mr. Allison wrote that six of the 10 classrooms at Navigateurs were being used as classrooms for elementary

students, three were used for a preschool programme, and the final classroom was being used as a multipurpose room.

[5546] In connection with École Élémentaire du Bois-joli, Mr. Allison explained that the CSF was not interested in moving board office employees from the Pionniers Annex Office to École Élémentaire du Bois-joli because it was more than 22 kilometres away from the Executive Park Office: about a 30-minute drive.

[5547] In his evidence, Mr. Allison explained that several rooms at École Élémentaire des Navigateurs and at least one space at École Élémentaire du Bois-joli were used for early childhood education, so he was not willing to use them for school board office employees. When pressed, he conceded that it was the CSF's choice to use the spaces for Early Childhood Education, while stressing his view that early childhood services are within the CSF's mandate.

[5548] Mr. Stewart explained that Mr. Allison's business case finally provided the type of information that the Ministry was seeking. In his evidence, he commented that he understood the CSF's desire to continue to provide its early childhood services at École Élémentaire des Navigateurs. However, when retaining those services was weighed against quadrupling of the cost of school board office space, Mr. Stewart found it difficult to continue to support the CSF's decision.

[5549] Mr. Stewart also commented that he did not think that the CSF's assertion that École Élémentaire du Bois-joli was too distant from the Executive Park Office was reasonable. He did not think the CSF had justified the need for information technology specialists to be consolidated with other staff. Mr. Stewart was also disappointed that he did not receive any confirmation from Mr. Allison about how space was being used at École Élémentaire du Bois-joli.

[5550] Mr. Allison went on to address the design parameters for the requested board office space. This section consists of Mr. Allison's analysis of the space the CSF wanted to have for certain administrative purposes: educational staff offices, administrative offices, archives, information technology, a resource centre, meetings,

storage, a break room and design space. Essentially, Mr. Allison sets out the amount of space the CSF used for each of those purposes, and then requested extra space for many of those departments in light of the CSF's anticipation of growth. This is not what the Ministry meant when it asked the CSF to consider the Area Standards.

[5551] By this point, without support from the Ministry, Mr. Allison had made an offer to lease the Commercial Parkway Site, and it had been accepted. Mr. Allison made the offer because he felt he had to act quickly to find space for employees who worked at the Pionniers Annex Office.

[5552] Notably, Mr. Allison agreed to pay a lease cost that was much higher than the cost at the Executive Park Office. Mr. Allison agreed he signed the contract even though he knew that the Ministry had insisted on prior approvals before it would pay any increased lease costs. He admitted while under cross-examination that he took the risk that the lease cost might not be funded.

[5553] In the business case, Mr. Allison set out the anticipated average cost of the lease of the Commercial Parkway Site in comparison to the Executive Park Office. The Commercial Parkway Site would average an annual cost of about \$655,000, with an occupancy cost of \$26.82 per square foot. At the time, the Ministry funded \$104,520, or \$13.00 per square foot, for the annual lease cost of the Executive Park Office.

[5554] Mr. Stewart noticed that the lease costs for the new site had increased significantly. It seemed to Mr. Stewart that the CSF was seeking a six-fold increase in funding for its school board office. Mr. Stewart concluded that such a grand increase in costs was not justified, particularly since the CSF did not provide a cost analysis of alternative options for providing space.

[5555] Mr. Stewart considered the question for several weeks. He responded by way of an email dated February 27, 2014. He asked Mr. Allison to give more consideration to using surplus space at École Élémentaire des Navigateurs and

École Élémentaire du Bois-joli. He suggested that early childhood education was a discretionary service, not a Ministry requirement. He also pointed to the CSF's plan to use École Élémentaire du Bois-joli to accommodate board office space when the CSF first purchased it.

[5556] Mr. Stewart also averted to the Area Standards, and noted that the amount of space the CSF requested exceeded those standards. He brought up that the Ministry already funded more board space for the CSF than the Area Standards allowed.

[5557] Mr. Stewart concluded by stating that the Ministry would consider the CSF's request subject to the Area Standards once the CSF had addressed his concerns. In his evidence, he explained that he did not know at the time that Mr. Allison had already agreed to lease the new facility. He confirmed that at this point, he had not reached a firm decision. He thought that the Minister would be open to funding an interim measure that fell somewhere between the lease that the CSF requested, and the lease that the Ministry had previously funded.

[5558] Mr. Stewart retired in March 2014. At the time of his retirement, the board office lease question had not been resolved. The file was passed on to Mr. Palmer.

[5559] On March 18, 2014, Mr. Allison sent a further Positioning Letter to Mr. Palmer informing him that the CSF had moved forward with the lease of 2,271 m² of office space at the Commercial Parkway Site. Mr. Allison attached a copy of the Ministry's Area Standards, and noted that the CSF would only be allowed 747 m² under those provisions. He stated the CSF's view that it was "simply impossible" for the CSF to consolidate its operations into a facility of that size.

[5560] Interestingly, in arguing this position, Mr. Allison relied on the Joint Fact Finder's Report-- a report prepared for this litigation with which Mr. Palmer was unfamiliar at the time. This caused Mr. Palmer some concern that the CSF was using litigation to further capital requests without providing necessary context. The

Minister did not consider the Joint Fact Finder's Report when deciding whether to fund the CSF's request.

[5561] On March 21, 2014, Mr. Palmer informed Mr. Allison by telephone that the Province would not fund the CSF's additional lease costs. He confirmed that the Ministry did not build or pay for school board office space through Capital Planning Cycles, and had not done so for 20 to 25 years. He did, however, leave the door open to the CSF to apply for funding the next year by making an official request.

[5562] Believing that his next step was to make an official request to have the lease of the new space funded, Mr. Allison sent another Positioning Letter to Assistant Deputy Minister Fayad on May 6, 2014, and officially requested that the Ministry fund the entire amount of the lease of the New CSF Board Office for the 2014/15 school year forward. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[5563] Mr. Allison attached to that letter a copy of the final lease that he negotiated. Pursuant to that lease, the CSF would pay \$12 per square foot in the first two years; \$14 per square foot in the next two years; \$15 per square foot in the fifth and sixth years, and \$17 per square foot in the last four years of the lease. The CSF's annual basic rent would increase from \$293,388 in the first two years, to \$415,633.00 in the last four years of the lease. The monthly basic rent started at \$24,449 in the first two years, and increased to \$34,636.08 in the last four years.

[5564] Assistant Deputy Minister Fayad responded on May 21, 2014. She explained that the Ministry's position with respect to the request remained as was communicated in an April 11, 2014, letter between counsel. In that letter, Mr. Doust, counsel for the defendants, wrote that the amount requested exceeded the Area Standards. He also expressed concern that the CSF had not obtained prior approval before entering into the lease as previously requested by the Province. Mr. Allison agreed that Mr. Palmer had previously been clear that no lease costs would be funded without prior approval. Mr. Doust advised that since the CSF had

leased space far in excess of the Area Standards, for a much higher lease cost, and had not secured prior approval, the Province would not fund the lease.

[5565] Assistant Deputy Minister Fayad wrote that since the Minister had not given prior approval of the increased lease costs and the matter was at issue in this litigation, the Ministry would take no further action in relation to the request.

[5566] Unsatisfied, Mr. Allison renewed his request by way of another Positioning Letter in June 2014. Assistant Deputy Minister Fayad wrote that the Ministry's position had not changed, and that the Ministry would not provide the CSF with any additional lease funding beyond what it provided in 2013/14.

[5567] Mr. Allison explained that the CSF funded the extra lease costs out of its operating grant funding. To fund the lease, the CSF cut about 27 classroom aide positions. Mr. Allison described this as a very difficult decision, but stated his view that the CSF had no other choice.

3. Discussion

[5568] The CSF raises three issues with the Ministry's approach to the CSF's Board Office space. It says that the Area Standards should not apply to the CSF, that it is disadvantaged by a policy against funding school board office capital projects and that the Ministry must specifically fund the lease of the New CSF Board Office.

a) Area Standards

[5569] The plaintiffs take the position that the Ministry erred by relying on the Area Standards to decline the CSF's requests for additional board office space. They argue that the Area Standards do not provide sufficient space for the CSF's operations, noting Mr. Miller's evidence that school boards typically request board office space in excess of the Area Standards.

[5570] The plaintiffs also argue that the Area Standards fail to account for the CSF's unique needs as a provincial school district. They point out that while

majority-language school districts sometimes own facilities for transportation and maintenance functions, the CSF's province-wide nature makes it inefficient for the CSF to provide those services through conventional means. While the CSF does not require the same maintenance staff, since it contracts most of its maintenance and transportation work, it requires space for district-level administrators to do that work.

[5571] The plaintiffs say the CSF also requires additional Board Office space to fulfill its linguistic and cultural mandate. They suggest the CSF requires cultural and pedagogical departments that majority-language school boards do not, as well as a larger technology department to adapt instruction to its mandate.

[5572] The plaintiffs also argue that given its provincial mandate, the CSF board office serves as a gathering point for trustees, administrators and teachers to address educational questions and to attend training. The plaintiffs say that majority-language districts do not need to host regular meetings of such groups from around the province.

[5573] The plaintiffs also point out that the Area Standards have not been updated since about 1994. Because of that, they suggest the Area Standards were not modified to take into account the CSF's unique needs. Further, the plaintiffs note that the last updates came before the significant technological advances that have marked the past 15 years.

[5574] The defendants counter that this dispute is not about the Area Standards for school board offices. They point out that the CSF's board office space has never been restricted to the amount of space allowed by the Area Standards.

[5575] I agree with the defendants. The CSF has never been held to the Area Standards; the Ministry has consistently funded board office space for the CSF that greatly exceeds the Area Standards. While Ministry officials occasionally averted to the Area Standards in the course of denying the CSF increased funding for its school board office, its real concern was that the CSF was requesting more space

than the Ministry believed it actually needed to accommodate its administrative services, and with the cost associated with the CSF's requests for more space.

[5576] It is true that few other school districts have board office space as small as the Area Standards allow. The plaintiffs point to the school board offices for both SD39-Vancouver and SD36-Surrey. They note that those administrative offices exceed the Area Standards by more than 8,000 m² and 6,000 m² respectively. They also identify seven other districts that have total space designated to board office functions in excess of the Area Standards by more than 2,000 m². Only two school districts in the Joint Fact Finder's report, SD40-New Westminster and SD53-Okanagan Similkameen, have less or equivalent space to what would be allowed under the Area Standards.

[5577] While the New CSF Board Office is not alone in exceeding the Area Standards, the scale by which it exceeds the Area Standards is remarkable. The evidence shows that the New CSF Board Office exceeds the Area Standards by 1,767 m². To frame it differently, it exceeds the Area Standards by 32.8 m² per 100 FTE students.

[5578] Looking at the districts on which the plaintiffs chose to focus, the scale of the CSF's board office exceeds the Area Standards at a far greater magnitude than the offices for either SD39-Vancouver or SD36-Surrey. SD39-Vancouver's Board Office space exceeds the Area Standards by 8,468 m². Given its 2014/15 enrolment of 54,341, it exceeds the Area Standards by 15.58 m² per 100 FTE students. Similarly, the SD36-Surrey board office exceeds the Area Standards by 6,193 m². Given its enrolment of 70,765 students, it exceeds the Area Standards by 8.75 m² per 100 FTE students.

[5579] Just under half of all districts have more space than the Area Standards allow. The space in those districts exceeds the Area Standards by about 14 m² per 100 FTE student. Only two districts had more board office space per 100 FTE students in excess of the Area Standards than the CSF: SD20-Kootenay Columbia (68 m²/100 FTE student) and SD48-Sea-to-Sky (58 m²/100 FTE student). Those

two districts are outliers, and tend to skew the average higher. Leaving those two districts aside, the average amount of board office space in excess of the Area Standards averaged to 10.4 m²/100 FTE students, and ranged from 2.4 m²/100 FTE (SD42-Maple Ridge) to 27.86 m² per 100 FTE (SD44-North Vancouver).

[5580] As I see it, the discrepancy between the size of the New CSF Board Office and the Area Standards illustrates how much extra space and funding the CSF was seeking. The Ministry was never truly focused on the Area Standards; with respect to the New CSF Board Office, it was always cited as one of many reasons for asking the CSF to provide further justification for its request. The Ministry's true concern was that the CSF was going too far past what the Area Standards would allow and not justifying its need for space.

[5581] As a result, I find that there is no breach associated with the Ministry's Area Standards for school board offices: the CSF was never held to those standards.

b) Deprioritization of Board Office Capital Projects

[5582] The plaintiffs argue that the Ministry's policy against funding school board office projects through Capital Planning Cycles has a disproportionate impact on the CSF. They say that majority school boards built their offices before the size of those offices were limited by the Area Standards in the 1980s, and before the projects were deprioritized in 1990. The plaintiffs argue that the CSF is disadvantaged because it was not "grandfathered in" from a prior regime.

[5583] The plaintiffs also say that the CSF does not have the Local or Restricted Capital Reserves that other districts can use for school board office projects. They suggest that the CSF has limited ability to set aside operating funding as Local Capital. The plaintiffs point to the added costs the CSF incurs providing transportation, developing French-language curricula, and delivering Francophone cultural activities. They note that the size of the CSF's overall operating budget makes it harder for the CSF to achieve the economies of scale that allow other districts to set aside operating funding as Local Capital.

[5584] The plaintiffs suggest the Minister should therefore make an exception and fund a capital project for a CSF Board Office. They note that the Ministry made exceptions to its policy for some districts, but not for the CSF, pointing to the new school board office projects that were approved for SD35-Langley and SD77-Summerland and the maintenance facility that was constructed for SD37-Delta, all of which included some capital plan funding.

[5585] The plaintiffs argue that the Ministry's policies leave the CSF dependent on the Ministry to pay its leased board office space. They suggest that the CSF is vulnerable to the Ministry's financing decisions in a way that the majority-language districts are not. They point to the Province's decision to not fund the CSF's 2009/10 lease costs, discussed in detail in Chapter XXXV, Leases. Despite repeated requests by Mr. Bonnefoy for funding to be reinstated, the Ministry did not fund the CSF's board office lease that year. The CSF paid the lease of the board office out of its operating funding in 2009/10. Plaintiffs also point to the difficulties the CSF has encountered because of the Ministry's decision to freeze lease funding to the CSF beginning in about 2014/15. Effectively, the plaintiffs say, the Ministry has not fully funded the lease of the CSF's board office since that time.

[5586] In Chapter XII, Public Funds, I discuss the various sources of funding available to the majority as compared to the CSF, and weigh them against one another. Based on that analysis, I conclude that the CSF faces added challenges with respect to the public funds made available to it for minority language educational facilities. While the CSF and majority boards are in a substantively equivalent financial position mathematically, the sources of capital funding available to the CSF do not give it the same flexibility to move forward with capital projects expeditiously. They do not, for example, give the CSF flexibility to pursue a capital project for a Board Office without support from the Province.

[5587] Against that, it must be considered that the Ministry funds the CSF's lease of board office space when it has not done so for other school districts. Mr. Stewart's evidence was that, up to the time of his retirement, the Ministry had not deprioritized

funding the CSF's lease of board office space in favour of funding school leases. He insisted that all CSF requests for lease funding were on an "equal playing field", and that the request for board office space was not seen as a lower priority request.

[5588] In Chapter VI, *The Respective Roles of the Province and the CSF*, I discuss the CSF's right to management and control. The CSF's right to management and control gives it a measure of control over those aspects of educational facilities that go to the core of its mandate: the minority language and culture. It requires, at the high end, a measure of management and control "over the educational facilities in which their children are taught" (*Mahe* at 371-372), particularly those aspects of education that "pertain to or have an effect upon their language and culture" (*Mahe* at 375). In *Arsenault-Cameron*, the Court confirmed that where the numbers warrant the creation of homogeneous facilities, "representatives of the minority have the right to a degree of governance of these facilities" (at para. 42).

[5589] The Province retains some of its jurisdiction over the education provided to the linguistic minority pursuant to s. 93 of the *Constitution Act, 1867*. Matters that are outside the scope of language and culture (for example, the right to tax) fall outside the minority's right to management and control. Additionally, the Minister has a residual role to play developing institutional structures, regulations and policies to deal with the Province's linguistic dynamics (*Arsenault-Cameron* at para. 43). In particular, the Minister may fix "legitimate parameters of the exercise of the right of management by the Board", and enforce provincial norms (at para. 58). The linguistic minority is not entitled to any particular design of the education system. British Columbia continues to enjoy the jurisdiction to alter educational institutions of the education system pursuant to its plenary power over education. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise its right of management and control consistently with them.

[5590] It falls within the Province's residual jurisdiction pursuant to s. 93 of the *Constitution Act, 1867* to design the education system as it sees fit. This includes

the right to design a system for funding board office space in the Province. Thus, implementing a system whereby the CSF leases its board office facility is constitutionally permissible except to the extent that it interferes with the CSF's right to management and control, or fails to provide rightsholders with the type of space they are entitled to.

[5591] There is some evidence to suggest the CSF's board office funding is vulnerable to the pressures of the Ministry's operating budget. Mr. Stewart confirmed that between 2009/10 through March 2014 the line item in the capital branch's budget for CSF leases was being reduced year over year. He confirmed that to fund the lease of the New CSF Board Office, the Ministry would have had to find the funding elsewhere in its budget. He confirmed that funding for CSF leases was very tight around the time of his retirement. Nevertheless, he maintained that the Capital Branch would have been willing to fund additional space if the CSF could justify the request. In the end, at the time of his retirement, he was not satisfied that the CSF had made out an adequate case for the new lease to be funded.

[5592] Taking into account all the evidence concerning the CSF's board office, I do not consider that operating out of leased Board Office space deprives the CSF of management and control over matters pertaining to language and culture. The evidence does not establish that the CSF lacks security of tenure or is otherwise unable to fulfill its linguistic and cultural mandate because of its board office arrangements. With the exception of one year when the Ministry was undergoing severe financial constraints, the Ministry always funded the CSF's board office lease. It facilitated the CSF's acquisition of the former Weaver Elementary in Delta to help ensure that it had sufficient board office space. The Ministry only stopped funding the full amount of the lease after the CSF had acted unilaterally to secure much grander space than it was entitled to, without the requisite Ministry approval. In essence, it failed to adhere to valid provincial norms and policies. Thus, in my view, the Ministry has not interfered with the CSF's rights to management and control by funding leased rather than owned space. Its policy is therefore consistent with s. 23.

c) Failure to Specifically fund the Lease of the New CSF Board Office

[5593] The plaintiffs argue that the Ministry must fund the lease of the New CSF Board Office. They base their argument in convoluted mathematics that attempt to show that if the Ministry's funding for the CSF's Board Office had kept pace with the CSF's enrolment growth, the Ministry would be funding the same amount as the New Board Office lease.

[5594] The CSF points out that when it moved to the Executive Park Office, it had 2,871 students. Its office was 747 m². It therefore had about 26 m² per 100 FTE students. When it approved funding for that lease, the Ministry did not take into account the Area Standards.

[5595] By 2014/15, the CSF had 5,382 students enrolled. The Ministry continued to fund the same 747 m² of space. The plaintiffs observe that at that point in time, the Ministry was funding about 14 m² per 100 FTE students.

[5596] The plaintiffs submit that the Ministry ought to have made a 15% increase to the square metres per 100 FTE student that it funded in 2006/07. The 15% increase is intended to correspond with the 15% Francophone Supplement that the Ministry began applying to the CSF's operating funding. With that increase, the Ministry would fund 29.92 m² per 100 FTE students. The plaintiffs say that since the Ministry did not make that increase, the Ministry's leasing policy around the school board office space has failed to recognize the CSF's growth.

[5597] The plaintiffs point to Mr. Miller's evidence that it is sometimes appropriate to build a board office to reflect anticipated growth. They suggest it is reasonable for the CSF to anticipate growth by about 2,200 students by 2024, bringing its enrolment to 7,590 students. If the CSF had that enrolment, and the Ministry funded 29.92 m² per FTE, the Ministry would fund 2,271 m²: the very square footage of the New CSF Board Office.

[5598] The CSF arrived at this number by applying the 15% Francophone Supplement to the square metres that were funded at the Executive Park Office. That, they say, would have been necessary to maintain funding at 2001/02 levels. Unfortunately, this misconstrues the nature of the payment of the CSF leases. The lease funding is provided in recognition of the fact that the Ministry chose not to fund capital projects for an owned board office for the CSF. It is not operating funding; it is capital funding. Further, as the CSF itself acknowledges elsewhere in its submission on the board office, the 15% Francophone Supplement is unrelated to funding for board office space. Thus, there cannot be any expectation of a 15% increase in funding.

[5599] Moreover, this misinterprets how a 15% markup would work. Any 15% markup would apply to the funding allocated to the CSF for the lease, not the amount of space that the government would fund. This is particularly so because the Ministry does not provide targeted funding based on amount or use of space; it provides untargeted funding. If the CSF's lease funding were marked up by 15%, it would still fall short of funding the CSF's lease of the New CSF Board Office.

[5600] I also note that the plaintiffs provided no basis for their growth projection; they simply cited the number of students that would mathematically justify a space the size of the New CSF Board Office if the Ministry were to continue to fund the same space per student (marked up by 15%). It is another example of the CSF engaging in backwards planning; it tends to take action and justify its actions through speculative predictions.

[5601] Given the lack of a basis for the CSF's anticipated growth, and my conclusion that it is inappropriate to mark up the formula of metres squared per FTE, I have done my own calculation of the square metres per student that the Ministry would need to fund to maintain 2001/02 funding proportionate to the CSF's enrolment as of 2014/15. In 2014/15 the CSF had 5,382 students enrolled. At 26.02 m² per 100 FTE, the Ministry would fund about 1,400 m² total for the CSF Board Office. The New CSF Board Office exceeds that by about 870 m².

[5602] Of course, even then, it is not clear to me that 2001/02 is an appropriate baseline. The evidence suggests that when the Ministry began funding the CSF's lease of the Executive Park Office in 2001/02, it did not refer to the Area Standards. The Ministry was willing to fund more than the CSF was entitled to at that time in anticipation of the CSF's growth. Thus, in my view, in 2001/02, the Ministry was likely funding more space than the CSF was entitled to at the time. Moreover, the CSF acquired École Élémentaire du Bois-joli for the CSF to partly accommodate its school board office, which would relieve some of its need for space.

[5603] In my view, the Ministry is not required to fund the lease of the New CSF Board Office. The Ministry is entitled to establish provincial norms and funding mechanisms so long as they do not interfere with the CSF's exercise of its management and control. The Ministry did so; the CSF refused to comply with those norms. The CSF moved forward unilaterally and secured an extravagant school board office. The Ministry now continues to fund that portion of the CSF's lease that it funded previously. It is my conclusion that until the CSF complies with the Ministry's requirements by providing feasibility work that properly justifies its need for new space or for additional lease funding, the Ministry is not required to specifically fund the CSF's lease of the New CSF Board Office.

E. Justification and Remedy

[5604] I conclude that British Columbia's rightsholders are receiving the type of school board office facilities they are entitled to. I also find that the Ministry's policies for funding that space do not infringe s. 23. If I had found otherwise, then it would have been open to the Ministry to justify that breach. If that breach were not justified, the analysis would turn to the appropriate remedy. I set out the framework and the common findings of fact relevant to the justification analysis in Chapter IX, Justification, and remedies in Chapter X, Remedies. Because I have done so, and because I find no rights breach, I do not find it necessary to address how I would have addressed those issues.

F. Summary

[5605] I conclude that, given the CSF's enrolment, rightsholders are entitled to the highest level of management and control province-wide. That affords rightsholders the right to board office facilities equivalent to what the majority receives. I conclude that the New CSF Board Office provides rightsholders with far greater amenities than are warranted based on the CSF's numbers. The facilities are opulent.

[5606] I do not find that the CSF is disadvantaged by the Area Standards for school board offices because the CSF has never been held to those standards. I also conclude that the Ministry has the jurisdiction under s. 93 of the *Charter* to elect to fund the CSF's board office by way of a lease instead of a capital project because it does not interfere with the CSF's right to management or control and does not result in rightsholders receiving less than what they are entitled to. Finally, I find that the Ministry is not required to fund the CSF's lease of the New CSF Board Office because the CSF acted unilaterally to acquire the facility without adhering to the Ministry's valid procedures requesting lease funding. As a result, I do not find that any of the Ministry's policies for funding the CSF's Board Office Space are contrary to s. 23.

XXXIV. INTRODUCTION TO PART 4: THE SYSTEMIC CLAIM

[5607] The plaintiffs rely on the evidence in the Community Claims to ground their arguments that rightsholders are disadvantaged by several aspects of the Province's capital funding system for education, contrary to s. 23. In particular, the plaintiffs claim that rightsholders are disadvantaged by the Ministry's policies concerning the CSF's leases, Expansion Projects, Building Condition Projects and Site and School Acquisition Projects. They additionally raise issue with the Provincial system for municipal community planning and the administrative requirements of the Province's capital planning system (prioritization, PIRs, the Area Standards and Enrolment Projections).

[5608] I address those issues in Chapter XXXV, Leases; Chapter XXXVI, Expansion Projects and the Enrolment Driver; Chapter XXXVII, Building Condition

Projects and the Building Condition Driver; Chapter XXXVIII, Site and School Acquisition Projects; Chapter XXXIX, Community Planning; and Chapter XL, Administrative Requirements of the Capital Funding System.

XXXV. LEASES

[5609] The plaintiffs take the position that the Ministry's policies for funding the CSF's leases of school facilities are contrary to s. 23. I have distilled three themes from their argument.

[5610] First, the plaintiffs argue that it is presumptively contrary to s. 23 of the *Charter* that the CSF leases school facilities, arguing that the *Charter* guarantees owned rather than leased facilities. The plaintiffs suggest the evidence shows that leased facilities are never substantively equivalent to owned facilities.

[5611] Second, the plaintiffs raise issue with the Ministry's approach to lease negotiations, arguing that the Ministry does not assist the CSF, leaving it at the mercy of majority boards. This relates to one head of relief the CSF seeks in connection with leasing: an order requiring the Ministry to assist with lease negotiations.

[5612] The third and final theme relates to the Ministry's policies concerning leased facilities. The CSF traces the history of the Ministry's policies, which includes the 2009/10 Lease Funding Suspension introduced in Chapter XXIII, *École Élémentaire des Navigateurs* (Richmond); a requirement for pre-approval of CSF leases in about 2013; and a freeze to all CSF lease funding after about 2014/15. The primary relief sought by the CSF concerning leasing-- orders requiring the Ministry to fund CSF leases and overturn the funding freeze--relates to this aspect of the leasing claim.

[5613] The answer to these questions depends on the findings that I make in the preceding Community Claim chapters. In particular, I rely on my conclusions concerning the alleged breach of s. 23 and the findings that I made in the section on "Causation, Responsibility and Findings Relevant to the Systemic Claims" in each of the following chapters: Chapter XVII, *École Élémentaire La Passerelle* (Whistler);

Chapter XVIII, École Élémentaire de la Vallée de Pemberton (Pemberton); Chapter XIX, École Élémentaire Les Aiglons (Squamish); Chapter XX, École Élémentaire du Pacifique (Sechelt); Chapter XXI, École Élémentaire des Sentiers-Alpins (Nelson); Chapter XXII, École Élémentaire Entre-lacs (Penticton); Chapter XXIII, École Élémentaire des Navigateurs (Richmond); Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)); Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)); Chapter XXVI, École Victor-Brodeur (Victoria); Chapter XXVIII, École Élémentaire Océane (Nanaimo); Chapter XXIX, École Élémentaire La Vérendrye (Chilliwack), Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam) and Chapter XXXIII, Board Office.

[5614] Below, I begin by outlining the Ministry's general approach to leases for the CSF and the historical context, which is rooted in *Vickers #1* and *Vickers #2*. Then, I address the plaintiffs' argument that the evidence shows that leased facilities *prima facie* breach s. 23 of the *Charter*, followed by the plea for greater government involvement in negotiations, and the challenge to Ministry funding policies.

A. Background

[5615] To properly consider the plaintiffs' arguments, I begin by tracing the history of the CSF's form of tenure and the role leases have played, focusing on *Vickers #1* and *Vickers #2*. Then, I provide an overview of the CSF's need to lease facilities today.

1. Historical Context

[5616] The Province has always envisioned that some minority language schools would operate out of leased facilities. The FPFCB challenged that idea in litigation in the 1990s. I provide an overview of that litigation in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, where I outline the history of the CSF. Here, I review that litigation again with a focus on how it has influenced the CSF's form of tenure today.

[5617] When the FEA was created, pursuant to what was then ss. 114, 115 and 155 of the *Former School Act*, majority boards enjoyed the power to acquire, hold and dispose of land and improvements in their own names.

[5618] The FEA was initially established in 1995 by way of the *Francophone Education Regulation*. It was not given the power to acquire land for educational purposes. As I explained in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, in lieu of the power to acquire land, the *Francophone Education Regulation* gave the FEA the power to enter into and dispose of leases for land or land and improvements (s. 11(1)). The FEA was also given a power to enter into agreements with municipalities, regional districts and school districts around the joint use of facilities (s. 11(2)). The Minister had a mandatory duty to provide the FEA with Federal Government funding provided to the Province for capital expenditures for Francophone education (s. 7(2)). The FEA was limited to using only the federal funding to pay for its leases, and was required to obtain the Minister's approval before leasing real property (s. 11(3), (4)).

[5619] When the Minister announced that the FEA would be expected to lease school facilities and that the Province would not fund capital purchases or constructions for the FEA, the FPFCB resumed a legal action claiming that the failure to provide capital funding to the FEA offended the Province's duty in s. 23 to provide minority language educational facilities where the numbers warrant. The FPFCB argued that the *Francophone Education Regulation* was *ultra vires* the *Former School Act*. In the alternative, the FPFCB argued that the regulation was unconstitutional on several bases, among them that the FEA was limited to using federal funds for capital expenditures, and that the regulation did not provide for a dispute resolution mechanism to ensure the FEA would be able to obtain facilities and equipment.

[5620] Mr. Justice Vickers considered those issues in *Vickers #1*. He concluded that limiting the FEA's access to capital funds while providing the majority with capital funding did not fulfill the Province's constitutional obligations. He commented

that the Province was clearly attempting to shift its constitutional responsibility by allowing the CSF to only use Federal Government money for capital expenditures (at para. 36). He further noted that the denial of capital funding was particularly problematic given that the FEA was only allowed to lease property, unless federal funds were provided, while the majority could purchase as well as lease property (at para. 37).

[5621] Turning to the leasing requirements and the absence of a dispute resolution mechanism, Mr. Justice Vickers found difficulty in the absence of an opportunity for the minority to acquire land and improvements in its own name (at para. 38). He pointed out that the limitation on the form of tenure placed the FEA at the mercy of school boards unless there was some dispute resolution mechanism in place. That, he said, did not afford the FEA the measure of management and control envisioned by s. 23 of the *Charter* (at para. 40).

[5622] Following *Vickers #1*, in 1997 the Province amended the *Francophone Education Regulation* and the *Former School Act* to allow the CSF to acquire and dispose of land and improvements. The Province's capital funding system would begin to apply to the CSF.

[5623] However, the amendments did not establish a formal procedure to facilitate the transfer of leased homogeneous facilities to the CSF. The Province also did not create a special capital funding envelope to finance transfers between majority boards and the FEA. Over time, the FPFCB became concerned that the FEA was finding negotiations with school boards difficult. Parents were also expressing concern about insecurity of tenure and the quality of leased facilities. The FPFCB decided to pursue further litigation.

[5624] In September 1998, Mr. Justice Vickers heard a second challenge to the creation of the FEA, focused on whether the 1997 amendments to the *School Act* met the Province's constitutional obligations. In *Vickers #2*, Vickers J. considered whether the amended legislation adequately provided for the transfer of assets to

the CSF. The proceedings turned on s. 166.29 of the *School Act*. That section read in part as follows:

(2) A francophone education authority and a board may, with the prior approval of the minister, enter into an agreement for the transfer of assets that are used by one of the parties but that are vested in the other party.

(3) A francophone education authority and the board of a school district located in the francophone school district may, with the prior approval of the minister, enter into an agreement for the purposes of

(a) the construction, maintenance, operation and use of facilities, to be used jointly by the authority and the board, or

(b) contributing to the cost of construction, maintenance or operation of the facilities referred to in paragraph (a).

[5625] The FPFCB argued that s. 166.29 was contrary to s. 23 because it left the transfer of assets to negotiation between the parties, placing the CSF at the mercy of majority boards, which might result in the CSF paying high rents, lacking control over shared facilities, and suffering from impermanent school programmes. They also expressed concern that the arrangement would always leave Francophone students with second-rate facilities.

[5626] Mr. Justice Vickers conceded that s. 166.29 was not reassuring to rightsholder parents (at para. 37). Nevertheless, he concluded that although the provision was permissive rather than mandatory, it could be interpreted as placing an affirmative obligation on government to ensure an appropriate conclusion to any agreement negotiated between a majority board and the CSF (at paras. 39-42). He acknowledged it was possible that the Minister might, at some future date, exercise his discretion in a manner that would infringe s. 23. However, he held that the possibility was only incidental to the purpose of the discretion, which is to ensure that all eligible students receive a Francophone education (at para. 44).

[5627] Mr. Justice Vickers confirmed that to prevent assimilation, standalone schools should be provided where the numbers warrant. Where the numbers dictate a shared facility, every effort should be made to provide sufficient management and control of its programme to the CSF (at para. 45). Nevertheless, he was satisfied

that ownership was not the only way to provide for management and control of a school programme (at para. 46). Thus, he concluded that failure to provide for ownership of school property, in whole or in part, did not make the legislation flawed. He pointed out that in some circumstances, flexibility in ownership might better serve the parties (at para. 47).

[5628] Mr. Justice Vickers went on to conclude, however, that a dispute resolution mechanism was required to resolve issues that might arise between the CSF and majority boards in connection with the use and lease of facilities. The Province went on to enact the *Education Mediation Regulation* to respond to Mr. Justice Vickers's concerns. I discuss this in more detail in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation.

2. The CSF's Leased Space Today

[5629] As a result of the unsuccessful challenge in *Vickers #2*, the CSF has continued to lease a number of facilities. As I explained in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, in 2014/15, 18 of the CSF's programmes operated entirely in rented school facilities. The CSF also leases two additional schools that serve as annexes to École Victor-Brodeur (Victoria): Lampson Annex and Sundance Annex.

[5630] With few exceptions, majority boards own the school facilities they operate. Mr. Miller confirmed this in his evidence on discovery, citing an exception for some store-front alternative school programmes. He advised that school districts are, collectively, the largest landholders in the province outside the Crown.

[5631] The Ministry does not separately pay for majority school board leases. They pay their own leases using their Operating Block grants. However, despite the move to the Enrolment-Based Funding Model for calculating Operating Block grants in 2002, the Province has continued to directly fund the CSF's leases outside the Operating Block. Mr. Miller advised that the Province believes it is appropriate to fund the CSF's leases because the CSF sometimes operates in leased space

instead of building new schools. Mr. Stewart likewise confirmed that the Ministry has always viewed the lease payments as necessary to satisfy the statutory requirement to provide spaces for all public school students enrolled by a school board.

[5632] While the Ministry funds the CSF's lease of space for its programmes, it does not fund those aspects of the leases that relate to the operation and maintenance of those facilities. Mr. Miller advised that the Ministry has historically refused to fund those charges because the CSF would have to pay the maintenance and operating costs of an owned facility using its Operating Block grants.

[5633] The Province pays the CSF's lease costs out of the Capital Branch's internal operating budget. The internal operating budget is also used for expenses like staff travel and professional development. As I explain in detail below, in the past several years, the Ministry has frozen the lease funding that it will provide to the CSF, citing the increasing pressure on the internal operating budget.

B. Does Section 23 Guarantee Owned Facilities?

[5634] The plaintiffs take the position that s. 23 creates a presumption that the CSF is entitled to owned, not leased, facilities. As I explain above, Mr. Justice Vickers considered and rejected that argument in *Vickers #2*. The plaintiffs argue that 17 years of evidence following *Vickers #2* show that leasing is not constitutionally permissible.

[5635] I answer that question with reference to my findings in the Community Claim chapters. I additionally rely on the evidence concerning leasing arrangements in SD73-Kamloops/Thompson and SD71-Comox Valley, and evidence concerning the CSF's leased, heterogeneous secondary programmes that are not included in the claim in SD46-Sunshine Coast, SD67-Okanagan Skaha, SD71-Comox Valley and SD75-Mission. I describe the situations in those communities below, before considering the CSF's specific arguments about whether s. 23 guarantees leased rather than owned school facilities.

1. SD71-Comox Valley

[5636] In SD71-Comox Valley, the CSF operates a newly-built, owned homogeneous school, École Au-cœur-de-l'île. Prior to that, the CSF leased heterogeneous space from SD71-Comox Valley first at Airport Elementary, then at Robb Road Elementary. I do not reach any conclusions about whether those programmes offer a global educational experience equivalent to what is offered to the majority.

[5637] When the CSF assumed jurisdiction in Comox, the CSF's programme was located in leased space at Airport Elementary. In 2001, SD71-Comox Valley asked the CSF to relocate its elementary programme from Airport Elementary to Robb Road Elementary, a French immersion school. The CSF was told that SD71-Comox Valley would limit enrolment in the French immersion programme to protect the needs of the CSF programme.

[5638] Mr. Bonnefoy explained that the CSF programme had its own wing at Robb Road Elementary. A learning resource centre was attached to the school. Since the majority programme used the school's administrative space, the CSF's administrative space was not immediately visible upon entering the school.

[5639] Ms. Chagnon was the principal of the CSF's Comox programme from 2004/05 through 2007/08. When Ms. Chagnon first arrived in Comox, elementary students were housed in four classrooms in one wing of the school. However, at that point the CSF did not have exclusive use of that wing. The school also had access to a computer lab and a portion of a classroom for special education.

[5640] Mr. Bonnefoy explained that by the time he arrived at the CSF in 2004, French immersion enrolment at Robb Road Elementary had increased, causing overcrowding and forcing the CSF to install a portable to meet its needs. Parents of CSF students in Comox were complaining about the learning conditions.

[5641] The Ministry approved the acquisition of a school in Comox by the CSF in about 2005, to be completed three years in the future. After extensive and

tumultuous tripartite negotiations, in 2009, the CSF and the Ministry signed a Capital Project Agreement for the construction of École Au-cœur-de-l'île at the former Village Park Elementary site.

2. SD73-Kamloops/Thompson

[5642] In Kamloops, the CSF programme, École Collines-d'or, operates out of a homogeneous facility that is leased from SD73-Kamloops/Thompson. I do not make any conclusions about whether or not that facility offers a global educational experience equivalent to what is offered to the majority.

[5643] According to Mr. Bonnefoy, the CSF initially leased heterogeneous space in a majority-language school from SD73-Kamloops/Thompson, and had its classrooms spread throughout the school.

[5644] To avoid problems associated with heterogeneous environments, CSF administrators decided to move to a leased, homogeneous facility. Mr. Bonnefoy suggested the school was not in an ideal location. By Mr. Allison's account, the school is a small and has poor facilities.

[5645] In 2010, Mr. Allison received information that SD73-Kamloops/Thompson planned to close four schools, which he believed to be bigger and better-situated than the school the CSF was using. On reviewing a map, he observed that the four schools are better situated in Kamloops than the school the CSF was occupying. He expressed the CSF's interest in leasing one of those schools. Apparently, that lease never went forward.

[5646] Mr. Allison raised the issue with the Ministry. Mr. Cavelti confirmed with Mr. Allison that the CSF did not have any priority or right of first refusal for leases of closed majority school board assets.

3. Leased, Heterogeneous Secondary Programmes

a) SD46-Sunshine Coast

[5647] In Sechelt, the CSF offers the Sechelt Francophone Secondary Programme in heterogeneous space at Chatelech Secondary. The programme does not form part of the CSF's claim concerning Sechelt, and I make no findings concerning whether the programme offers a global educational experience equivalent to what is provided to the majority.

[5648] Students in Grades 8 to 10 at the Sechelt Francophone Secondary Programme take French, Social Studies and Science courses in French. In Grade 11, students take two courses in French: French and Social Studies. By their final year, students' only CSF course is French. The CSF employs three Francophone teachers to deliver the programme. Two teach exclusively for the CSF, and the third works for both the CSF and SD46-Sunshine Coast.

[5649] The CSF uses three classrooms at Chatelech Secondary. The Francophone programme has use of a science lab in the science area of the school, and classrooms for French and Social Studies in different areas of the school.

[5650] According to Ms. Picard, the principal of the Sechelt Francophone Secondary Programme, it is challenging to schedule secondary courses. SD46-Sunshine Coast organizes the majority school schedule. School administrators work the CSF's plans into the schedule after the fact. As a result, it can be difficult for CSF secondary students to enrol in all of their preferred options courses while completing the requirements for graduation from the CSF secondary programme.

b) SD67-Okanagan Skaha

[5651] The Penticton Francophone Secondary Programme operates in heterogeneous space at Penticton Secondary. The programme does not form part of the CSF's claim concerning Penticton, and I make no findings concerning whether the programme offers a global educational experience equivalent to what is provided to the majority.

[5652] When Mr. Blais was principal of the CSF's Penticton programmes, the Penticton Francophone Secondary Programme was housed at Summerland Secondary. More students enrolled in the programme after it moved to Penticton Secondary. It is not clear whether the move arose out of a request by the CSF or out of an eviction by SD67-Okanagan Skaha.

[5653] Ms. Daragahi, the principal of the CSF's Penticton programmes, explained that Penticton Secondary is a very new school. It is a triple-track school, offering French immersion, a majority programme and a Francophone programme. Ms. Daragahi explained that the CSF has one classroom assigned to it, and two part-time teachers who deliver programming in French. Students in Grades 9 and 10 take science, social studies and French with CSF teachers; students in Grade 10 also receive their planning course in French. In Grade 11, CSF teachers teach French and Social Studies to CSF students. In their final years, French is the only CSF course.

[5654] Mr. Allison described the contractual arrangement for the secondary programme at Penticton Secondary. The CSF pays SD67-Okanagan-Skaha an amount per student per block taught by SD67-Okanagan-Skaha employees. The CSF also pays an administration fee. The total cost is about \$309,402.02, which Mr. Allison thought was expensive.

[5655] Mr. Allison was pressed about his belief that the Penticton Francophone Secondary Programme is expensive while he was under cross-examination. It was put to Mr. Allison that the CSF pays significantly less per student than it receives per student pursuant to its Operating Block grant. Counsel suggested that the CSF comes out ahead, bringing in more per student than it is charged. Mr. Allison maintained that despite this, the CSF would pay less if it ran its own programme.

c) SD71-Comox Valley

[5656] Before École Au-cœur-de-l'île was built, CSF students in Comox attended heterogeneous middle and secondary programmes at Aspen Park Middle and

Highland Secondary, respectively. Those programmes do not form part of the CSF's claim, and I make no findings concerning whether the programme offers a global educational experience equivalent to what is provided to the majority.

[5657] According to Mr. Bonnefoy, in 2004 CSF middle school students at Aspen Park Middle were integrated into the majority programme, but took one course, French, with a CSF teacher. Secondary students were similarly accommodated at Highland Park Secondary.

[5658] Ms. Chagnon was principal of those programmes for a number of years, and testified that the CSF had exclusive use of one classroom at Aspen Park Middle, which allowed staff to give that room a Francophone environment. However, the CSF students were integrated into the majority-school home rooms. The quality of French spoken by CSF students tended to decline in the heterogeneous environment.

[5659] At the secondary programme at Highlands Secondary, the CSF offered only two classes in French. Secondary students were less involved in Francophone youth leadership programmes than their peers in homogeneous schools.

d) SD75-Mission

[5660] According to Mr. Bonnefoy, when he was Secretary-Treasurer of SD75-Mission, the CSF had four to six Francophone students attending a Francophone programme at Mission Secondary. The CSF paid SD75-Mission per block of instruction taught to CSF students. According to Mr. Bonnefoy, the Ministry did not provide SD75-Mission with guidelines or feedback on that system.

4. Findings of Fact

[5661] Taking into account all the evidence concerning the CSF's past and present leased facilities, I find that the CSF's experience is mixed. In Nelson and Richmond, although facilities are leased, I conclude that the CSF is able to offer a global educational experience that is equivalent to what is offered to the majority. In others, the CSF is operating in facilities that are not equivalent, but are proportionate

to what is offered to the majority: for example, in Whistler and at the Nanaimo Francophone Secondary Programme. In still others, I find that the CSF occupies leased facilities that are not equivalent or proportionate to those offered to the majority, but that the infringement is justified: In Pemberton, for example. With reference to Squamish, I find that the CSF operates out of leased, substandard facilities because the CSF refused an appropriate facility. I find that two of the CSF's leased programmes operate in facilities where the global educational experience is unjustifiably substandard: in Penticton and Sechelt.

[5662] The relationships between the CSF and its majority board lessors are of mixed quality. Some are positive: The leasing arrangement in Nelson seems to work well. SD8-Kootenay Lake (Nelson) and the CSF appear able to work collaboratively. SD67-Okanagan Skaha (Penticton) has worked collaboratively with the CSF on renovations to the former Nkwala Elementary.

[5663] Other relationships are more challenging. SD38-Richmond senior staff have used pressure tactics and threatened evictions that were never likely to occur. This created concerns for rightsholder parents of children attending École Élémentaire des Navigateurs.

[5664] The problems with majority-board lessors can become acute where the CSF leases heterogeneous space and the majority-board lessor is under enrolment pressure itself. At École Élémentaire Les Aiglons (Squamish), École Élémentaire La Passerelle (Whistler) and École Élémentaire de la Vallée de Pemberton (Pemberton), the CSF programmes had limited use of and control over physical education and library instruction time, visibility within the school and community and the classrooms and special education space made available to it. Notably, all these schools are located in a single district: SD48-Sea-to-Sky.

[5665] The CSF's relationship with its majority-board lessors at Robb Road Elementary in SD71-Comox Valley seemed to work better. Although the CSF did not have its own administrative space and had limited learning assistance space, the CSF's classrooms were located together in a single wing of the school, allowing it to

maintain a cohesive environment. It also shared space with a dedicated French immersion school, which Dr. Ardanaz maintained was always the CSF's preference when operating heterogeneous programmes.

[5666] The CSF's relationships with majority board lessors at heterogeneous Francophone secondary programmes pose their own problems. While all the administrators of heterogeneous Francophone secondary programmes reported challenges creating a cohesive environment, I find that the problems largely relate to the small numbers of students attending the programmes, and the resulting fact that students have only limited Francophone instruction. On the other hand, Nanaimo District Secondary School staff have assisted the CSF to identify and occupy space that should make it easier for the Nanaimo Francophone Secondary Programme to create a more cohesive environment.

[5667] Sometimes the CSF contributes to problems with its relationship with majority boards. This was the case in Squamish, where the CSF acted unilaterally instead of collaboratively with SD48-Sea-to-Sky around the potential move of École Élémentaire Les Aiglons to Stawamus Elementary.

[5668] There was considerable evidence about whether maintenance arrangements meet the CSF's needs. Again, I find that the situation is mixed. Some majority boards are responsive to the CSF's maintenance concerns, like SD8-Kootenay Lake (Nelson). I also note that the CSF chose to continue its maintenance agreement with SD68-Nanaimo-Ladysmith after moving to an owned elementary school because the arrangement worked well and was cost-effective. There were no complaints concerning a lack of maintenance in those facilities where the CSF leases heterogeneous space in Whistler, Pemberton and Squamish, in SD71-Comox Valley or at any of the CSF's heterogeneous secondary programmes.

[5669] There are maintenance issues with other majority board lessors. SD46-Sunshine Coast chose to renovate its own facilities on the Sechelt Elementary Campus years before it renovated the building housing École Élémentaire du Pacifique (Sechelt), although the work was eventually completed. SD67-

Okanagan Skaha is slow responding to École Élémentaire Entre-lacs' (Penticton) maintenance needs. SD39-Vancouver did not respond to a need to have the HVAC system renovated and repaired in the decade that the CSF leased École Élémentaire Anne-Hébert (Vancouver (East)) when the need for repairs was first identified to it in 1997. Of course, in that period the CSF was receiving AFG funding for students attending École Élémentaire Anne-Hébert; the CSF was simply unwilling to spend its AFG funds at that school because it did not own the facility.

[5670] There are sometimes wait times for maintenance to be performed at École Élémentaire du Pacifique (Sechelt), however the wait times only relate to less urgent maintenance work. It is also not clear that there would not be similar wait times if the CSF owned the school. Indeed, there is some evidence that owned CSF schools like École Élémentaire Anne-Hébert (Vancouver (East)) sometimes face long wait times for maintenance work.

[5671] With respect to security of tenure, again, the situation is mixed. I find that in many instances, the CSF generally enjoys stable security of tenure. This appears to be the case at École Élémentaire des Sentiers-Alpins (Nelson) and École Élémentaire Entre-lacs (Penticton), where there have been no threats of eviction. It is also currently the case at École Élémentaire des Navigateurs (Richmond), although in the past SD38-Richmond has threatened evictions to put pressure on the CSF. I find that it is highly unlikely that the evictions actually would have taken place, but the situation caused some upset for the École Élémentaire des Navigateurs community. While SD39-Vancouver negotiated year-to-year leases of École Élémentaire Anne-Hébert (Vancouver (East)) with the CSF, I am satisfied the CSF knew it would enjoy long-term tenure at that school.

[5672] In some instances, the CSF has experienced insecure tenure in leased facilities. In 1999/00, SD46-Sunshine Coast evicted École Élémentaire du Pacifique (Sechelt) from the Sunshine Building and moved it to a less desirable building on the Sechelt Elementary Campus. Since then it has enjoyed relatively secure tenure. SD48-Sea-to-Sky always insisted on year-to-year leases for all three schools the

CSF operates in the Sea-to-Sky Region. SD48-Sea-to-Sky evicted École Élémentaire Les Aiglons (Squamish) on at least three occasions: twice in the 1990s, and once in 2015. SD48-Sea-to-Sky also evicted École Élémentaire La Passerelle (Whistler) into portables at Myrtle Phillip Elementary in the 1990s and early 2000s before moving it to surplus space at Spring Creek Elementary. Much of the programme at Myrtle Phillip Elementary has since been displaced into community space in the same building. SD48-Sea-to-Sky likewise forced École Élémentaire de la Vallée de Pemberton (Pemberton) into portables behind Signal Hill Elementary to make room for its own enrolment. The relationship with SD71-Comox Valley when the CSF programme was at Robb Road Elementary was better, although the CSF eventually had to install a portable as enrolment grew at the majority programme.

[5673] In the CSF's early days, it appears as though Ministry staff took active steps to intervene and prevent loss of tenure by the CSF. Ministry staff did so in 1999 when SD68-Nanaimo-Ladysmith threatened to evict École Élémentaire Océane (Nanaimo) from its heterogeneous space at Quarterway Elementary. The Ministry was not willing to give the CSF the same assistance in 2015 when École Élémentaire Les Aiglons (Squamish) faced eviction from Garibaldi Highlands Elementary by SD48-Sea-to-Sky. Of course, the Ministry refused that assistance when the CSF had a reasonable option available to it that it chose not to take.

5. Discussion

[5674] The plaintiffs argue that although Mr. Justice Vickers declined in *Vickers #2* to hold that the CSF must necessarily own its school facilities, the evidence shows that conclusion is no longer tenable. The plaintiffs argue that in the 17 years since that decision, the CSF's reliance on rented school facilities has repeatedly led to a lack of substantive equivalence, and an insufficient degree of management and control.

[5675] The plaintiffs ground their argument in the CSF's right to management and control. Pointing to *Mahe*, the plaintiffs suggest the CSF has a reduced level of management and control everywhere it rents educational space. They point out that

although majority boards have no constitutionally entrenched rights, they enjoy a very high level of management and control because they own their facilities.

[5676] The plaintiffs take the position that rented school facilities are not a permanent solution, and are only acceptable as a short-term solution, or where the numbers do not warrant a school facility. In their interpretation of s. 23, the *Charter* requires that, where the numbers warrant, the CSF's school facilities must literally belong to the minority.

[5677] The plaintiffs argue that the right to equality inherent in s. 23 likewise creates a presumption that the CSF will offer education from owned school facilities, rather than leased facilities. Since majority boards own their schools, the plaintiffs argue that owned schools are necessarily incidental to equivalence.

[5678] The plaintiffs also say that heterogeneous leased facilities are unconstitutional because they prevent the CSF from offering homogeneous instruction. In their submission, heterogeneous facilities interfere with the CSF's exercise of management and control over the educational programme and linguistic and cultural environment, contrary to s. 23.

[5679] The plaintiffs also suggest that leased facilities are unattractive to parents. Citing *Association des Parents- SCC*, the plaintiffs argue that school facility conditions that discourage enrolment result in a breach of s. 23. In their submission, leasing is not constitutionally permissible to the extent that leased school facilities deter parents by appearing less permanent, stable or visible than majority schools.

[5680] The defendants take the position that leasing is not necessarily contrary to the CSF's right to management and control. In the defendants' submission, through the duration of a CSF's lease of a majority school, it has a right to quiet enjoyment of the property. The CSF thus has the ability to manage and control the educational aspects of their programme in the facility with no interruption. The defendants suggest there is no suggestion that leasehold tenure of a homogeneous facility does

not provide the CSF with sufficient enjoyment except to the extent that the CSF's tenure is less secure.

[5681] The defendants point out that in most areas where the CSF leases majority-owned schools on a year-to-year basis, the CSF has experienced quiet enjoyment for many years. They say that SD48-Sea-to-Sky was the only district to deprive the CSF of its instructional space due to enrolment growth in its schools. The defendants suggest the CSF bore a significant responsibility for the situation in Squamish as it had notice since at least June 2010 that it would eventually lose its space in Garibaldi Highlands Elementary, but refused the reasonable alternative of moving to Stawamus Elementary.

[5682] In the defendants' interpretation of the plaintiffs' argument, the question of the number of children is important to the issue of whether leasing is constitutionally permissible. The defendants take from the plaintiffs' submission that if the number of children does not fall at the high end of the sliding scale, the numbers do not warrant minority language educational facilities, and it might be appropriate for the CSF to lease facilities. In the defendants' submission, in many of the communities where the CSF leases facilities, the numbers are not at the high end of the scale. Where the numbers are at the high end of the scale, the CSF owns its facilities.

[5683] With specific reference to the plaintiffs' allegation that leased schools are not attractive to parents because they create insecurity of tenure, the defendants suggest the CSF's allegations are not proven. The defendants point to very high participation rates in the CSF's leased heterogeneous facilities in SD48-Sea-to-Sky.

[5684] In Chapter VI, The Respective Roles of the Province and the CSF, I explain that where the number of children likely to enrol in a CSF programme falls at the high end of the sliding scale, the CSF is entitled to a measure of management and control over those aspects of educational facilities that impact on the minority language and culture. It requires, at the high end, a measure of management and control "over the educational facilities in which their children are taught" (*Mahe* at 371-372), particularly those aspects of education that "pertain to or have an effect

upon their language and culture” (*Mahe* at 375). In *Arsenault-Cameron*, the Court confirmed that where the numbers warrant the creation of homogeneous facilities, “representatives of the minority have the right to a degree of governance of these facilities” (at para. 42).

[5685] The Province also retains some of its jurisdiction pursuant to s. 93 of the *Constitution Act, 1867* over the education provided to the linguistic minority. Matters that are outside the scope of language and culture (for example, the right to tax) will fall outside the minority’s right to management and control. Additionally, the Minister has a residual role to play developing institutional structures, regulations and policies to deal with the Province’s linguistic dynamics (*Arsenault-Cameron* at para. 43). In particular, the Minister may fix “legitimate parameters of the exercise of the right of management by the Board”, and enforce provincial norms (at para. 58).

[5686] British Columbia continues to enjoy the jurisdiction to alter educational institutions pursuant to its plenary power over education. The linguistic minority is not entitled to any particular design of the education system. In my view, it falls within the Province’s residual jurisdiction pursuant to s. 93 of the *Constitution Act, 1867*, to design the system for funding space for students. Thus, implementing a system in which the CSF leases some of its educational space is constitutionally permissible except to the extent that it interferes with the CSF’s right to management and control, or fails to provide rightsholders’ children with the type of space they are entitled to. Indeed, it is the Province’s role to craft a regulatory system that responds to this unique interplay between the majority and minority in the province.

[5687] Taking into account all the evidence concerning leased facilities, I do not find that when the CSF operates out of leased space it automatically lacks management and control over matters pertaining to language and culture. Indeed, I find that the CSF is only entitled to facilities falling at the high end of the sliding scale in three communities in this claim where the CSF leases space: Penticton, Richmond and Nelson. In all three communities, the CSF operates out of homogeneous leased space and enjoys security of tenure. Within its walls, it has complete control over all matters going to the language and culture of the

community. In all three communities, the Ministry funds the CSF's use of space, and the CSF has sufficient space to accommodate its elementary enrolment.

[5688] The CSF's relationships with SD67-Okanagan Skaha and SD8-Kootenay Lake have generally been positive and co-operative. While rightsholders in Penticton are not housed in fully equivalent facilities, the facilities do not deprive the CSF of its right to management and control over matters pertaining to language and culture.

[5689] While the relationship with SD38-Richmond has been challenging, since the 2010 departure of SD38-Richmond's former Secretary-Treasurer, the relationship has become a positive one. I also note that the CSF had recourse to a dispute resolution mechanism to resolve its problems with SD38-Richmond, but chose not to avail itself of that option.

[5690] In the remaining communities in the claim that operate out of leased facilities, the numbers fall somewhere in the middle of the sliding scale. In those communities, the CSF has typically shared heterogeneous facilities (such as in SD48-Sea-to-Sky), although sometimes it has had access to homogeneous facilities (such as at École Élémentaire du Pacifique (Sechelt)). In each of those cases, the numbers do not warrant homogeneous facilities over which the CSF exercises full management and control. While operating out of a heterogeneous facility does have the effect of reducing the CSF school's management and control over school facilities, the CSF maintains an appropriate measure of control over matters that go to language and culture in the course of instructing its students. The CSF has its own classrooms and instructors, teaches a specialized curriculum and maintains full homogeneity with the walls of its classrooms.

[5691] In connection with the CSF's argument that leased facilities discourage enrolment, I am unable to find that is so based on the evidence. In SD48-Sea-to-Sky, enrolment has continued to increase at all three CSF schools despite the fact that the CSF operates out of heterogeneous space. At École Élémentaire des Navigateurs (Richmond), where the CSF had the most challenging relationship with

its landlord out of any in the claim and the greatest fear of eviction (although that fear was unfounded), the CSF experienced enrolment increases in every year except for 2010/11. They experienced enrolment increases in most of those years where SD38-Richmond was using the media to exert pressure on the CSF.

[5692] Thus, in my view, the evidence does not go as far as the plaintiffs say. It does not establish that leased facilities are so inferior that rightsholders are not receiving all that they are entitled to pursuant to s. 23. The evidence does not establish that leasing arrangements always result in the CSF having inferior facilities, poor maintenance, challenging relationships with majority board lessors or insecure tenure. I cannot conclude that it reduces the CSF's level of management and control to below what rightsholders are entitled to. The situation is mixed. Sometimes those arrangements work; sometimes they do not.

[5693] However, as with School and Site Acquisition Projects, the CSF is always limited because of leasing arrangements. The CSF has no input into decisions taken around school closures, and therefore has limited choice over what closed facilities it is allowed to use. It must wait until a majority board chooses to close a school, and take whatever becomes available. That is why the CSF leases an equivalent facility 10 kilometres outside Nelson. I also note that the CSF has not been able to persuade SD73-Kamloops/Thompson, to allow it to lease closed facilities that it would prefer to the one it occupies. I will take this into account when discussing disposal orders in Chapter XXXVIII, Site and School Acquisition Projects.

C. Ministry Involvement in Lease Negotiations

[5694] The plaintiffs argue that the events that have occurred since *Vickers #2* show that the Province has acted contrary to Mr. Justice Vickers' ruling, leaving the CSF to negotiate its leases without assistance. Below, I discuss the Ministry's general approach to lease negotiations, and two outliers to that approach: an instance where the Ministry involved itself in negotiations with SD61-Greater Victoria without a request, and an instance where the Ministry did not intervene in negotiations with SD48-Sea-to-Sky.

1. General Approach to Lease Negotiations

[5695] The CSF typically negotiates leases with majority boards without Ministry assistance. Both Dr. Ardanaz and Mr. Bonnefoy testified that the CSF avoids involving the Ministry in negotiations to preserve the CSF's relationships with majority boards.

[5696] Mr. Bonnefoy gave evidence about the process for formalizing CSF leases during his time as Secretary-Treasurer. Typically, he sent majority boards template contracts, then majority board staff would complete a schedule of fees. After the contract was signed, Mr. Bonnefoy sent the lease to the Ministry for payment.

[5697] Mr. Miller and Mr. Stewart confirmed that Ministry staff do not usually participate in lease negotiations between the CSF and majority boards. The Ministry also does not have any standards or policies concerning what amenities should be provided to the CSF in lease arrangements. The Ministry leaves the terms of leases to the school boards to negotiate.

[5698] Mr. Miller conceded that the Ministry intervenes in lease negotiations on request by the CSF. The Ministry would typically encourage the majority board to enter into the agreement using moral suasion and its influence. Mr. Miller suggested that the Minister has limited tools to intervene, as it lacks a directive power that it can use to influence school board lease negotiations. While the Ministry had an active capital programme to use as leverage in the CSF's early years, the stall in capital project approvals after 2005 made it difficult to continue negotiating deals for the CSF.

[5699] There are a few examples in the evidence of the Ministry assisting the CSF through challenging lease negotiations on request. Ministry staff assisted the CSF to secure space when it faced evictions in Nanaimo and Comox. In Vancouver, when École Élémentaire Anne-Hébert Annex (now École Élémentaire Rose-des-Vents) was being evicted from the church annex it was using, the Deputy Minister persuaded SD39-Vancouver to allow the CSF to lease Queen Elizabeth Annex

temporarily. Indeed, in the CSF's early years, when Mr. Miller, Mr. Owen and Deputy Minister Ungerleider were involved, Ministry staff did not hesitate to advocate for the CSF's needs and to use powers of persuasion to help the CSF resolve its problems.

[5700] In about 2010 and 2011, the Ministry took a more active interest in the negotiation of CSF leases. Due to financial circumstances in 2010, Ministry staff grew concerned with limiting government expenditures on CSF leases. Ministry staff wanted to review CSF leases to compare them to market rental rates.

[5701] Mr. Stewart explained that the Ministry saw some urgency to the matter, and wanted to complete the review by the end of June 2010 so that the issue would be closed by the start of the 2010/11 school year. Ministry staff contacted Shared Services BC, the successor to ARES, to perform the review because of its expertise in real estate matters. Mr. Stewart's evidence was that Shared Services BC did not respond quickly, so he escalated the matter. Finally, he received a response indicating that Shared Services BC "does not undertake reviews of leases to determine whether they are competitive."

[5702] On further discussion, Mr. Stewart and Mr. Cavelti determined the best approach would be to review CSF leases to ensure the Ministry was not double funding administrative costs that the CSF was expected to pay using its Operating Block grant. If there was evidence of double funding, then staff would consider implementing a standard-form lease.

[5703] Although staff were frustrated with Shared Services BC, Mr. Stewart engaged one of their staff, Mr. Andy Schimmel, to do the work. In December 2010, Mr. Schimmel advised that he could not determine if any leases had been double funded. He noted that different leases were used in different areas, and that it was not clear on the face of the leases who was responsible for what payments.

[5704] Despite this, in January 2011, at Mr. Cavelti's request, Mr. Schimmel provided a spreadsheet showing the cost of leasing government space in various

communities. He cautioned Ministry staff against comparing those rates to the rates the CSF paid because the properties were leased for different uses. Heeding that advice, Ministry staff did not do any such comparison. Overall, Mr. Stewart thought that the lease review was unhelpful.

[5705] Mr. Schimmel suggested the Ministry create a standard-form lease agreement to address some of the concerns with double funding. He also suggested the Ministry engage professional negotiators to act on behalf of the CSF. Mr. Palmer recalled that the Ministry did not actively pursue these ideas. It seemed complex and unworkable to arrive at a template that would be acceptable to all of the CSF's lessors, school district or otherwise. The Ministry also lacked the internal expertise required to create a template or negotiate real estate contracts. He could not recall the Ministry ever pursuing the idea of contracting a negotiator.

[5706] Mr. Stewart asserted that Mr. Schimmel advised that Shared Services BC would have to create a specialized agreement on a fee-for-service basis. The Ministry would have also had to pay to engage a Shared Services BC negotiator. These suggestions arose in February 2011, eight months after the Ministry first began making inquiries of Shared Services BC.

[5707] In light of the long delay, the quality of service and the associated cost, Mr. Stewart decided not to engage Shared Services BC. Mr. Stewart also noted that the CSF's requests for lease reimbursements appeared to be declining. Mr. Stewart anticipated that they would continue to decline as the CSF moved into additional permanent facilities.

[5708] The plaintiffs take issue with the fact that the Ministry did not involve the CSF in these reviews. Notably, the lease review began shortly after the CSF had commenced this litigation alleging problems with the Province's leasing system. This likely explains why the Ministry was reluctant to work with the CSF on a collaborative solution.

[5709] Ultimately, then, the Ministry's approach to the CSF did not change. The Ministry has typically left the CSF to negotiate leases on its own, but would assist the CSF on request.

[5710] In more recent years, the Ministry has ceased taking this approach. In 2012, without a request from the CSF, the Ministry intervened directly in the CSF's negotiation of the lease of Lampson Annex in Victoria. In 2013 and 2014, the Ministry refused the CSF's request for assistance negotiating with SD48-Sea-to-Sky.

2. Ministry Lease Intervention in Victoria

[5711] In 2012, on an exceptional basis, the Ministry became involved in the negotiation of the CSF's lease of Lampson Annex from SD61-Greater Victoria. I describe those circumstances in Chapter XXVI, *École Victor-Brodeur* (Victoria).

[5712] To summarize, in the spring of 2012 Mr. Allison asked SD61-Greater Victoria administrators about surplus space to relieve overcrowding at *École Victor-Brodeur*. SD61-Greater Victoria identified six schools with surplus space. SD61-Greater Victoria was willing to evict the tenant at Lampson Elementary to make room for the CSF.

[5713] The Ministry assisted Mr. Allison to negotiate the lease of the Lampson Annex from SD61-Greater Victoria. As I see it, Mr. Stewart likely became involved because the Ministry had instituted a requirement for the CSF to have its leases pre-approved before the Ministry would fund them. Mr. Stewart led the negotiation, and negotiated a 5% increase over the lease costs paid by the former tenants of Lampson Elementary. The negotiations resulted in a three-year lease of two of the three floors of Lampson Elementary, beginning September 1, 2012, at an annual rate of \$336,000. SD61-Greater Victoria receives that amount as operating revenue.

3. SD48-Sea-to-Sky Leasing Arrangement

[5714] In contrast to the negotiation of the Lampson Elementary lease, in 2013 and 2014, the Ministry refused a specific request by the CSF for assistance in connection with its leases with SD48-Sea-to-Sky.

a) Lease Negotiations with SD48-Sea-to-Sky

[5715] Dr. Ardanaz, Mr. Bonnefoy and Mr. Allison all testified that SD48-Sea-to-Sky insisted on one-year leases of its facilities. SD48-Sea-to-Sky routinely denied Mr. Bonnefoy's requests for longer terms.

[5716] Mr. Bonnefoy and Mr. Allison testified that lease re-negotiations with SD48-Sea-to-Sky therefore took place annually. Every year, both districts discussed their needs at a meeting between officials from both districts and the principals of the three CSF programmes in the Coast Mountain region and the three host schools. Following the discussion, SD48-Sea-to-Sky officials sent the CSF a draft contract to be finalized once both sides knew their final enrolments and SD48-Sea-to-Sky knew its operating costs.

[5717] Mr. Allison and Mr. Bonnefoy testified about the negotiations for 2012/13, 2013/14 and 2014/15. Mr. Bonnefoy, who was involved in the 2012/13 negotiations as a contractor, testified that by 2012 the CSF had two full-time principals for its three Coast Mountain schools. However, SD48-Sea-to-Sky was charging the CSF fees for administrative services including the services of school principals.

[5718] Ms. Drapeau, the principal at École Élémentaire Les Aiglons, accepted that Garibaldi Highlands Elementary administration received and signed for mail and packages, and redirected visitors to École Élémentaire Les Aiglons. She also noted that the principal at Garibaldi Highlands Elementary coordinated École Élémentaire Les Aiglons' students' involvement in reading morning announcements. However, she stressed that École Élémentaire Les Aiglons provided its own supervisors for recess, lunch and after school and other administrative services.

[5719] At the April 13, 2012, annual lease negotiation meeting, the CSF suggested a review of SD48-Sea-to-Sky's administrative charges. Shortly thereafter, SD48-Sea-to-Sky replaced its Secretary-Treasurer with Mr. Hetherington.

[5720] SD48-Sea-to-Sky circulated a draft lease for 2012/13 in the summer or fall of 2012. Pursuant to that lease, the CSF would be charged a portion of salaries for

administrators, clerical staff, librarians and librarian clerks. The CSF would also be charged a portion of the operating budget for both Garibaldi Highlands Elementary and Spring Creek Elementary.

[5721] Mr. Allison took issue with many of these administrative fees because the CSF had its own librarians, secretaries and principals. Mr. Allison was also concerned that the CSF was being charged arbitrary operating fees based on the CSF's proportion of the student population rather than actual use of supplies by CSF staff and students.

[5722] After consulting with the school principals, in February 2013 Mr. Allison wrote to Mr. Hetherington to dispute the administrative and school support charges. Mr. Hetherington responded that it was standard practice between the two districts to share total costs proportionately to the number of students in the building. Mr. Allison agreed to Mr. Hetherington's suggestion that the issues be addressed in the 2013/14 lease negotiation, but stressed that the CSF wanted to re-evaluate the administrative fees.

[5723] The 2012/13 lease was signed in February 2013. The CSF was charged about \$115,000 for school support or administrative fees across its three schools. The CSF was responsible for paying that aspect of the lease charges.

[5724] By June 2013, Mr. Hetherington was replaced as Secretary-Treasurer for SD48-Sea-to-Sky by Mr. Ikebuchi. Mr. Allison received SD48-Sea-to-Sky's schedule of costs in the summer of 2013. On review, Mr. Allison noticed that SD48-Sea-to-Sky was charging for more square metres than it had in previous years. On consultation with principals of the three schools, he was told that the CSF programmes did not have access to more space than they had previously occupied.

[5725] Mr. Allison raised this concern with Mr. Ikebuchi, who confirmed that the CSF was charged for space based on the proportion of CSF students in the school rather than the space in the rooms the CSF occupied. Since the proportion of CSF students in SD48-Sea-to-Sky schools had increased, the CSF was being charged

more. Mr. Allison protested, but did not press the issue because the Ministry paid that aspect of the lease.

[5726] Mr. Allison also raised with Mr. Ikebuchi the school support and administration fees. He pressed that the CSF did not use SD48-Sea-to-Sky administration, clerical and supervision services, as the CSF had its own staff. Mr. Ikebuchi responded that SD48-Sea-to-Sky was responsible for all people using the facility. He also noted that the formula resulted in limited costs to the CSF: half the cost to SD48-Sea-to-Sky, reduced further based on the CSF's proportion of the school population.

[5727] On September 24, 2013, Mr. Ikebuchi also advised that SD48-Sea-to-Sky would add \$31,000 to the agreement for transportation services for École Élémentaire La Passerelle (Whistler), reflecting what he said was the cost of half of one bus. Mr. Allison thought this was very expensive compared to what the CSF paid to contract bus services. Mr. Allison suggested reducing the charges to \$10,000 for the year.

[5728] Mr. Allison sent Mr. Ikebuchi the CSF's enrolment data in October 2013. By January 2014, Mr. Ikebuchi sent Mr. Allison the schedule of fees for 2013/14. Mr. Allison consented to an increase to the base rent cost because the Province paid that aspect of the lease. He protested the administrative fees again, and raised with Mr. Ikebuchi that he had asked Mr. Hetherington to renegotiate those fees. Mr. Ikebuchi declined because in his view the CSF programmes were using school services and supplies.

[5729] When he sent the schedule of fees, Mr. Ikebuchi asked about next steps to finalize the \$31,000 increase for transportation costs. When Mr. Allison protested, Mr. Ikebuchi suggested the CSF could provide its own transportation services.

[5730] The CSF paid part of the fees, but disputed and withheld the administrative service fees and transportation and service charges. The CSF eventually paid those

fees under protest only because it was a condition for the CSF to settle a lease arrangement for 2014/15.

[5731] Mr. Allison and Mr. Ikebuchi exchanged comments on the schedule of fees for 2014/15 in July 2014. That year, the CSF was not charged for supervision at Garibaldi Highlands Elementary. Mr. Allison did not understand why, but did not make inquiries. Mr. Allison once again took issue with administrative and service fees. The CSF was also charged additional transportation fees again. Mr. Allison did not pursue its own transportation services because Mr. Ikebuchi told him that the CSF could not use SD48-Sea-to-Sky's bus loading zones.

b) Requests for Ministry Assistance

[5732] The CSF sought Ministry assistance with lease negotiations with SD48-Sea-to-Sky on several occasions. When Mr. Allison asked for assistance with the 2013/14 lease negotiations in October 2013, Mr. Cavelti responded that the Ministry did not intervene in negotiations between districts.

[5733] Mr. Allison sought assistance again in February 2014. He forwarded a recent email exchange with Mr. Ikebuchi to Mr. Stewart, and stated that he felt the CSF had no choice but to pay what SD48-Sea-to-Sky had stipulated.

[5734] At the same time, the CSF was facing eviction from Garibaldi Highlands Elementary in Squamish, which I discuss in detail in Chapter XIX, École Élémentaire Les Aiglons (Squamish). As I explain there, Mr. Allison also sought Mr. Stewart's assistance resolving that issue.

[5735] Mr. Stewart wrote to Mr. Allison and Mr. Ikebuchi on February 12, 2014. He acknowledged that both districts had contacted the Ministry about the dispute. He explained that the Ministry typically did not involve itself in inter-district discussions. However, since both districts had separately sought Ministry advice, he thought it appropriate to meet to attempt to reach a mutually agreeable solution.

[5736] According to Mr. Allison, the meeting between Mr. Ikebuchi, Mr. Stewart and Mr. Allison took place on February 14, 2014. Mr. Allison explained in some detail why he disagreed with the charges and that the CSF needed space in Squamish. Mr. Allison perceived that Mr. Stewart listened at the meeting, but did not participate in the discussions or take any action. Mr. Stewart testified that he saw it as his role to hear both sides of the story, and to encourage both sides to reach agreement. His view coming out of the meeting was that there was no further need for the Ministry to intervene, as he expected Mr. Ikebuchi and Mr. Allison to resolve their differences themselves.

[5737] At the time of Mr. Stewart's retirement at the end of March 2014, the issues between the CSF and SD48-Sea-to-Sky had not been resolved. Mr. Stewart confirmed that his view at the time he retired was that it was open to both sides to invoke the *Education Mediation Regulation*, and neither side did so. He was not asked to intervene again.

[5738] On September 30, 2014, Mr. Allison sent a Positioning Letter to Assistant Deputy Minister Fayad in connection with lease negotiations with SD48-Sea-to-sky. He wrote that the CSF required "direct intervention from the Ministry to negotiate a longer-term lease with SD48-Sea-to-Sky". He specifically asked that the Ministry be directly involved in all steps, aspects and meetings related to the lease negotiation for the 2015/16 school year. He also suggested that Ministry intervention could ensure that administrative fees were no longer charged by SD48-Sea-to-Sky. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, namely that this letter appears to have been created for litigation purposes, I take from this letter only the fact that the request was made.

4. Argument and Analysis

[5739] The plaintiffs argue that the lease negotiations with SD48-Sea-to-Sky and SD61-Greater Victoria demonstrate that negotiations between the CSF and majority school boards are not fair and balanced.

[5740] The plaintiffs point out that SD48-Sea-to-Sky repeatedly charged the CSF administrative fees that it disputed, which the CSF must pay out of its operating budget. Overall, the plaintiffs say that SD48-Sea-to-Sky staff acted in a “cavalier” way, contrary to the two districts’ common purpose of educating students.

[5741] In the plaintiffs’ submission, the negotiation of the lease of Lampson Annex also demonstrates the inequality in bargaining power. They take the position that Mr. Stewart was unable to negotiate a favourable lease rate due to inequality in bargaining power.

[5742] Thus, the plaintiffs say the Ministry’s policy of leaving the CSF to negotiate leases without assistance is not constitutionally permissible. In their submission, Ministry staff take a “hands-off” approach to CSF leases, which fails to heed the guidance of Vickers J. in *Vickers #2* at para. 48, where he suggested the CSF’s ability to carry out its mandate could be hampered by the need to bargain for space on a continuing basis. They point to the Ministry’s failure to assist the CSF with the SD48-Sea-to-Sky lease negotiations despite repeated requests.

[5743] The plaintiffs acknowledge that the CSF never pursued the *Education Mediation Regulation* to resolve its issues with SD48-Sea-to-Sky. To explain the decision, they avert to their submission on the *Education Mediation Regulation*, where they argue that the instrument does not ensure the CSF has management and control of its programme without constant reference to majority boards. The plaintiffs argue that the CSF could not risk its fragile tenure in SD48-Sea-to-Sky by invoking the *Education Mediation Regulation*.

[5744] The plaintiffs also argue there was nothing significant about the Lampson Elementary lease that specifically justified the Ministry’s involvement. They note that Mr. Stewart testified that the Ministry was involved because Mr. Stewart was aware that École Victor-Brodeur was over capacity, and was aware that SD61-Greater Victoria had surplus space. They also point to Mr. Stewart’s statement that the Ministry had a direct interest in the negotiations because the Ministry would pay the

lease. The plaintiffs suggest that the same is true of all communities where the CSF leases educational space.

[5745] In the plaintiffs' submission, the Ministry ought to take an interest in the CSF's negotiations for leased educational space everywhere space is needed, and should specifically take an interest in negotiations in those communities where there are evident problems. In the CSF's view, it would be more appropriate for the Ministry to involve itself in negotiations where the CSF faces risks associated with a loss of educational space (Squamish) than communities like Victoria, where there is ample space available for the CSF to lease.

[5746] The plaintiffs point out that the Ministry had an opportunity to assist the CSF through its review of CSF leases, but chose not to. They suggest it was unreasonable for the Province to believe the CSF's lease costs would continue to decline as Mr. Bonnefoy had told Ministry staff on several occasions that the CSF's enrolment was growing rapidly. In their view, the Ministry ought to have anticipated lease costs would increase as the CSF's enrolment began to exceed its capacity.

[5747] The defendants take the position that the Ministry has generally been helpful when the CSF has asked for assistance. Based on the evidence of Dr. Ardanaz and Mr. Bonnefoy, they say that the CSF's approach to lease negotiations was generally to try to negotiate the leases themselves, without Ministry assistance, to preserve the CSF's relationship with majority boards. When the CSF sought assistance, the Ministry was almost invariably willing to help. The defendants' position is that the only incident where the Ministry denied assistance was with respect to the SD48-Sea-to-Sky negotiations in 2014.

[5748] The defendants take the position that the Ministry was justified in not pursuing the work with Shared Services BC because the Ministry was not satisfied with the quality of the work, and because the lease costs were declining. They also point out that the Ministry continued to fund the CSF's leases as presented for two years.

[5749] It appears to me that there are two issues to be decided: First, whether the CSF experiences an inequality in bargaining power, and second, whether the Ministry ought to assist the CSF and has not done so.

[5750] With reference to whether the CSF lacks bargaining power, it is not clear to me that the CSF is being charged unreasonable fees. As I see it, at SD48-Sea-to-Sky's insistence, the CSF was charged rents and fees for the Sea-to-Sky region based on the proportion of its students in the school. It is not clear to me that this is totally arbitrary, as Mr. Allison suggested to SD48-Sea-to-Sky staff, or as the plaintiffs allege in their argument. I cannot determine whether the fees are fair without hearing SD48-Sea-to-Sky's side of the story.

[5751] It is also not clear to me that the lease of Lampson Annex resulted in arbitrarily high fees. Mr. Stewart negotiated a small increase above what a previous tenant had paid to lease Lampson Elementary, which is not totally arbitrary.

[5752] It should also be noted that the high rents are not something that has a disproportionate impact on the CSF itself. The CSF is not responsible for paying all of the negotiated costs. The CSF only pays the administrative fee portions of leases; the Ministry pays for the actual use of space. Indeed, in negotiations with SD48-Sea-to-Sky, the CSF did not push back against the rate for the use of space because it knew the Ministry would fund those portions of the lease. Thus, the lack of bargaining power has a limited effect on the CSF so long as the Ministry continues to fund the CSF's lease of space.

[5753] However, the CSF clearly had unequal bargaining power as compared to SD48-Sea-to-Sky resulting in it having to pay administrative fees that it disputed. The CSF was beholden on SD48-Sea-to-Sky for space for its programmes, and had little to offer that SD48-Sea-to-Sky needed. This is generally the case in most CSF negotiations with majority school boards. The CSF needs space to occupy its programmes, and usually begins its programmes in space leased from majority school boards.

[5754] In the face of that lack of bargaining power, the Ministry has adopted a laissez-faire approach to the CSF's lease negotiations. The Ministry's approach to the CSF's leasing arrangements has historically been to offer assistance only upon request by the CSF. For many years, this approach was coupled with the CSF's desire not to ask the Ministry for assistance out of fear that it could damage its relationships.

[5755] The evidence establishes that in 2010 and 2011 the Ministry took some steps related to the CSF's leases that could have resulted in different policies that might have assisted the CSF. The Ministry attempted to review the CSF's leases and considered creating standardized lease terms and rates. Although the Ministry engaged the Province's real estate division, it did not receive any helpful information, and what information it did receive was subject to very long delays.

[5756] On the other hand, there were some steps that the Ministry chose not to take. The Ministry did not seriously consider engaging professional negotiators. The idea of creating a standard-form lease was outside the Ministry's expertise, would have proven very expensive from Shared Services BC and the Ministry was dissatisfied with their work to that point. I agree with the defendants that the Ministry was justified in not pursuing that work any further with Shared Services BC

[5757] Notably, when the Ministry declined to pursue those options, it was aware that the CSF's lease costs were in decline, and anticipated they would continue to decline as the CSF opened new schools. The Ministry did not have information to suggest the CSF was considering opening any new programmes in leased facilities.

[5758] The Ministry adopted an active role with respect to the CSF's negotiation of the Lampson lease. This occurred at a time when the Ministry had advised the CSF that it would require pre-approval before the Ministry would fund any new leases, and was generally engaging in greater scrutiny of lease costs. The Ministry had even been considering implementing standard-form leases and rates shortly prior.

[5759] By the time the CSF was negotiating the SD48-Sea-to-Sky lease, though, the Ministry had begun taking a passive approach to the CSF's need for space. As I explained in Chapter XXIV, *École Élémentaire Rose-des-Vents (Vancouver (West))*, around the time this litigation started, the Ministry ceased being an advocate for the CSF's interests with majority boards. Instead, the Ministry adopted an approach of maintaining neutrality between school districts.

[5760] This approach appears to have infused the Ministry's decision to refrain from becoming involved in the CSF's lease with SD48-Sea-to-Sky. While Mr. Stewart attended a meeting between Mr. Ikebuchi and Mr. Allison, he acted as a facilitator. Indeed, he always remained neutral as between the two districts. He refused to become involved until both districts had sought assistance. Mr. Palmer also declined to become involved, despite receiving several Positioning Letters. He thought it appeared the CSF was evaluating options and making progress, and suggested the CSF did not directly ask him to intervene. He, too, cited a desire to remain neutral between the two districts.

[5761] The Ministry's desire not to assist the CSF in recent years is understandable. It seems to me that after the CSF started this action in 2010, it often looked for ways to manipulate events to advance their position in the litigation. This certainly appears to have been the case with respect to its need for space to house *École Élémentaire Les Aiglons (Squamish)*. It would have been reasonable for the Ministry to fear that if it actively assisted the CSF in lease negotiations, the CSF would have found a way to use it against the Ministry in this case.

[5762] Nevertheless, as I see it, the Ministry's recent practice of maintaining neutrality between school boards has left the CSF to deal with its leasing arrangements with SD48-Sea-to-Sky and other districts on its own, without assistance from the Ministry. The CSF asked the Ministry to intervene, but the Ministry took a passive approach that attempted to maintain neutrality between the two districts. I infer, based on the Ministry's approach in connection with *École Élémentaire Rose-des-Vents (Vancouver (West))* and the Ministry's responses

refusing the assistance sought in the CSF's many Positioning Letters, that the Ministry would have taken the same position if the CSF were experiencing other challenging negotiations.

[5763] Overall, I find that the Ministry's neutral approach runs counter to the requirement that the Ministry do whatever is practical to preserve and promote minority language education in British Columbia and therefore counter to s. 23. By requiring the CSF to take responsibility for securing and negotiating leases then adopting a practice of neutrality and refusing to advocate on behalf of the CSF, the Ministry has left the CSF to the whims of majority boards, just as Mr. Justice Vickers cautioned against.

[5764] However, this does not mean that the CSF was without recourse. It is precisely the type of dispute that arose in SD48-Sea-to-Sky that Mr. Justice Vickers envisioned when he explained that some form of a dispute resolution mechanism was required. The Ministry created the *Education Mediation Regulation* to assist the CSF to properly conclude lease negotiations. The CSF could have had recourse to mediation, but chose not to in order to protect its relationship with SD48-Sea-to-Sky.

[5765] In my view, though, the creation of the *Education Mediation Regulation* does not absolve the Ministry of its duty to assist the CSF with its challenging negotiations for leased space. The Minister has a duty to ensure that facilities are provided where the numbers so warrant. It must act as the CSF's advocate to meet its duty to preserve and promote minority language education.

[5766] If the Ministry wants to remain neutral between districts, it has the option of invoking the *Education Mediation Regulation* when the CSF and majority school boards are hesitant to do so. It could also take some of the steps that it considered taking in 2010 and 2011: appointing a professional negotiator, or implementing standard form contracts and rates. Sitting idly by when the CSF needs assistance does not meet the Province's duty to do whatever is practical in the circumstances.

D. Lease Funding Policy

[5767] In their argument, the plaintiffs trace the history of Ministry lease funding policies and argue that each policy failed to recognize the Province's constitutional obligations. Here, I trace the history of the Ministry's approach to lease facilities for the CSF, and consider the constitutional ramifications of those policies.

1. Accounting for Lease Revenues

[5768] The plaintiffs argue that the CSF is disadvantaged by the accounting framework for lease revenues. They say there is a significant disincentive for majority districts to enter into Long-Term Leases with the CSF because the income from Long-Term Leases (greater than five years) flows into a Restricted Capital Reserve account and can only be spent with ministerial approval. The revenue from Short-Term Leases (less than five years) may be treated as operating or capital. If treated as capital, the proceeds flow into a district's Local Capital Reserve account, which the district may spend at its discretion. They point to Mr. Stewart's evidence, where he confirmed that some districts prefer to receive rent as operating revenue because it gives them greater flexibility.

[5769] The plaintiffs note that the CSF has never had a Long-Term Lease of any of the school facilities it rented from majority boards. They point to evidence that when the CSF sought a long-term Lease of École Élémentaire Entre-lacs (Penticton), the Ministry refused SD67-Okanagan Skaha's request for an exemption from the rule that the lease proceeds would be treated as Restricted Capital Reserve. The CSF never secured a long-term lease in Penticton.

[5770] I agree that most school districts prefer Short-Term Leases with the CSF because it allows the revenue to flow into the majority board's operating or Local Capital Reserve accounts, allowing greater flexibility about how the funds are spent.

[5771] But the CSF's argument concerning a lack of long-term leases is a red herring. In many places where the CSF had only year-to-year leases, it was clear to the CSF that it nevertheless would enjoy long-term security of tenure. This was

certainly the case at École Élémentaire Anne-Hébert in Vancouver (East), where SD39-Vancouver had given assurances since at least 2000 that the CSF would have long-term access to École Élémentaire Anne-Hébert despite one-year leases.

[5772] The real issue with respect to the CSF's security of tenure is enrolment and capacity at majority boards. In most instances, the CSF enjoys long-term security of tenure because majority boards have low enrolment and because they are able to generate flexible funding by leasing to the CSF. Where the CSF does not enjoy secure tenure-- for example, in SD48-Sea-to-Sky-- the problem arises out of the fact that the competing majority school district is experiencing growing enrolment and has limited space to accommodate the CSF, and the Ministry has limited capital to make new space available to the CSF. The length of the contract is secondary.

[5773] Moreover, the Ministry has the jurisdiction to set the parameters of the education system. The Ministry adheres to the allocation of lease revenues that it does because those are the requirements in Generally Accepted Accounting Principles. I do not consider this is an unreasonable approach that interferes with the CSF's right to management and control over aspects of education that go to language and culture, nor does it deprive rightsholders of the minority language educational facilities that the numbers warrant.

[5774] The plaintiffs also argue that the Ministry recognizes that CSF leases unfairly supplement majority board operating budgets. They rely on a comment Mr. Stewart made while he was under cross-examination. Counsel asked Mr. Stewart whether the Ministry considered that it was "entirely appropriate and fair from a broad educational perspective that the CSF shouldn't be paying rent to an Anglophone school district with surplus assets to use a school facility for a school purpose". He responded that was "something that probably occurred to many people in the Ministry as a proposition or as a possibility." He also conceded the idea of requiring districts to provide the CSF with space for free "was not pursued with school districts" because school boards own their assets, and the Ministry was loath to step in on a particular use of a building and require it to be provided to a

particular group for no rent. He pressed that the Ministry had no legal power to do so.

[5775] The defendants suggest it is unfair for the CSF to characterize Mr. Stewart's statements as recognition of unfairness. In their submission, Mr. Stewart candidly acknowledged that the thought had occurred to some Ministry staff, but that there were interests to be balanced. Mr. Stewart also acknowledged that even if it were a good idea, the Ministry had no power to compel districts to provide space free of charge. Mr. Stewart did not, the Province says, acknowledge that it would be fair to take that approach.

[5776] The plaintiffs argue it was unreasonable for the Ministry to take the position that it could not ask school boards to provide space to the CSF free of charge. The plaintiffs point out that in 2009/10, the Ministry did ask districts to provide educational space to the CSF at no charge, as I discuss below. Thus, the plaintiffs argue, the Ministry has simply been unwilling to use its power to influence with moral suasion to help the CSF to secure sufficient educational space.

[5777] The Province's residual jurisdiction over education includes the right to "develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province" (at para. 43). In British Columbia, that unique blend of dynamics includes the fact that school boards are autonomous and own and operate their own property. To balance the concerns of the majority and the minority, the Province has devised a structure that involves the CSF leasing properties, and the Ministry compensating majority boards for the use of their facilities. As I see it, that type of decision is one that is within the Province's powers to make so long as it does not interfere with the minority's right to whatever facilities the numbers warrant and right to management and control.

[5778] The decision to compensate majority boards for use of their facilities does not prevent the CSF from securing facilities. Indeed, it ensures it. It also does not prevent the CSF from exercising management and control over leased school

facilities as the CSF has quiet enjoyment over leased facilities as long as it occupies them and the Ministry pays the CSF's basic rents.

[5779] The plaintiffs also point to the amendments to the *School Act* and argue that the Ministry now has the power to intervene in how school boards use their surplus assets. The plaintiffs suggest that the Province has refused to use those new powers to assist the CSF, thus accepting that the CSF's lease payments will subsidize the operating budgets of majority boards. As I develop in Chapter X, Remedies, I do not find that the amendments to the *School Act* give the Ministry those powers.

2. 1996-2001: Issues with CSF Early Lease Agreements and Funding

[5780] The plaintiffs argue that the Ministry's policies at the CSF's inception failed to assist the CSF, and resulted in the CSF paying disproportionately high lease costs.

a) Facts

[5781] After the FEA assumed exclusive jurisdiction over Francophone education in 1996/97, all of its programmes operated in leased, heterogeneous schools, with the exception of four homogeneous leased schools: École André-Piolat (North Vancouver), École Élémentaire La Vérendrye (Chilliwack), École Élémentaire Anne-Hébert (Vancouver (East)) and École Victor-Brodeur (Victoria). Mr. Jack Fleming, a former provincial Deputy Minister, negotiated the leases.

[5782] In Dr. Ardanaz and the CSF's view at that time, the costs paid pursuant to the contracts negotiated by Mr. Fleming were too high. However, Dr. Ardanaz found it challenging to renegotiate them when they expired. SD39-Vancouver requested \$750,000 more than the amount agreed to for 1996/97. SD44-North Vancouver requested that the CSF pay \$300,000 more than in previous years for courses that CSF students were taking at Handsworth Secondary. SD37-Delta sought \$8,200

per FTE student, when the CSF thought \$7,000 per student was appropriate. All these amounts were eventually reduced through negotiation.

[5783] Dr. Ardanaz raised issues related to lease costs in meetings with Minister Paul Ramsay and other Ministry staff. In May 1997, CSF officials informed the Ministry that majority boards were making demands that exceeded the CSF's revenues. The CSF asked for the Minister's assistance. Dr. Ardanaz could not say whether the Ministry in fact intervened, thus assisting to influence the majority boards to reduce their demands.

[5784] Dr. Ardanaz also advised that the CSF often perceived a shortfall of about \$500,000 per year in its lease cost reimbursements. Dr. Ardanaz agreed while under cross-examination that the shortfall related to a "tension" between the Ministry and the CSF concerning reimbursement for the operating and maintenance portions of CSF leases: something the Ministry thought it was funding through Operating Block grants, but that the CSF believed ought to have been reimbursed separately.

[5785] Dr. Ardanaz was also concerned that the CSF was required to use Federal Government start-up funds from the Special Agreement to finance some of its leases. Dr. Ardanaz agreed while under cross-examination that the Ministry was funding the CSF's long-term leases. I infer from this that the CSF was only required to use Special Agreement funds for its short-term leases pending the CSF's acquisition of a Programme Cadre facility. The Special Agreement provided that the funds were intended to address a host of costs, including start-up rental costs, which would include those leases.

[5786] The CSF raised the issue with the Ministry in April 1998. On April 22, 1998, Mr. Ouimet, then the Director of Administration and Educational Services for the CSF, wrote to Mr. Rob Gage, Assistant Director at the Ministry, and sought recognition of additional CSF lease amounts. On May 12, 1998, Mr. Connolly, Director at the Ministry, provided a response based on two principles: First, the CSF was to be treated the same as all the other school districts. Second, Special

Agreement funding was to be used to address temporary, rather than ongoing cost pressures.

[5787] With those principles in mind, Mr. Connolly agreed to support some of the CSF's lease costs, which had previously been supported by the Special Agreement. His response is consistent with the idea that the Ministry used the Special Agreement to fund some leases pending acquisition of permanent space by the CSF. Mr. Connolly suggested the CSF's lease costs could be divided into two categories. Short-term leases (where it was planned that a school would be acquired or built within the next two years) would be supported through the Capital Planning Cycle on expiry of the Special Agreement. The longer term leases, where no capital project was anticipated, would be funded with Operating Block funding.

[5788] Consistent with Mr. Connolly's directions, Dr. Ardanaz confirmed the CSF requested capitalization of its leases in its next Capital Plan Submissions.

[5789] Shortly thereafter, the CSF began to incur a deficit. I describe and make findings concerning this deficit in Chapter XII, Public Funds. In his September 1999 letter to the Ministry seeking approval of the deficit, Dr. Ardanaz attributed \$650,000 of the \$2.4 million gross deficit to double administration costs in leases. In the Financial Review Briefing Note prepared for the Review Team, the CSF pointed to its concerns with leasing arrangements being too expensive, and that the CSF paid administration costs to majority school boards in addition to the salaries of their own administrators. Overall, the CSF believed it was being charged exorbitant fees.

[5790] In its final report and recommendations, the Review Team expressed concern that Special Agreement start-up funding had allowed the CSF to treat some lease costs as start-up costs even though they were ongoing operating costs. The Review Team also identified that the Ministry did not fully recognize all of the operations, maintenance and lease costs, particularly the school-based administration costs. The authors recommended that the CSF Board involve the Ministry in lease negotiations by requesting direct participation by the Ministry, or by concluding leases subject to Ministry approval.

[5791] The CSF went on to complete a deficit elimination plan. At a meeting to discuss that plan in January 2000, the CSF asked how the CSF should involve the Ministry in lease negotiations. Mr. Connolly indicated that it was in the Ministry's interest to help and support the CSF in that respect. He explained that the Ministry had tools to make the majority boards treat the CSF in an equitable manner.

[5792] The CSF moved forward with the recommendation to involve the Ministry in lease negotiations. The CSF prepared a standard form contract that included a signature line for the Ministry to provide final approval. The CSF sent the standard form contract to Mr. Connolly for suggestions, but Mr. Connolly replied that the Ministry could not provide the CSF with legal advice. He also commented that the Ministry wanted to be closely involved in negotiations with school boards, and that Mr. Owen, the Director of the Governance and Legislation Branch of the Ministry, had been instructed to assist the CSF with those negotiations.

[5793] Dr. Ardanaz followed up with Mr. Connolly to confirm the CSF was not seeking legal advice, but seeking feedback on the CSF's plan to conclude lease negotiations subject to ministerial approval. Mr. Connolly again encouraged Dr. Ardanaz to approach Mr. Owen about lease negotiations. He did not offer support for the CSF's proposed process.

[5794] Dr. Ardanaz advised that he sought Mr. Owen's assistance with a few lease negotiations on an *ad hoc* basis, and Mr. Owen assisted. He conceded it would not have been appropriate for Mr. Owen to intervene unless the CSF requested help.

[5795] Thereafter, the CSF pursued a tripartite committee to examine the adequacy of funding for the CSF, but the Province refused citing the wholesale review of the Operating Block funding allocation system and the impending move to the Enrolment-Based Funding Model that took place in 2002.

b) Discussion

[5796] The plaintiffs argue that the Province took a "hands off" approach to lease costs in the CSF's early years. They say that doing so was a specific failure to take

positive steps to ensure the Province was meeting its constitutional obligations. The plaintiffs suggest funding put toward the capitalization of long-term leases should have been used to fund the permanent French-language school facilities instead. They say the Province declined to put a process in place to fix a systemic problem.

[5797] In the plaintiffs' submission, it is no answer that the Province moved to the Enrolment-Based Funding Model in about 2002. The plaintiffs point out that formula did nothing to assist the CSF to negotiate leases with majority school boards. Instead, the plaintiffs say, the CSF was left to deal directly with majority school boards, with an offer by the Province to "call us if you need us".

[5798] The defendants disagree. In the defendants' submission, the scope of the Review Team's work did not go so far as to assess the adequacy of funding to the CSF. They also note that the Review Team did not conclude that lease costs were a primary cause of the CSF's deficit. The defendants also say the Review Team's recommendation concerning leases was placed as Recommendation 17 out of 33, and therefore not one of the most important recommendations.

[5799] Additionally, the defendants say it is not fair for the CSF to complain that the Ministry was not involved in lease negotiations because the CSF did not want the Province involved at the time. They rely on the evidence of Dr. Ardanaz, who testified that he typically did not think it would be helpful to involve the Ministry in all negotiations because he was concerned about the CSF's reputation. In their submission, Dr. Ardanaz continued to take that position despite Mr. Connolly's suggestion the Ministry had tools to assist, wanted to be involved, and had appointed Mr. Owen to provide assistance.

[5800] In this instance the Ministry did not fail to act in the face of indications the lease funding system was broken. The evidence establishes that from the CSF's early days, the Ministry envisioned that leasing would play some role in the CSF's acquisition of school properties.

[5801] In the CSF's first several years of operation, some of the funds that were provided by the Federal Government were used to fund short-term CSF leases pending the CSF's permanent capital acquisition of the sites. The Special Agreement funds were clearly intended to be used for those purposes. While the CSF might have preferred for those funds to be used for something else, they were specifically designed to cover leases, among other costs.

[5802] Some leases were to be funded through the Ministry's capital programme in those first few years. The plaintiffs take issue with that, and say that capital funds should have been used to fund permanent acquisitions. I conclude the Province has the right to control the design of the education system subject to constitutional limits, and that the CSF is not *prima facie* deprived of appropriate facilities or adequate management and control because it leases surplus schools. While the Ministry is constitutionally obligated to fund the CSF's leases, the CSF has no right to require that the funding come from any specific government budget category.

[5803] While the Ministry funded the CSF's leases, it did not fund those portions of the leases related to the CSF's operating costs. The Ministry has consistently held the view that the CSF would be responsible for paying the administrative costs in its leases out of its Operating Block if it owned the school. Thus, the Ministry would only fund that portion of the leases that related to space occupied by the CSF. The CSF has always disputed this.

[5804] When the CSF incurred an operating deficit in 1999/00, it attributed \$650,000 of its \$2.4 million gross deficit to double administration costs: about one-third of the deficit. The Review Team found those costs contributed to the CSF's deficit.

[5805] The Review Team suggested greater involvement by the Ministry in the CSF's negotiation of leases through either direct participation or by concluding leases subject to Ministry approval. The CSF prepared a standard-form lease contract that required Ministry approval, but officials from the Ministry did not support that plan. Instead, the Ministry staff suggested that the Ministry had tools to make

majority boards treat the CSF equitably. They appointed Mr. Owen to assist the CSF with lease negotiations, and encouraged the CSF to seek his assistance negotiating with majority boards.

[5806] Ultimately, though, it appears that the parties reached an impasse. In response to issues with administrative fees and problems with leases, the Ministry preferred that it assist the CSF as needed. The CSF then declined to involve the Ministry.

[5807] Moreover, it was in this period that the *Education Mediation Regulation* was enacted. The CSF likewise chose not to invoke the *Education Mediation Regulation* when issues arose going forward with connection to its leases. So did the Ministry.

[5808] Overall, in my view, the evidence establishes that the Province was not presented with a clearly broken leasing system that it declined to fix. The Ministry was made aware of some small issues with leasing and proposed solutions, but the CSF chose not to avail itself of the solutions that the Ministry provided.

3. 2002/03- Funding for CSF Leases at the Start of the Enrolment-Based Funding Model

[5809] The plaintiffs argue that the Province recognized that it underfunded the CSF's lease costs in 2002/03, and then funded an additional \$545,202 to make up the shortfall. The plaintiffs suggest the Minister then decided to fully fund the CSF's leases going forward, up to market rate.

[5810] As I explain in Chapter XII, Public Funds, in 2002/03 the Province deregulated the Operating Block funding model by moving from the Resource-Cost Funding Model to the Enrolment-Based Funding Model. Under the Resource-Cost Funding Model, the Province had funded school boards' actual, historical lease costs. When the Ministry moved to the Enrolment-Based Funding Model, the Ministry retained lease funding for one or two years then eliminated it for all school boards except the CSF.

[5811] In March 2003, Mr. Boyle, Interim Secretary-Treasurer for the CSF, wrote to Mr. Miller and reported that the CSF's space funding portfolio produced a shortfall of about \$600,000 annually, creating an "unbearable burden" on the CSF. Mr. Boyle pointed to lease costs as part of the reason for the shortfall, as school boards were charging the CSF prices that were established with reference to commercial market rental rates. He suggested the Ministry help the CSF by either establishing benchmark rental rates, or committing to fully funding the CSF's space portfolio.

[5812] Mr. Miller responded by explaining that it was unlikely that Government would regulate rental rates given its new focus on deregulation to improve school board autonomy and choice. He informed Mr. Boyle that the CSF would be left to negotiate with majority boards to arrive at rates agreeable to both sides. Mr. Miller allowed that the Ministry would continue to fund the appropriate cost of CSF leases, limited to the maximum amount allowed for the CSF's enrolment based on the Area Standards, and less operating and maintenance charges.

[5813] Mr. Miller explained that letter was the Ministry's way of confirming that the Province would continue to specifically fund CSF leases despite the move to the Enrolment-Based Funding Model. He explained that the Ministry did continue to fund CSF leases less maintenance and administrative fees, but that the Ministry did not hold the CSF to the Area Standards as he suggested it might.

[5814] Although it appears the Ministry intended to continue restricting its payment of CSF leases to the capital portion of leases, there is some evidence that might suggest the Ministry changed its position. In August 2003, Ministry staff sought a decision from the Deputy Minister in connection with CSF lease costs by way of a Briefing Note. Staff explained to the Minister that the CSF had to lease space to provide educational programmes in many areas of the Province. Lease funding at the time was based on a portable equivalency rate. Staff review suggested support for the CSF's request for funds to cover an additional cost of leasing facilities up to \$545,202 for 2002/03. Staff also recommended funding actual lease costs (not exceeding market rates) going forward.

[5815] The Deputy Minister approved that note, such that the CSF was provided with additional operating funds of \$545,202 to cover the shortfall on leased facilities in 2002/03. He also approved funding for CSF leases going forward, “to the actual cost (up to market rate).”

[5816] The decision to make up the shortfall was communicated to the CSF by way of a letter to the CSF in August 2003. The Ministry also informed the CSF that since new schools were nearing completion, the Ministry anticipated the CSF’s lease costs would reduce annually over the next two years.

[5817] On reviewing this documentation, Mr. Miller conceded that although he initially believed that the Ministry did not approve Mr. Boyle’s request for funding to make up the shortfall, it appears as though the funding went forward. He had no independent recollection, however, of the request being approved.

[5818] As the Ministry moved further toward rolling lease funding into the Operating Block in the fall and winter of 2003, it was proposed that capital leases for the CSF would continue to be funded because it was more cost effective for the CSF to lease than to own facilities. By December 2003, it was proposed that the Ministry would cease funding district leases in 2004/05 except for the CSF’s leases.

[5819] Overall, the evidence is unclear about what, exactly, the Ministry’s payment of \$545,202 was intended to address. The briefing note attributes the shortfall to the fact that the CSF was being funded based on a portable equivalency rate while being charged market prices. It also makes reference to the fact that the CSF pays on a “triple net” basis and thus must pay for operating costs. Thus, in my view, the extra funds and decision to pay for leases up to market rates was likely intended to compensate the CSF for its actual costs, which were more than what the Ministry would fund based on the cost of portables to accommodate the CSF’s then-current enrolment.

[5820] However, the evidence falls short of the Ministry acknowledging that it was unfair that the CSF paid administrative fees and compensating the CSF for those

costs. The briefing note makes only passing reference to the administrative fees before recommending funding the full cost of leases up to market value. The Ministry's larger concern was that it was only paying for what the CSF would be charged if it were using portables when it had no option to do so. The Ministry has also consistently maintained, despite this briefing note, that it would not pay the administrative portions of leases. Thus, in my view, it was never the understanding of or policy implemented by Ministry staff that the Ministry would fund the administrative fees charged to the CSF.

4. The 2009/10 Lease Funding Suspension

[5821] Consistent with the decision taken in 2003, the Ministry funded the CSF's leases through 2008/09 outside of its Operating Block grant. As I introduced in Chapter XXIII, *École Élémentaire des Navigateurs (Richmond)*, the CSF suspended that funding for one year in 2009/10. The plaintiffs argue that the Province implemented the Lease Funding Suspension unilaterally, risking the CSF's relationship with its majority school board landlords and access to school facilities. The defendants suggest the policy had no impact on the CSF's operations.

a) Facts

[5822] Mr. Stewart explained that, in June 2009, Government as a whole was experiencing budgetary pressures due to a global economic recession. The Ministry was directed to find expenditures it could defer without breaching any legal commitments. In the course of those discussions, Mr. Stewart attempted to protect the CSF's lease funding as the Ministry viewed them as necessary to meet the statutory requirement to provide spaces for all students enrolled by a school board.

[5823] Ultimately, the Ministry decided not to fund the CSF's leases in 2009/10. Ministry staff believed the CSF would be able to remain in the facilities it leased from school boards rent free. However, Mr. Miller confirmed the Ministry did not plan to reimburse the CSF for the cost of its leases with its non-school board landlords.

[5824] In August 2009, Deputy Minister Gorman wrote to all school boards and informed them the Ministry would not pay the CSF's leases that year. He stated the Minister expected school boards to provide the CSF with space at no charge.

[5825] The plaintiffs argue that the CSF had no advance notice of the decision, which the defendants do not dispute. The CSF was in the process of renegotiating contracts in the spring of 2009 when Mr. Bonnefoy received an email from Mr. Butler, Regional Manager responsible for the CSF, asking him to consult with him before agreeing to any rent cost increases, as the Ministry would have limited ability to fund rent increases that year. Thereafter, Mr. Cavelti asked Mr. Bonnefoy for a list of the facilities the CSF was leasing and those that it owned, which Mr. Bonnefoy provided. Those communications do not mention that the Ministry was considering not funding the CSF's leases for the coming year.

[5826] After Deputy Minister Gorman wrote to districts, Mr. Bonnefoy attempted to deal with the fallout from the decision. In October 2009 he wrote to all the CSF's majority board lessors and provided them with a template of terms for 2009/10 lease agreements. He confirmed that the CSF would still be responsible, where applicable, for paying for operating costs and administrative fees.

[5827] Mr. Bonnefoy also tried to persuade the Ministry to reinstate funding, and proposed a number of ways of funding CSF leases. In November 2009, he asked the Ministry if it would pay those leases that were in effect, such that only the year-to-year contracts that had not been renewed would go unfunded. He also urged the Ministry to fund the CSF's leases with non-school board entities, such as the community hall used by École Élémentaire La Vérendrye (Chilliwack) as a gymnasium.

[5828] At a meeting with Ministry officials in November 2009, Mr. Bonnefoy raised a concern that the CSF might not be viewed as a reliable lessor following the Lease Funding Suspension. He proposed several near-term strategies for dealing with the CSF's need to lease space: mandating school boards provide the CSF with a right of first refusal on leases of surplus facilities; requiring school boards to credit 50% of

all lease revenues to the Province so it could apply those funds to the CSF's leases; and reducing funding protection grants and applying the savings to the CSF's leases. According to Mr. Bonnefoy, Deputy Minister Gorman stated he would take the suggestions under advisement, and consider their legislative implications.

[5829] Mr. Miller testified the Ministry did not pursue Mr. Bonnefoy's suggestion the CSF be given a right of first refusal or that the Ministry appropriate lease revenue to apply to CSF leases. Mr. Stewart advised that Ministry staff decided against giving the CSF a right of first refusal because it could hamper school boards' ability to dispose of properties. The Ministry was also concerned it would effectively give the CSF a right to approve of school disposals, which would harm the relationship between the linguistic minority and the majority.

[5830] Instead of a right of first refusal, Ministry staff considered strengthening the *Education Mediation Regulation* to allow the Minister to refer the CSF and majority boards to binding arbitration. After lengthy discussion, the Ministry moved away from the idea because the *Education Mediation Regulation* was untested, and it could harm the relationships between school boards.

[5831] Mr. Bonnefoy explained that the issue of lease funding arose again at his final meeting with the Ministry in December 2009. Mr. Bonnefoy informed Ministry staff that the Lease Funding Suspension hurt the CSF's relationships with majority school boards. Mr. Bonnefoy was "pleased and shocked" when Ministry staff advised they would reconsider the Lease Funding Suspension. Mr. Bonnefoy sent a follow-up letter to Mr. Stewart, Mr. Cavelti and Mr. Butler, where he strongly encouraged the Ministry to consider reinstating lease funding.

[5832] In support of his request, Mr. Bonnefoy provided his calculation of the CSF's lease costs for 2008/09 and 2009/10. That information shows that if the Ministry had funded all leases for 2009/10, the cost would have been \$1,155,956, which represented a decrease of \$1,080,038 from the \$2,235,994 the Ministry had been asked to reimburse the previous year.

[5833] Mr. Stewart testified that Ministry staff discussed Mr. Bonnefoy's renewed request. As of December 16, 2009, the Ministry was open to reinstating CSF lease funding if any funds were available at the end of the fiscal year.

[5834] As of the end of Mr. Bonnefoy's tenure with the CSF at the end of December 2009, the Lease Funding Suspension remained in effect. Mr. Allison took over as Secretary-Treasurer at the beginning of 2010. In early January 2010, he pressed the Ministry again about reinstating lease funding. In response, Mr. Stewart acknowledged the Lease Funding Suspension had created difficulty for the CSF, but advised that the Ministry would only be able to consider payment if surplus funds were available at the end of the fiscal year.

[5835] Mr. Allison also asked Mr. Stewart to confirm that the Ministry would fund the CSF's leases in future years. Mr. Allison stressed that the lack of certainty was making it difficult for the CSF to enter into new leases. Mr. Stewart confirmed that the Ministry would attempt to restore lease funding for 2010/11.

[5836] In March 2010, Mr. Miller confirmed to Mr. Allison that funds had been set aside for the CSF's 2010/11 leases. Shortly thereafter, Mr. Allison participated in the annual Ministry conference call concerning the funding formula, wherein Mr. Miller confirmed to all school boards that the CSF's leases would be funded for the coming year. Mr. Miller went on to confirm this in an email.

[5837] Ultimately, Mr. Bonnefoy explained, majority boards did not charge the CSF lease costs in 2009/10, essentially giving the CSF free rent for that year. The CSF was not evicted from any schools at that time or as a result of the decision not to fund leases. However, the CSF had to pay the costs of its leases for the Atchelitz Hall in Chilliwack (\$17,500) and for its school board office (\$88,345) with its operating funding.

[5838] The plaintiffs argue, however, that the decision not to fund the CSF's leases hurt its relationship with majority boards and jeopardized the CSF's access to space.

[5839] Mr. Bonnefoy explained that after the Ministry notified majority boards of its decision not to fund leases, several officials from majority school boards called him and expressed frustration. In particular, he received phone calls from officials at SD48-Howe Sound, SD8-Kootenay Lake and SD38-Richmond. He also received a phone call from an official with SD67-Okanagan Skaha, with whom the CSF had been collaborating on a joint proposal to update the HVAC system at École Élémentaire Entre-lacs (Penticton). According to Mr. Bonnefoy, he did significant “damage control” to reassure majority school boards that the CSF had not been aware of the decision in advance.

[5840] Mr. Miller advised that the Capital Branch received fewer complaints from majority boards. Mr. Miller was only aware of SD38-Richmond pushing back against the decision not to fund leases. Mr. Stewart, as well, could only recall that SD38-Richmond refused to accept the decision.

[5841] I explain SD38-Richmond’s reaction to the Lease Funding Suspension in some detail in Chapter XXIII, École Élémentaire des Navigateurs (Richmond). There, I conclude that when SD38-Richmond was frustrated with the Lease Funding Suspension, it threatened to hold the CSF to the terms of the lease extension the parties had just negotiated. SD38-Richmond was quick to turn to the media to put political pressure on the Ministry and the CSF. SD38-Richmond also threatened to evict the CSF from Kilgour Elementary, although it was highly unlikely that it realistically would have done so. The threat left the parents of children attending École Élémentaire des Navigateurs uncertain about the availability of a school for their children.

[5842] Ultimately, SD38-Richmond abandoned those tactics because the Ministry stepped in to assist the CSF and to ensure it would be able to continue to access Kilgour Elementary. I accept Mr. Stewart’s evidence that he would have done everything in his power to ensure that SD38-Richmond allowed École Élémentaire des Navigateurs to remain at Kilgour Elementary.

[5843] I also infer that SD38-Richmond was not candid with the CSF in connection with the renewal of the CSF's leases of Kilgour Elementary following the funding freeze. SD38-Richmond refused to enter into new leases with the CSF and asked the CSF to invoke the overholding clause in 2010/11, ostensibly because the Ministry had not adequately confirmed to SD38-Richmond officials that the Ministry would fund the lease. However, the evidence establishes that the Ministry told SD38-Richmond that it was working toward a standard lease and rates, and SD38-Richmond was waiting for the results of that lease review. Neither the Ministry nor SD38-Richmond told the CSF that this was the real reason that SD38-Richmond was refraining from signing a new lease. This was a stretch of the truth that caused the CSF to fear its tenure was insecure even though there was never any serious doubt that the CSF would continue to have access to Kilgour Elementary indefinitely.

[5844] Indeed, I find that the CSF has never faced any serious risk that it would be evicted from or lose its lease of Kilgour Elementary. From 2007 until 2014, SD38-Richmond has made many assertions that the CSF might be able to acquire Kilgour Elementary outright. Given SD38-Richmond's history of using pressure tactics to achieve its own ends, I infer that SD38-Richmond would not have gone through with its threats to evict École Élémentaire des Navigateurs.

b) Discussion

[5845] The plaintiffs argue the Lease Funding Suspension gambled with the CSF's access to school facilities in 14 communities, and unjustifiably jeopardized the CSF's relationship with its majority school board landlords.

[5846] The plaintiffs also suggest the Lease Funding Suspension made the CSF look like a "bad risk". The plaintiffs point out that the districts from which the CSF rented space were losing a share of their operating budget, and were not given an opportunity to generate operating revenue by leasing to another party because the Ministry asked the majority boards to continue to lease to the CSF free of charge.

[5847] In the plaintiffs' submission, the cost savings could not justify the Province's decision. Relying on Mr. Millers' evidence, the plaintiffs say the Province's sole intent was to save money. The plaintiffs say that the savings amounted to a "modest" amount: what the Ministry expected to be about \$2 million based on 2008/09 costs, and what actually would have amounted to about \$1.1 million based on Mr. Bonnefoy's numbers. By comparison, the Ministry also chose to cancel AFG funding that year, resulting in savings of about \$110 million. Surmising that the Province likely cut other costs as well, the plaintiffs say that the lease funding was only "an infinitesimally small" and "a truly imperceptible proportion" of the total amount saved by the Province.

[5848] The plaintiffs argue that the Ministry acknowledged that it had hurt the CSF. They point to a statement by Mr. Stewart in a January 2010 email to Mr. Allison that "the Ministry realizes that not providing the lease funding in 2009/10 has created difficulty for the CSF." Similarly, in his evidence, Mr. Stewart stated, "I think the court has seen, this has put the CSF in a difficult position and we understood that." He also testified that he had empathy for the uncertainty that parents were feeling.

[5849] The defendants respond that the Lease Funding Suspension was the product of unique financial challenges faced by the Province in 2009/10. The defendants also take the position that the cost of the freeze was borne almost entirely by lessor school districts, not the CSF. They stress that funding was reinstated a year later.

[5850] The defendants also argue that the Lease Funding Suspension had no effect on the quality of education provided in CSF schools. The defendants concede the decision resulted in some threats, and was unpleasant. However, they take the position that there was no real consequence to the CSF. They point to the evidence of Mr. Bonnefoy that the CSF was able to remain in majority board schools for free, and that with four exceptions, the majority boards complied with the Ministry's direction without raising an issue. Mr. Bonnefoy also agreed that the CSF was not evicted from any of the schools it operated.

[5851] In response to this purported admission by Mr. Stewart, the defendants point out that Mr. Stewart also testified that he had “every reason to believe” the CSF would have space, and that the Ministry would have done everything in its power to ensure the CSF never lost any space.

[5852] The evidence establishes that the Ministry implemented the Lease Funding Suspension because of financial circumstances at that time and its need to generate cost savings. While the plaintiffs urge that the amount was a small one, in my view, given that there were no funds left to reinstate funding at the end of the fiscal year when the Ministry considered doing so, the cost savings were necessary to respond to the global economic situation.

[5853] The CSF was not given advance notice of the plan. The CSF negotiated agreements with majority boards for 2009/10 in good faith under the impression the Ministry would fund its leases in the ordinary course, subject to a lack of funding for rent increases. There is no doubt the lack of advance notice made things more difficult for the CSF.

[5854] Ultimately, though, there was no actual damage to the CSF’s relationships with majority board lessors. While about four school boards expressed dissatisfaction to Mr. Bonnefoy, only SD38-Richmond pressed the issue. The Ministry was prepared to -- and did -- exert pressure on SD38-Richmond to ensure the CSF did not lose access to Kilgour Elementary. Further, the CSF has continued to have strong relationships with most of its majority board lessors going forward, and did not face any evictions or loss of space arising out of the Lease Funding Suspension. I do not take Mr. Stewart to have admitted the Lease Funding Suspension harmed the CSF.

[5855] Overall, I am satisfied that majority boards suffered the most because of the Lease Funding Suspension. The Lease Funding Suspension had minimal impact on the CSF’s relationship with majority school boards going forward. It did not result in the CSF losing any of the space that rightsholders were entitled to, nor did the CSF

lose its right to management and control. In my view, the Lease Funding Suspension is constitutionally permissible.

5. 2013: Requirement for Lease Pre-Approval

[5856] Sometime between 2010 and 2013, the Ministry instituted a requirement that the CSF seek pre-approval of its leases. The plaintiffs argue the requirement is not constitutionally permissible.

a) Facts

[5857] For many years, there was no formal requirement for the Ministry to approve CSF leases. Indeed, when the CSF suggested a standard-form contract requiring ministerial approval, Mr. Connolly refused.

[5858] However, it appears as though there was at least an informal agreement that the CSF would seek approval before entering into new leases to start new programmes. In 2003, Dr. Ardanaz offered to lease Kilgour Elementary from SD38-Richmond, subject to ministerial approval. Dr. Ardanaz confirmed in his evidence that the Ministry approved the lease. I take from this that there was at least an understanding in the early 2000s that the CSF would seek Ministry approval before committing to new leases.

[5859] The evidence shows that, as the Ministry expected when it chose not to continue pursuing the idea of standard form leases and rates, the CSF's lease costs decreased for several years, then began to increase again in about 2012. The table below, which was prepared by Mr. LeBrun and Mr. Cavelti, shows the Ministry's records of the payments it made for CSF leases over time, and how they increased then decreased again.

Year	Lease Funding from Province
1998/99	\$215,784
1999/00	\$928,901
2000/01	\$736,916
2001/02	\$794,080

2002/03	\$1,187,873
2003/04	\$1,531,895
2004/05	\$1,830,581
2005/06	\$2,298,336
2006/07	\$2,494,366
2007/08	\$2,216,697
2008/09	\$2,239,894
2009/10	(Lease Funding Suspension)
2010/11	\$1,439,875
2011/12	\$1,163,108
2012/13	\$1,526,258
2013/14	\$1,691,200

[5860] Mr. Palmer explained that the Ministry was concerned about the cost escalation. He confirmed while under cross-examination that he knew the lease funding the Ministry paid had fluctuated, and was once more than \$2.2 million.

[5861] Meanwhile, according to Mr. Stewart, the Capital Branch's internal operating budget, from which it paid CSF leases, was under increasing pressure. The budget was being reduced in 2010/11, 2011/12 and 2012/13. Due to the increasing cost pressures posed by the CSF's increasing lease costs and the reduced budget category, the Ministry had to find savings in other areas of the Capital Branch budget, such as by reducing funds for staff travel and professional development.

[5862] Mr. Stewart confirmed that, due in part to the decreasing funding, the Ministry began engaging in increasing scrutiny of CSF leases. Both Mr. Stewart and Mr. Palmer testified that the Ministry began requiring the CSF to seek approval of its leases before the Ministry would fund them. Mr. Palmer suggested the Ministry planned to treat the lease requests like capital requests, expecting the CSF to justify its need and give advance notice so the Ministry could budget for the costs.

[5863] Mr. Allison conceded that it was reasonable for the Ministry to want advance notice of the CSF's lease costs for planning purposes. In the same exchange, he refused to accept the Ministry needs information about the cost of opening a new

school. This is another example of the unreasonable and argumentative stance Mr. Allison took while under cross-examination.

[5864] There was some question about what, exactly, the CSF was told about the need for lease pre-approval, and when it received that notice.

[5865] Mr. Stewart suggested he told Mr. Allison the CSF would be required to inform the Ministry of new and increased leases in about the fall of 2010. However, documentation shows that in September 2010, Mr. Allison sent Mr. Cavelti a copy of its renewed lease with SD8-Kootenay Lake, with information about the cost of the lease, after it was already complete.

[5866] In February 2013, internal Ministry communications show that Mr. Cavelti was unsure whether the Ministry required the CSF to submit its leases for pre-approval. Mr. Palmer testified that he confirmed the requirement with Mr. Cavelti to ensure he informed the CSF of the requirement.

[5867] In 2012/13, the CSF submitted its leases for reimbursement, and included new leases in Revelstoke, Vancouver, Pemberton, Whistler and Victoria. In February 2013, a letter was sent from Mr. Miller to Mr. Allison raising issue with the CSF's submission. It noted that the CSF had included five new leases, and asked the CSF to provide supporting documentation: copies of the leases, numbers of students enrolled, and a copy of previous correspondence to the Ministry in connection with those leases.

[5868] The evidence shows that the Ministry was involved in the early discussions of some of these leases: notably those in Vancouver and Victoria. Mr. Stewart negotiated the lease of Lampson Annex in Victoria and confirmed to Mr. Allison that the Ministry would fund leases for space to relieve overcrowding at École Élémentaire Rose-des-Vents.

[5869] In his evidence, Mr. Stewart confirmed that he helped to draft the February 2013 letter from Mr. Miller to Mr. Allison, and signed it under Mr. Miller's name. He

asked for the information because he was concerned that the CSF had been opening programmes and requesting funding for new leases without prior approval. For example, the CSF had started a new lease in Kamloops without ever having identified a need in that area in its capital plan or otherwise. He also wanted to ensure the requested space was being used for classrooms, and that the number of students justified the lease.

[5870] Mr. Allison responded to the Ministry later that month, summarizing information about the new leases, and including copies of the leases as requested. Mr. Stewart confirmed the Capital Branch was satisfied with the response.

[5871] Based on Mr. Allison's response, Mr. Palmer explained, the Ministry understood there had been some miscommunication. The CSF had informed the Knowledge Management Branch of the Ministry about the new schools it had opened, and that information had not made its way to the Capital Branch. According to Mr. Stewart, that was to be expected because the Capital Branch is interested in new programmes for funding purposes, whereas the Knowledge Management Branch was interested in registration of students. To remedy that problem, the Ministry developed a communication plan to ensure the problem did not recur.

[5872] Mr. Stewart suggested that was the first time that the CSF had requested new leases without giving the Ministry prior notice. As a result, he directed Mr. Cavelti to direct the CSF to notify the Capital Branch of all future leases. Mr. Stewart took the position that was not the first time that the requirement for pre-approval was communicated, although he conceded he could be wrong.

[5873] Mr. Cavelti wrote to Mr. Allison again in March 2013, and specifically asked Mr. Allison to inform him prior to entering into any new leases. He stressed the need to keep the Capital Branch apprised of new leases in addition to other departments in the Ministry so that the Capital Branch could ensure funding would be available.

[5874] Going forward, in May 2013, the CSF sought advance approval to lease an additional meeting room at its Executive Park Office in Richmond. Mr. Stewart

confirmed the CSF complied with the Ministry's requirement in that instance. Based on the information that the CSF provided, and his understanding of the Ministry's internal operating budget at the time, Mr. Stewart approved that lease cost.

[5875] As I describe in Chapter XXXIII, Board Office, in the fall of 2013 Mr. Allison began looking for new board office space. While attempting to justify that lease, in November 2013 Mr. Allison sent Mr. Palmer and Mr. Cavelti (copying Mr. Stewart) an estimate of the CSF's anticipated lease costs for the following year. The Ministry noticed that the CSF had included a new lease in SD5-Southeast Kootenay (Fernie) that the Ministry had not approved. Mr. Cavelti wrote to Mr. Allison and confirmed that the Ministry would need to carefully review each of the CSF's requests for additional funding. Mr. Cavelti also wrote that without prior approval, the Ministry could not guarantee funding for new leases.

[5876] Ministry officials required the CSF to prepare a business case to justify its request for a lease of the New CSF Board Office. Ultimately, on the basis of that business case and the cost of the lease, the Ministry refused the CSF's request for funding of the New CSF Board Office. The CSF had already entered into the lease of that facility, unbeknownst to the Ministry at that time.

[5877] While Mr. Palmer was under cross-examination, it was suggested to him that the Ministry's messaging had shifted from needing to be informed of lease cost increases to the CSF requiring approval before entering into new leases. According to Mr. Palmer, the Ministry was simply attempting to be clearer in its communication to the CSF. He conceded that Mr. Cavelti's March 2013 letter to Mr. Allison asking to be kept apprised of new lease amounts was unclear that the Ministry wanted to approve future leases.

[5878] In March 2014, Mr. Simon Couture, Finance Director for the CSF, sent the CSF's 2013/14 lease costs to the Ministry for reimbursement. The new Fernie lease, which had been brought to the Ministry's attention during negotiations concerning the board office, was included in that list. There were also new lease costs in Revelstoke and Rossland. While the CSF had communicated some

information about the Fernie lease to the Ministry, it appeared to Mr. Palmer that the CSF had only communicated a change to the school's name and configuration, not information about new lease costs.

[5879] On receiving the 2014 lease information, Mr. Cavelti wrote to Mr. Couture and expressed that "the ministry needs to confirm the availability of funding before the CSF enters into new leases or increases existing leases." He asked for supporting documentation. Mr. Couture's response was in part that he did not understand why the CSF had to justify increases for leases for educational space, and that he believed the Ministry should take charge of lease negotiations.

[5880] In advance of the 2014/15 year, shortly after Mr. Cavelti's exchange with Mr. Couture, Mr. Allison asked to lease an additional classroom in Fernie, and to open a new school in Burnaby. Mr. Palmer's view was that Mr. Allison's March 2014 request concerning 2014/15 lease costs was inadequate for the Ministry's purpose, as he wanted to see a business case justifying the additional space. He confirmed, however, that he did not know if that had been communicated to the CSF.

[5881] In July 2014, Mr. Allison also sought extra space to accommodate École Élémentaire Entre-lacs due to increasing enrolment. He explained that the CSF wanted to lease a room at McNicoll Park Middle at a cost of around \$10,000 per year. Again, Mr. Palmer was concerned that Mr. Allison did not provide any detail about the number of students that could be expected. However, the Ministry did not communicate this back to the CSF.

b) Discussion

[5882] The plaintiffs argue that the requirement for the CSF to seek pre-approval of its leases is not constitutionally permissible. In their submission, the Ministry is obligated to fund access to educational space for the CSF, and its internal funding constraints are irrelevant to its constitutional obligations. The plaintiffs argue that by requiring the CSF to lease space then not funding the leases without pre-approval,

the Ministry prevents the CSF from growing its programmes to achieve the remedial objects of s. 23.

[5883] The defendants' view is that the constitutional requirement to provide educational space does not mean that the regime must be structured perpetually to allow the CSF to direct the Ministry to fund leases without advance notice and proper planning. The defendants argue that the CSF's rejection of the requirement for pre-approval is an example of the CSF considering itself to be immune from the normal rules governing the education system and the need to plan like all other districts.

[5884] A major thrust of the defendants' argument is that it required sufficient advance notice to ensure funding would be available, and the CSF was not providing it with that information. The CSF concedes it is constitutionally permissible for the Ministry to request information about funding costs for budgeting purposes. The CSF's position is that it generally kept the Ministry aware of its needs.

[5885] The plaintiffs argue that prior to requesting pre-approval of CSF leases, the Ministry was fully aware of the five leases in Victoria, Vancouver, Whistler, Revelstoke and Pemberton. They point to Mr. Stewart's pre-approval of the lease of a church basement near École Élémentaire Rose-des-Vents and involvement in the negotiation of Lampson Annex. They also avert to Mr. Allison's evidence that he told Ministry officials about the leases in Whistler and Pemberton, and that the Ministry assigned an institution number for the new school in Revelstoke.

[5886] The plaintiffs also note that Mr. Allison sought advance approval to lease a meeting room adjacent to the Executive Park Office, and told the Ministry about the CSF's plans to expand its leases in Fernie and Penticton, and start a new lease in Burnaby.

[5887] The plaintiffs acknowledge that Mr. Allison failed to advise the Capital Branch of its new lease in Fernie, but suggest the cost of that lease was very small (\$16,038): what they call a "truly insignificant amount".

[5888] By the plaintiffs' account, the Ministry's requests for pre-approval represented a moving target. They suggest the Ministry never communicated to the CSF that its recent requests for lease funding were deficient and required a business case justification. Relying on Mr. Stewart's evidence, the defendants counter that Ministry staff had been asking since 2009 that the CSF seek prior approval before committing to new lease costs.

[5889] In Chapter VI, *The Respective Roles of the Province and the CSF*, I discuss the respective roles of the Province and the CSF. There, relying on *Mahe*, *Arsenault-Cameron* and *Alberta Public Schools*, I conclude that the Minister is entitled to develop institutional structures and regulations governing the minority's right to management and control. So long as those structures do not interfere with the minority's linguistic and cultural concerns, the minority is required to comply with those regulations, and must exercise their right of management and control consistently with them.

[5890] I find that the Ministry chose to institute a requirement that the CSF give it notice prior to entering into any new leases for two reasons. First, it was important to the Ministry that it could appropriately budget for the CSF's costs. Second, the Ministry was concerned that the CSF's lease costs had begun to increase following a few years of decline. However, given that the CSF's lease costs had only declined for one or two years and remained well below 2008/09 levels in 2013/14, I find that the primary reason for the pre-approval requirement was the Ministry's need to plan its expenditures.

[5891] I find that the Province's plenary jurisdiction over education allows to it create a funding system that requires the CSF to notify the Ministry of its lease costs and provide a justification for them. The CSF's right to establish new programmes does not go unchecked; there is a legitimate role for the Ministry to play "verifying whether the Board had met provincial requirements" (*Arsenault-Cameron* at para. 55). Since the Ministry was still open to funding new leases and only wanted the opportunity to ensure that programmes were justified in advance, the pre-

approval requirement is a valid one. Thus, in my view, the plaintiffs rightfully concede that the Ministry is entitled to establish the requirement that it did.

[5892] The question then becomes what, exactly, the CSF was required to do, and whether it adhered to those requirements.

[5893] I am satisfied that prior to Mr. Allison's tenure as Secretary-Treasurer, the CSF had a practice of seeking prior approvals of its leases. Whether that fell away with Mr. Bonnefoy or Mr. Allison is unclear. However, given that Mr. Stewart testified that it was only in about 2012 that the Ministry began receiving lease funding requests without prior approval, the practice likely fell away with Mr. Allison.

[5894] At some point between 2010 and 2013, Mr. Stewart or Mr. Cavelti might have reconfirmed this requirement to Mr. Allison. By March 2013, though, Mr. Cavelti had clearly communicated to Mr. Allison that the CSF must give the Capital Branch advance notice prior to entering into any new leases for new programmes. In the fall of 2013, it was reconfirmed to Mr. Allison that the requirement was for pre-approval, not simply for advance notice. While the Ministry's messaging was not always clear, it is understandable that was so given that the CSF's prior practice had been to seek approval before entering into new leases.

[5895] The defendants also point to Mr. Butler's email to Mr. Bonnefoy in July 2009 asking the CSF to consult with the Ministry before agreeing to any rent increases in advance of the 2009/10 Lease Funding Suspension. Notably, Mr. Butler related his request to "the constraints we are operating under this year". I do not find that he communicated a pre-approval requirement to Mr. Allison at that time; indeed, the Ministry was concerned with increases to existing leases, not new leases.

[5896] While Mr. Palmer wanted the CSF to justify any new leases with a business case, the Ministry fell short of communicating that requirement to the CSF. The business case requirement went beyond the pre-approval practice that appears to have been in place in the early 2000s. While the Ministry asked the CSF to prepare

a business case to justify the lease of the New CSF Board Office, no one explained that the requirement would apply to all future leases.

[5897] The CSF complied with the Ministry's request for more information about its leases in about February 2013. In May 2013, the CSF complied with the requirement for pre-approval, and the Ministry approved the CSF's request for additional space at its Executive Park Office. Later, in late 2013 or early 2014, the Ministry refused the CSF's request for its lease of the New CSF Board Office.

[5898] After that, in 2014, the CSF returned to its practice of simply informing the Ministry of its anticipated lease costs rather than seeking pre-approval. When pressed on that by Ministry staff, Mr. Couture was indignant at the requirement. Thereafter, the CSF sought pre-approval on at least two occasions.

[5899] I find there was a communication breakdown between the Ministry and the CSF. The Ministry did not clearly communicate its requirements for pre-approval or a business case to the CSF. The CSF, already frustrated at the requirement, sometimes only partially complied with the Ministry's requirements.

[5900] In any event, though, the evidence does not suggest that the Ministry refused to fund any of the CSF's additional lease costs because the CSF had failed to abide by the requirement to seek pre-approval. As a result, the requirement did not deprive rightsholders of space where the numbers so warranted.

6. 2014/15: Lease Funding Freeze

[5901] In 2014/15, the Ministry froze the CSF's lease funding. This seems to have arisen out of a combination of what the Ministry saw as the CSF's failure to abide by the pre-approval requirement as well as the events surrounding the CSF's lease of the New CSF Board Office. The plaintiffs argue the funding freeze is unconstitutional.

a) Facts

[5902] When the CSF was attempting to justify its lease of the New CSF Board Office to the Ministry in the fall of 2013, it provided the Ministry with a chart showing its anticipated lease costs for 2014/15. The chart suggested the CSF's lease costs would be lower in 2014/15 than in 2013/14. Mr. Allison conceded it was reasonable for the Ministry to rely on his representation. However, he also maintained that he did not communicate to the Ministry that his estimate was final.

[5903] Mr. Palmer recalled that in March 2014 he learned that the CSF had revised its previous lease funding estimate from \$1.52 million to about \$1.69 million: an increase of about \$165,000. This put pressure on the Capital Branch's internal operating budget.

[5904] In July 2014, Mr. Allison wrote to Mr. Palmer and Mr. Cavelti and informed them of the CSF's plans to rent more space in Penticton. Mr. Palmer had also heard from Mr. Howley, the Facilities Director for SD61-Greater Victoria, that the CSF was looking at extending its lease of Lampson Annex and starting a new lease of the Sundance Annex. By September 5, 2014, the Ministry had not received an official request for those leases to be funded. Mr. Palmer was concerned the Ministry's budget could not accommodate those new leases.

[5905] Through the summer of 2014, Mr. Cavelti and Mr. Palmer discussed ways of managing the cost pressure CSF leases placed on the Capital Branch's operating budget. They considered providing the CSF with an indexed lump sum payment for leases, or approving lease funding only when justified based on the Area Standards. Mr. Palmer wrote to the Financial Services Branch of the Ministry and asked if there was any unallocated Ministry funding the Capital Branch could use to fund CSF leases, but that request was refused in light of budget pressures.

[5906] Mr. Palmer explained the Ministry took a decision to freeze the CSF's lease funding at about \$1.7 million, the amount that the Ministry had funded for the CSF's leases in 2013/14. Assistant Deputy Minister Fayad wrote to Mr. Allison and

informed him of the decision in September 2014, relating it to the fact that the CSF's requested funding exceeded the budgeted amounts. She advised that further increases were financially unsustainable. She confirmed that the Ministry would not fund any lease costs in excess of \$1,691,200 until further notice. The CSF was not constrained in how it divided those funds among its leases. She suggested the CSF could fund lease costs in excess of that amount using its operating funds.

[5907] Mr. Allison sent a Positioning Letter to Assistant Deputy Minister Fayad in October 2014, asking her to reconsider the decision. In the alternative, Mr. Allison asked for Ministry assistance communicating the decision to majority school boards. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[5908] In response, Assistant Deputy Minister Fayad encouraged Mr. Allison to share a copy of her letter with the non-school district organizations from which the CSF leased space. Assistant Deputy Minister Fayad also wrote to all districts from which the CSF leased space and asked them to keep the freeze in mind when renegotiating CSF leases. However, when Mr. Palmer spoke with representatives from SD61-Greater Victoria concerning the CSF's lease of Sundance Annex, he told them the CSF could fund the lease of that facility from its Operating Block.

[5909] In response to requests from Mr. Allison to lift the freeze, Assistant Deputy Minister Fayad reiterated that the Ministry would not increase the CSF's lease funding until further notice. When Mr. Allison later requested additional funding for its new lease of the Lampson Annex and the Sundance Annex in Victoria, those requests were refused.

[5910] Mr. Palmer confirmed that as of the date he gave evidence in May 2015, the CSF's lease funding was still frozen. He also acknowledged that the primary reason for the funding freeze is financial.

b) Discussion

[5911] The plaintiffs argue the funding freeze is not constitutionally permissible. They note that the CSF was the fastest growing school district in the Province in 2014/15, and also one of only 15 growing school districts. The plaintiffs argue that the Province was imposing limits on the CSF's growth, and therefore limits on the extent to which the CSF could implement s. 23 of the *Charter*.

[5912] The defendants' position is that even with the funding freeze, the Ministry funds the majority of the CSF's lease costs consistent with the advance notice that they received. They suggest it is open to the CSF to supplement any excess lease costs it chooses to incur from its operating budget, and that the CSF will be better able to do so when the litigation has concluded.

[5913] The defendants say the lease funding freeze was the product of the CSF's failure to give the Ministry sufficient notice of its lease cost increase. They note the CSF represented that its lease costs would not increase in 2014/15. Relying on that representation, the Province refused all new requests for additional lease funding that year, including the cost of the New CSF Board Office. Thus, the defendants say, the Ministry was not being arbitrary or leaving the CSF to the vagaries of the majority boards; the Ministry was only enforcing its requirement for advance notice.

[5914] The plaintiffs submit that the defendants' reliance on increased lease costs is unfounded. They acknowledge the CSF's requests for lease funding increased between 2011/12 and 2014/15. However, they point out that in 2008/09, the Ministry funded lease costs of \$2,239,894. The Ministry funded total costs of \$1,439,845 in 2010/11. Comparing the CSF's total lease costs in 2010/11 (\$1,439,845) to lease costs in 2013/14 (\$1,691,200), the plaintiffs argue that lease costs had only increased by \$251,325, less than the total cost of the pre-approved lease of Lampson Annex (\$336,000) in that time period. Lease costs remained less than they were in 2008/09, prior to the Lease Funding Suspension.

[5915] The plaintiffs also say cost is not a relevant consideration given the Province's positive duty to fund instructional space where the numbers so warrant. The plaintiffs point to Ministry of Finance documentation showing that in 2014/15 the Province ran a surplus of \$879,000,000, and forecasted surpluses in the next three fiscal years.

[5916] The plaintiffs also suggest the Ministry provided the CSF with insufficient support communicating the funding freeze to majority school boards. In particular, the plaintiffs point to Mr. Palmer's statement to SD61-Greater Victoria officials that the CSF could fund leases out of its operating funds.

[5917] I find that as the CSF continued entering into new leases in 2014, the CSF did not involve or seek pre-approval of those leases from the Ministry, particularly as it negotiated new leases in Victoria. Meanwhile, the Ministry was concerned that it did not have funding in its internal operating budget to fund further increased costs.

[5918] As a result, with knowledge that the Victoria leases were looming, but without an official request for funding for those leases, the Ministry froze the CSF's lease costs at \$1.7 million, the cost the Ministry paid in 2013/14. The Ministry's primary reason was cost and pressure on its internal operating budget.

[5919] The Ministry notified all school districts from which the CSF leased space of its decision, and asked them to keep that in mind when renegotiating the CSF's leases. However, the Ministry has consistently refused the CSF's requests to lift the funding freeze. Otherwise, the Ministry has been of very little assistance to the CSF. There have been no assurances, for example, that the Ministry will do whatever is in its power to ensure the CSF is able to continue to lease space for its educational programmes. The Ministry has also since refused the CSF's requests for funding for additional leases.

[5920] The lease funding freeze has an impact on the CSF's ability to meet its mandate pursuant to s. 23. As I explain in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam), by September 2014

the CSF was looking for space to start a programme in Burnaby, and the Ministry was aware of this. It was in that context that the Ministry chose to freeze the CSF's lease funding at then-current levels. The change in policy shifted the financial burden for starting a new programme to serve an underserved community from the Ministry to the CSF. This placed the CSF in the difficult position of having to choose between existing programmes and services and starting a new programme to better accommodate rightsholders.

[5921] In that way, the new policy interferes with the CSF's ability to create a new catchment area in Burnaby, which is within its right to management and control over aspects of education related to language and culture. That right includes the right to determine the location of minority language instruction and facilities, what travel times are appropriate, and the geographic boundaries for assembly of students.

[5922] This difficulty may now be somewhat attenuated with the Ministry's decision to permit École des Pionniers to be built to a capacity beyond its current needs: from 550 to 660 students. However, by my estimate, the École des Pionniers Replacement Project would fall short of accommodating all the students that would be likely to attend a CSF programme in Burnaby.

[5923] However, and notwithstanding the Burnaby issue, in my view, by implementing the lease funding freeze, the Ministry exceeded its jurisdiction under s. 93 of the *Constitution Act, 1867*. While the Ministry generally has the residual discretion pursuant to s. 93 to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that have developed in the Province, its role is limited. The Province may not implement policies that interfere with the legitimate linguistic and cultural concerns of the minority: *Arsenault-Cameron* at para. 53.

[5924] I find that the funding freeze is a policy that interferes with the legitimate linguistic and cultural concerns of the minority. The minority generally has the right to determine when and where new school facilities are needed. By limiting funding for new leases, the Ministry impermissibly limits the CSF's ability to exercise its right

to management and control to start new programmes in facilities where the numbers so warrant.

[5925] The policy also treats the CSF inequitably. The CSF could choose to open new programmes and pay for them out of their Operating Block funds, as the CSF does with its lease of Sundance Annex. However, the Ministry funds space for all majority students outside the Operating Block. Requiring the CSF to fund its expansion using operating funds poses a disadvantage to the CSF that does not accrue to majority school boards.

[5926] This is not to say that there is not a role for the Province to play in determining whether the CSF has demonstrated the need for a new facility. There certainly is. It is open to the Ministry to implement reasonable requirements requiring the CSF to prepare a business case analysis to demonstrate that new or increased lease is warranted. The problem is with the blanket nature of the funding freeze. If there were some mechanism for the Ministry to approve of new leases where they are warranted, the funding freeze might be permissible. Without such a mechanism, I am satisfied that the funding freeze is contrary to s. 23 of the *Charter*.

7. Conclusion

[5927] I conclude that the Ministry's lease funding policies generally do not interfere with the CSF's right to management and control over school facilities, and have not deprived the CSF of the space that the numbers warrant. The Ministry's policy for the allocation of revenues from Long-Term Leases to capital accounts and Short-Term Leases to operating accounts does not limit the CSF's security of tenure, interfere with its right to management and control or deprive rightsholders of what they are entitled to. The evidence falls short of establishing that the CSF's early lease agreements were underfunded or that the Ministry recognized that it had been underfunding the CSF's leases. The Lease Funding Suspension, while inconvenient and unpleasant, caused no harm to the CSF. The Ministry's policy requiring the CSF to seek advance approval before entering into new leases or negotiating lease

funding increases is a valid one and is consistent with the Ministry's residual discretion to oversee and manage the education system.

[5928] The sole exception is the Ministry's lease funding freeze, which limits the CSF's ability to expand its programmes and open new educational facilities where the numbers so warrant. A blanket policy of that nature is clearly contrary to s. 23.

E. Justification

[5929] I conclude that the Ministry's Capital Plan Funding System related to CSF leases is contrary to s. 23 in two respects. First, it makes the CSF responsible for identifying sites to lease and negotiating lease contracts, without Ministry assistance. Second, the Ministry has implemented a blanket policy against funding any increases to the CSF's lease costs. The remaining question is whether either of those breaches is justified.

[5930] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". As I see it, the particular infringing measure that freezes the CSF's lease funding is likewise intended to ensure the fair and rational allocation of public funds.

[5931] The policy requiring the CSF to negotiate its own leases without Ministry assistance furthers a different purpose. The evidence from Mr. Stewart and Mr. Palmer persuades me that particular measure is intended to further the objective of ensuring school board autonomy. In the context of Canada's public law system, the goal of ensuring that statutory bodies like school boards act autonomously from Government furthers the rule of law and is therefore pressing and substantial.

[5932] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective.

[5933] I am satisfied there is a rational connection between the fair and rational allocation of public funds and a system that freezes the CSF's lease funding. By determining what amount the Ministry believes is appropriately spent on lease funding and capping funding at that level, the Ministry ensures that it has adequate funding to devote to other public purposes. I also see a rational connection between the goal of furthering school board autonomy and a measure that requires the CSF to negotiate its own leases without Ministry assistance. The policy ensures that the CSF identifies and enters into leases that are suitable to it, and the Ministry does not intervene in the CSF's operations except when it is appropriate to do so.

[5934] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[5935] The extent to which the measure minimally impairs the plaintiffs' rights must be determined based on the specific infringing measure and the engaged rights at issue. In this case, I do not find that either of the two measures is minimally impairing.

[5936] The Ministry could have achieved its objective of fairly and rationally allocating lease funding without a blanket cap on lease funding. Specifically, the Ministry could have allowed a mechanism whereby the Ministry would fund new lease costs when the CSF had justified its need for increased space within some reasonable amount of time before the start of the new lease. Instead, the Ministry implemented a blanket prohibition with no way of ensuring that programmes can expand to ensure rightsholders receive the minority language educational facilities that they are entitled to. I understand the Ministry's concern that it had attempted to implement that sort of a system previously and the CSF did not comply. However,

the Ministry ought to have found a different way of ensuring compliance, such as by refusing to fund leases where the CSF had not complied with Ministry policy. Indeed, the Ministry considered and rejected such an approach in favour of a process that saw it abandon its constitutional obligations.

[5937] The Ministry's policy of requiring the CSF to negotiate its own leases is likewise not minimally impairing. Previously, the Ministry intervened and advocated for the CSF's interests in problematic lease negotiations upon request. With that allowance, the measure was tailored to the CSF's needs. More recently, the Ministry has taken a passive approach and refrained from assisting the CSF in favour of maintaining neutrality between school boards. While that goal may be worthwhile, it has created a system whereby the CSF is left to the mercy of majority boards. The Minister could have achieved his objective of respecting autonomy through alternate means. Indeed, the Minister considered many of those alternate means: it considered and rejected the idea of appointing independent facilitators and implementing standard lease terms, which would have assisted the CSF without trenching on school board autonomy. Ministry staff rejected those proposals not for any policy reasons, but because staff were concerned about the cost and thought the CSF's lease costs would decrease going forward. It could have, at a minimum, turned to the *Education Mediation Regulation*, which would have allowed it to remain neutral while forcing the parties to negotiate to an agreement. I therefore conclude that the Ministry's requirement that the CSF negotiate leases without Ministry assistance fails to be justified at the minimal impairment stage.

[5938] Since both infringements fail at the minimal impairment stage, I consider that neither the Ministry's blanket lease funding freeze, nor the Ministry's policy requiring the CSF to negotiate leases without assistance is justified as a reasonable limit in a free and democratic society.

F. Relief

[5939] The plaintiffs seek the following three declarations regarding the defendants' funding of the CSF's leased space for minority language education programmes in

British Columbia, pursuant to subsection 24(1) of the *Charter*. (1) The defendants' decision to freeze the Conseil's lease funding at 2013/14 rates constitutes a violation of s. 23 of the *Charter*; (2) the defendants must fund the costs of the Conseil's leased facilities in areas where the Conseil does not own the facilities from which it offers French-language education; and (3) the Ministry of Education must make all reasonable efforts in assisting the Conseil in negotiating its leases with English-language school districts, local governments and other organizations.

[5940] I agree that in this instance declarations are the most appropriate remedy. However, for the reasons I give in Chapter X, Remedies, those declarations must be crafted with care to allow the Province some latitude to revise its policies and craft new ones that are constitutionally compliant. If I were to make all the orders sought by the plaintiffs, it would force the Government to enact laws in a specific manner, which exceeds the proper role for the Court.

[5941] To remedy the funding freeze, I declare that:

- a) The Ministry's policy freezing CSF leases at 2013/14 levels is contrary to s. 23 of the *Charter*, and therefore of no force and effect.

[5942] The remedy for the unconstitutional policy requiring the CSF to negotiate leases without assistance is more challenging. Normally, the appropriate remedy would be a declaration that the policy is of no force and effect. However, the plaintiffs seem to agree that it is appropriate for the CSF to take the lead with lease negotiations in some circumstances. Many witnesses suggested it would not be appropriate for the Ministry to intervene unless the CSF had made a request. The primary issue is that the Ministry's recent approach has been to refuse the CSF's requests for assistance. As a result, I will simply declare that the policy unjustifiably infringes s. 23 of the *Charter*, and require the Province to craft a policy or legislation to ensure that Government actors comply with s. 23.

[5943] I declare:

- a) The Ministry's policy requiring the CSF to negotiate leases without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.

[5944] As I discuss in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation, rather than striking down the Ministry's current practice, I order the Province to craft a law or policy to assist the CSF to identify appropriate space and resolve disputes with majority school boards. A formal law or policy is necessary to give the CSF the certainty it needs that the Ministry's assistance will be forthcoming.

[5945] The plaintiffs also seek *Charter* damages in relation to "the failure to indemnify the Conseil for the cost of the leases it has made with [majority school boards] and private organizations to provide instructional space". I acknowledge that those types of damages would compensate the CSF for the additional costs that it incurred leasing Lampson Annex and Sundance Annex due to the lease funding freeze. Because of those two leases, the CSF pays an additional \$124,000 each year that is not captured in its frozen lease block funding.

[5946] However, in my view, *Charter* damages are not appropriate to compensate the CSF for the cost of those leases. The Ministry has put in place a legitimate requirement for the CSF to seek pre-approval of its additional lease costs. The CSF refused to abide by that requirement when it entered into the leases of Sundance Annex and the balance of Lampson Annex. As I see it, the CSF should not be compensated for costs that it incurred in clear violation of valid Ministry policies.

G. Summary

[5947] I find that the fact that the CSF leases facilities is not presumptively contrary to s. 23 of the *Charter*. I am also satisfied the Ministry's historic lease funding policies have generally not deprived rightsholders of the minority language educational facilities that are warranted based on the numbers, or the CSF of its right to management and control.

[5948] However, I find that the Ministry's policies concerning lease negotiations inappropriately require the CSF to negotiate leases on its own without Ministry assistance. In recent years, the Ministry has also declined the CSF's requests for assistance. That policy disadvantages the CSF, and is contrary to the Ministry's duty to preserve and promote minority language education by ensuring facilities are provided where the numbers so warrant. The policy is not minimally impairing of rightsholders' rights, and therefore is not a reasonable limit in a free and democratic society. I therefore declare that practice to be contrary to s. 23 of the *Charter* and of no force and effect.

[5949] Additionally, the Ministry's decision to freeze the CSF's lease funding at 2013/14 levels is contrary to s. 23 because it prevents the CSF from starting new programmes where the numbers so warrant. It also fails to treat the CSF equitably because the CSF is forced to pay to expand its educational programmes using its operating funding. A blanket funding cap of that type, with no measure for ensuring that new programmes are opened where the numbers so warrant, is not minimally impairing and thus not a reasonable limit. As a remedy, I declare that the Ministry's policy freezing funding for CSF leases of educational space to be of no force and effect to the extent that the CSF's lease funding is frozen at 2013/14 levels.

[5950] I do not include in the finding of unconstitutionality any obligation to fund the lease of the New CSF Board Office.

XXXVI. EXPANSION PROJECTS AND THE ENROLMENT DRIVER

[5951] The second set of challenges that the plaintiffs raise in connection with the capital funding system relates to the operation of the Enrolment Driver, and the Ministry's treatment of Expansion Projects.

[5952] As I described in Chapter III, Introduction to the Capital Planning Process, Expansion Projects are capital projects designed to create new space for students by way of new schools and additions. The Ministry evaluates the requests based on current and forecasted enrolment, as measured by the Space Rank Formula.

[5953] The plaintiffs argue that the Enrolment Driver operates such that the Province does not fund CSF Expansion Projects where the numbers so warrant. They take that position for two reasons. First, they argue that a lack of funding for Expansion Projects between 2005 and 2011 disadvantaged the CSF because it was experiencing rapid enrolment growth in that period. Second, they say the Space Rank Formula does not address the CSF's needs, and is inconsistently applied.

[5954] The success of the plaintiffs' arguments depends on establishing that rightsholders are not receiving what they are entitled to because of the operation of the Enrolment Driver. While the plaintiffs do not draw that connection in their argument, I see it as the crux of the issue: the Province has the residual discretion in s. 93 to establish a capital funding system that balances the unique blend of linguistic and educational dynamics in the province. So long as the system they create ensures that rightsholders are receiving what they are entitled to and does not interfere with the CSF's exercise of its right to management and control, the system is a valid one. The plaintiffs raise an adverse effects discrimination claim: that a neutral system disadvantages the linguistic minority. Thus, they must prove that adverse effect-- a breach of s. 23-- in addition to a theoretical disadvantage.

[5955] For that reason, when analyzing the plaintiffs' claim concerning Expansion Projects, I rely on my conclusions concerning the alleged breach of s. 23 and the findings that I made in the section on "Causation, Responsibility and Findings Relevant to the Systemic Claims" in each chapter concerning a community where the CSF has no programme, operates out of leased space, or where the CSF proposes that it will divide a programme and start a new school: Chapter XVII, École Élémentaire La Passerelle (Whistler); Chapter XVIII, École Élémentaire de la Vallée de Pemberton (Pemberton); Chapter XIX, École Élémentaire Les Aiglons (Squamish); Chapter XX, École Élémentaire du Pacifique (Sechelt); Chapter XXI, École Élémentaire des Sentiers-Alpins (Nelson); Chapter XXII, École Élémentaire Entre-lacs (Penticton); Chapter XXIII, École Élémentaire des Navigateurs (Richmond); Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)); Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)); Chapter XXVI,

École Victor-Brodeur (Victoria); Chapter XXVII, École L'Anse-au-Sable (Kelowna); Chapter XXXI, Abbotsford French-Language Education; and Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam).

[5956] Relying on those findings, I address the two categories of the plaintiffs' arguments: that it was disadvantaged by a lack of Expansion Projects and by the operation of the Space Rank Formula.

A. Lack of Expansion Projects since 2005

[5957] The plaintiffs argue the CSF has been disproportionately affected by the Ministry's lack of funding for Expansion Projects since 2005.

1. History of Expansion Projects

[5958] As I described in Chapter III, Introduction to the Capital Planning Process, in the 1990s, the Province funded many Expansion Projects due to unprecedented school-age population growth. Growth in the 1990s was so substantial that despite regular annual capital funding, there were some 3,200 portables across the province in 1998. Beginning in 1998, the government of the day wanted to reduce the number of portables by half. Around the same time, the Province entered into a collective agreement that committed to reducing class sizes for primary grades from about 22 students to 18 to 19 students.

[5959] The confluence of these factors resulted in the need for new classroom space. So, the Ministry funded several hundred Expansion Projects between 1998 and 2000. Some districts, like SD39-Vancouver, benefited from a number of Expansion Projects despite overall enrolment decline between 1998 and 2000.

[5960] In almost all districts, enrolment has declined since then. Between about 2005 and the fall of 2011, the Ministry did not fund any new Expansion Projects.

[5961] In October 2011, the Ministry announced a \$353 million Capital Envelope for Expansion Projects in areas that were experiencing enrolment growth (the "2011 Expansion Programme"). Some of those projects were approved in districts with

overall growing enrolment, like the CSF; some were approved for pockets of districts that were experiencing enrolment growth despite overall declining enrolment. SD36-Surrey, in particular, was seeing growth of 1,000 to 1,500 students per year. The CSF was also experiencing growth.

[5962] Mr. Miller noted that the Ministry funded the 2011 Expansion Programme with a mix of new money, Ministry funding and district funding. The Ministry received about \$175 million in new funding from Treasury Board. The Ministry also amended the timeline and deferred funding for some projects that were proceeding slowly or seemed to no longer be justified, which made the funding available for the 2011 Expansion Programme. The Ministry also asked school boards to contribute some funds to projects from their Local and Restricted Capital Reserve accounts.

[5963] The 2011 Expansion Programme was designed to fund six elementary schools, one middle school, two secondary schools, four school additions and six school site purchases. As part of the 2011 Expansion Programme, the Province announced support for the CSF to acquire and build the Southeast False Creek Project described in detail in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)).

[5964] Since then, Mr. Palmer reported, there have been some discrete accelerated project announcements for Expansion Projects in SD36-Surrey due to its rapid enrolment growth. At the time Mr. Palmer testified in April 2015, about 7,500 students in SD36-Surrey were housed in portables rather than school buildings. So, in August 2014, the Ministry announced four new school projects in SD36-Surrey: a new secondary school and additions to three elementary schools, creating more than 1,800 spaces for students. Mr. Palmer confirmed the three additions were fully funded by SD36-Surrey, as was a portion of the secondary school.

2. CSF Enrolment Growth

[5965] Mr. Miller was frank that the dearth of Expansion Projects since 2005 had a disproportionate impact on the few districts experiencing enrolment growth.

[5966] The CSF is one of the districts that had growing enrolment in this period. In the 2005/06 Operating Grants Manual, the CSF was shown to have the largest percentage enrolment increase across the province, with growth of 4.88%. I note, however, that in absolute numbers, the CSF's growth was relatively low, at only about 159 students. SD36-Surrey, meanwhile, had absolute growth of 676 students, or 1.11% growth.

[5967] The data show that in every year except 2012/13 and 2014/15, the CSF had the highest growth rate, by percentage, out of any district in the Province. In 2012/13, the CSF came second to SD64-Gulf Islands, which had absorbed an existing SD44-North Vancouver school into its enrolment. For that reason, 2012/13 is anomalous, and the CSF should be considered to have had the highest percentage growth rate of any district in every year except 2014/15.

[5968] However, the CSF's absolute growth rate was small until 2013/14, particularly when that growth is compared to that of SD36-Surrey. The CSF grew by an average of fewer than 300 students per year in each year between 2005/06 and 2012/13. Its highest growth in any given year was 595 students in 2006/07, but most years it had absolute enrolment growth of less than 300 students. Between 2005/06 and 2012/13, SD36-Surrey had average annual enrolment growth of more than 800 students per year. In three of those years it had growth of more than 1,100 students.

[5969] Beginning in 2013/14, the CSF's absolute growth rate surpassed SD36-Surrey, and it began to have the highest growth rate in absolute numbers of any district in the Province: net growth of about 232 students in 2013/14 and 289 students in 2014/15.

[5970] I note that the period where the CSF began experiencing the highest absolute growth coincides with the commencement of the CSF's Expanded Admissions Policy, which was promulgated in April 2013 and suspended in May 2015. Even after taking into account those students who were impermissibly enrolled in CSF schools, the CSF's cumulative growth in 2013/14 and 2014/15 was higher than that of any other district.

[5971] Overall, between 2005/06 and 2015/16, taking into account the CSF's growth while omitting the children of non-rightsholders admitted to the programme, the CSF experienced net enrolment growth of 3,014 students. In the same period, SD36-Surrey experienced net enrolment growth of about 7,102 students. Thus, the CSF was growing at about 40% of the rate of SD36-Surrey in terms of absolute numbers.

3. CSF Capital Approvals: 2005-2011

[5972] Between 2005 and 2011, the Ministry supported a number of Expansion Projects for the CSF. In 2004/05, the Ministry announced support for CSF Expansion Projects in Comox and Campbell River. Thereafter, the Minister supported the CSF's acquisition of École Élémentaire Anne-Hébert in 2009/10, the Southeast False Creek Project in 2011, and the acquisition of École Élémentaire Sept-Sommets (Rossland) in 2013/14.

[5973] The lack of Expansion Projects in other communities did not stop the CSF from expanding its programmes. It simply did so in leased space. The evidence shows that the CSF opened new programmes in leased space in Pemberton and Rossland in 2005/06 and in Nelson in 2007/08. The CSF also entered into new or expanded leases to expand its programmes and accommodate enrolment growth in Revelstoke, Vancouver, Victoria and Fernie.

4. Discussion

[5974] The plaintiffs take the position that the CSF was especially disadvantaged by the lack of funding for Expansion Projects between 2005 and 2011 due to its growing enrolment.

[5975] The defendants note Mr. Miller's evidence was that the CSF was no more disadvantaged than other districts that also had growing enrolment. They point to evidence showing that many school districts have waited much longer than the CSF between approved capital projects. For example, SD6-Rocky Mountain, SD8-Kootenay Lake, SD10-Arrow Lakes and SD28-Quesnel have all had no capital projects approved since 2001. They also note that SD40-New Westminster, SD45-West Vancouver, SD46-Sunshine Coast and SD47-Powell River each had between one and three capital projects since 2001. Thus, they say that the CSF is not alone in having to wait.

[5976] For many of its requested capital projects in this claim, the CSF did not begin seeking Expansion Projects until the start of this litigation in 2010: Burnaby, Nelson, Pemberton, West Kelowna, and East and West Victoria. It is understandable that the Ministry did not support those projects at that time. Moreover, the CSF only began requesting Expansion Projects in North Victoria and Northeast Vancouver in 2013. As I see it, for all of these communities, the lack of Expansion Projects between 2005 and 2011 had no impact on the CSF's plans for growth. The lack of Expansion Projects in that timeframe cannot be faulted for not responding to the CSF's need when the CSF did not identify its need to the Ministry.

[5977] Seven of the Expansion Projects the CSF seeks in this claim were being sought between 2005 and 2010: the Abbotsford Elementary/Secondary Project, the Penticton Elementary/Middle Project, the Richmond Elementary/Secondary Project, the Sechelt Elementary Project, the Squamish Elementary Project (and later the Squamish Elementary/Secondary Project), the Whistler Elementary Project (and later the Whistler Elementary/Secondary Project), and the Vancouver (West) Elementary Project.

[5978] I find that the numbers in Whistler are unlikely to warrant homogeneous instruction, and that the standard of entitlement is being met. Thus, the absence of capital funding for Expansion Projects was not problematic for that area.

[5979] For most of the seven Expansion Projects that went unaddressed, the CSF had not identified a site that it could acquire. The CSF did not identify sites that were available or that it was interested in acquiring in any of Vancouver (West), Penticton, Sechelt or Squamish between 2005 and 2010. There are rights breaches in all four communities. The CSF is responsible for the situation in Squamish. The capital funding system responded to the CSF's need for an Expansion Project in Vancouver (West) in 2011. For Sechelt and Penticton, though, the rights breaches arise out of both a lack of appropriate sites taken together with a lack of funding to acquire them.

[5980] There are only two projects for which the CSF had both identified a site and made a project request between 2005 and 2010: the Abbotsford Elementary/Secondary Project and the acquisition of Kilgour Elementary in Richmond. I note, though, that the CSF has relatively secure tenure and is receiving what it is entitled to in Richmond. So, the only situation where a lack of funding for Expansion Projects was the primary cause of a rights breach is in Abbotsford.

[5981] As a result, I am prepared to conclude that the lack of Expansion Projects between 2005 and 2011 materially contributed to rights breaches in Abbotsford, Sechelt and Penticton.

[5982] However, based on the evidence before the Court, I cannot say whether the CSF was disproportionately impacted by the lack of Expansion Projects. There is limited evidence concerning the unmet need in other school districts. Some districts, despite having overall declining enrolment, were experiencing growth in regions within the district. There is no evidence about how those districts dealt with enrolment growth.

[5983] In my view, the CSF has an advantage over majority school boards with respect to the lack of Expansion Projects. While majority boards are unable to do so, the CSF can grow its programmes in space leased from majority school boards. Until quite recently, the Ministry fully funded all of those leases, as I describe in Chapter XXXV, Leases, which it does not do for majority school boards. Majority boards typically accommodate expansion using portables that they must purchase using their operating funds.

[5984] Regardless of whether the CSF was disproportionately harmed, I am prepared to conclude that the lack of Expansion Projects came at a time when the CSF was attempting to grow its programmes. Due to the lack of funding for Expansion Projects, the CSF has been unable to meet rightsholders' needs in a number of communities, particularly Abbotsford, Sechelt and Penticton. Thus, I find that the Ministry's failure to fund Expansion Projects between 2005 and 2011 hurt the CSF's ability to ensure rightsholders received all that they were entitled to in that period, contrary to s. 23.

B. Operation of the Enrolment Driver and Space Rank Formula

[5985] The Ministry evaluates relative need for Expansion Projects based on current and projected enrolment at the subject and surrounding schools. It does so in two ways. First, it requires the district to demonstrate that certain capacity utilization thresholds are met. Second, Ministry staff use the Space Rank Formula to score the project and assess the need for it relative to the need for other projects. If Treasury Board provides the Ministry with a Capital Envelope for Expansion Projects, the Province typically supports the most needed projects based on the Space Rank Formula.

[5986] The plaintiffs raise issue with all three aspects of the operation of the Enrolment Driver: the threshold rankings, the Space Rank Formula and the Province-wide ranking system. They also suggest the Ministry has not consistently applied the Space Rank Formula, to the detriment of the CSF. Here, I discuss how those factors operate before considering the plaintiffs' arguments.

1. Threshold Rankings, the Space Rank Formula and Provincial Rankings

[5987] Before the Minister will consider the need for an Expansion Project, the proposed project must meet two threshold requirements: an enrolment threshold and a capacity utilization threshold.

[5988] The enrolment thresholds require an elementary school to operate at 50 students above its capacity, and a secondary school at 75 students over capacity, before the Ministry will consider it to be a high priority project.

[5989] Starting in about 2002/03, the Ministry also began to hold districts to an area capacity utilization threshold. Ministry staff and school boards agree on a geographical zone surrounding a proposed school. The school board must show that the schools in that zone together operate at a sufficiently high capacity utilization to justify the construction of a new school in the zone.

[5990] The capacity utilization threshold varies depending on the size and circumstances of the school district and project. Most large districts must show that they are operating at 95% capacity at the elementary level or 110% capacity at the secondary level in that zone before the Ministry will seriously consider the school board's request. Smaller districts like the CSF must meet a lower threshold.

[5991] According to Mr. Miller, if the enrolment and capacity utilization thresholds are met, then the Ministry goes on to calculate the project's Space Rank score.

[5992] The starting point for the Space Rank Formula is capacity. The Ministry examines capacity at the subject school and proximate schools in the same zone to ensure the district could not address its need by redefining catchment areas.

[5993] Then, the Ministry is concerned with enrolment. Mr. Miller disclosed that the Ministry's foremost concern is existing enrolment because the Province wants to respond to the needs of students who are already in overcrowded schools. The Ministry also considers forecasted enrolment two years into the future for an elementary school, three years into the future for a secondary school, and five years

into the future for a site acquisition request. The Space Rank gives greater weight to existing enrolment to prioritize the needs of students already in school. When taken together, current capacity, current enrolment and projected enrolment are expressed as an index showing capacity utilization three to five years into the future.

[5994] Like the enrolment threshold, the Space Rank score is based on the absolute number of spaces required to house students, rather than a proportionate calculation of capacity utilization. Mr. Miller advised that the Ministry uses absolute numbers because it wants to ensure as few students as possible are housed in portables.

[5995] Ministry staff then rank all proposed Expansion Projects against one another based on the scores generated by the Space Rank Formula. This forms the basis of a Consolidated Capital Plan request that the Ministry submits to Treasury Board.

[5996] Mr. Miller suggested the Space Rank Formula is the sole metric for evaluating requests for Expansion Projects. He took the position that the Ministry does not have any regional targets that require it to spend a certain amount in each region of the Province. Mr. Palmer's evidence differed somewhat. He advised that sometimes it would not be politically palatable to build too many spaces in one region, so the Ministry might deviate slightly from the prioritization based on Space Rank Formula.

2. Operation of the Space Rank Formula for the CSF

[5997] Generally, the thresholds and Space Rank Formula operate in the same way for the CSF as for any other district. The Ministry never considered how the thresholds would impact the CSF. The CSF's projects are also ranked against all other requested projects in the Province in the Consolidated Capital Plan.

[5998] Mr. Miller acknowledged that the thresholds and Space Rank Formula examine capacity in proximate schools, which poses challenges for the CSF given its provincial jurisdiction. CSF schools are regional schools and located at a further distance from one another than majority neighbourhood schools. When examining

requests from the CSF, the Ministry considers a larger zone than it does for majority school requests. For example, when the Ministry evaluates a request for a CSF school in Burnaby, the Ministry would want to examine excess capacity at École Élémentaire Anne-Hébert (Vancouver (East)) and École des Pionniers (Port Coquitlam). When the Ministry considers a request for an Expansion Project from SD39-Vancouver, it will typically consider about four to eight elementary schools in a smaller geographic zone.

[5999] On the other hand, the thresholds and Space Rank Formula do take into account the CSF's special circumstances in other ways. According to Mr. Palmer, when the Ministry calculates the CSF's capacity utilization, it does not include capacity at schools that the CSF leases, but does include the enrolment at those schools. Thus, all of the CSF's enrolment is counted as exceeding its capacity where the CSF requests an Expansion Project to move out of leased space.

3. Deviation from the Space Rank Formula

[6000] The CSF takes the position that the Ministry has not been consistent in its application of the Space Rank Formula, to the detriment of the CSF.

[6001] The Minister approved a Consolidated Capital Plan and submission to Treasury Board for the 2007/08 budget year in about March 2005. The strategic document accompanying the Consolidated Capital Plan identified a continuing need for Expansion Projects growing districts. Staff informed the Minister that 30 of 60 districts met the capacity utilization thresholds for new space projects, although only five of those districts (including the CSF) projected enrolment growth. Staff forecasted the need for 1,000 new spaces for 2007/08, at a cost of \$19-20 million.

[6002] The Consolidated Capital Plan for that year reveals that the CSF had five of the top seven projects based on the Space Rank Formula. Two of those projects were approved: projects in Comox and Campbell River. CSF projects in the Sechelt, Penticton and Kamloops were passed over in favour of two projects in

SD36-Surrey, and one project in SD75-Mission that had lower Space Rank Scores than three of five CSF projects.

[6003] According to Mr. Miller, the Minister approved the projects as suggested by Ministry staff, and those funds went ahead. In total, the Province funded six site acquisitions in 2007/08, two of which were for the CSF.

[6004] The plaintiffs raise issue with the fact that the Province only funded two of the CSF's project requests in 2005 although the CSF had five of the seven highest-ranked Expansion Projects. The projects the Ministry supported included one for SD75-Mission that had a lower Space Rank Score than the CSF's requested projects for Sechelt and Penticton, and two projects for SD36-Surrey projects with lower Space Rank Scores than the CSF's requested projects for Sechelt, Penticton and Kamloops.

[6005] Mr. Miller testified that the projects for SD36-Surrey and SD75-Mission were approved, in part, because those districts had capital reserve funds to contribute to the projects. Each of the three SD36-Surrey projects involved \$500,000 of land capital reserve funds. SD75-Mission likewise contributed \$1.4 million to its project. Mr. Miller confirmed this opened up more space in the capital plan, allowing the Ministry to fund more Expansion Projects overall.

[6006] The plaintiffs suggest the Ministry approved projects for other districts instead of funding more CSF projects because to do otherwise would not have been "politically palatable", pointing to evidence from Mr. Palmer that such considerations would cause the Ministry to deviate from a strict application of its technical criteria.

4. Discussion

a) Submissions

[6007] In the plaintiffs' submission, the Ministry's method for deciding what Expansion Projects it will fund does not comply with the Province's constitutional obligations.

[6008] The plaintiffs argue that the CSF is disadvantaged by the Space Rank Formula's focus on absolute numbers. They say the Space Rank Formula operates such that small schools operating over capacity will always rank lower than large schools operating over capacity, to the detriment of the CSF's hopes to expand its many small schools.

[6009] The plaintiffs also note that the CSF is often looking to acquire space for the first time. Thus, in their submission, the CSF is disadvantaged by the requirement for school districts to project enrolment increases: something they suggest is irrelevant given that the CSF lacks any owned space in some areas. They also take issue with the lack of a mechanism to prioritize the CSF's desire to move out of heterogeneous environments, and reduce travel times in some communities. In the plaintiffs' submission, a capital funding system that ignores those factors necessarily breaches s. 23 of the *Charter*.

[6010] To illustrate, the plaintiffs point to the CSF's situation in Pemberton, where the CSF operates École Élémentaire de la Vallée de Pemberton out of portables and a community centre. In 2014/15, it had 48 students enrolled, and no capacity. That year, it would not have met the enrolment threshold of 50 students to qualify as a high-ranked project. In the plaintiffs' submission, the Space Rank Formula does not adequately take into account the CSF's lack of permanent facilities and desire for homogeneity in Pemberton.

[6011] The plaintiffs suggest the provincial-level ranking is fatal to the constitutionality of the Enrolment Driver. They argue that s. 23 mandates a consideration of local needs, pointing to comments in *Association des Parents-SCC*, where the Court held that the geographic scope of the assessment of equivalence requires courts to "think locally" (at para. 36). The plaintiffs suggest the Ministry's approach to the Consolidated Capital Plan, which ranks the CSF's projects against others province-wide, does not meet that standard.

[6012] In support of these arguments, the plaintiffs suggest the evidence shows the Enrolment Driver has not responded to the CSF's needs. They observe that the

CSF operated 18 schools out of rented facilities in 2014/15, some of which operated out of heterogeneous facilities, which they attribute to the operation of the Enrolment Driver. They also note that the Enrolment Driver has not responded to the CSF's requests to open new programmes in Burnaby and Abbotsford. They urge that the Enrolment Driver has not responded to the CSF's need to relieve overcrowding in Victoria and Vancouver.

[6013] Finally, the plaintiffs suggest that on at least one occasion, the Ministry deviated from the Space Rank Formula in a manner that was detrimental to the CSF. The CSF points specifically to the projects that the Ministry supported in about 2005/06, which tended to favour majority districts at the expense of the CSF.

[6014] The defendants take the position that the Enrolment Driver and Space Rank Formula adequately account for the CSF's unique circumstances and have responded to the CSF's need for Expansion Projects.

[6015] In connection with the plaintiffs' argument that the CSF is disadvantaged by the use of absolute numbers for the enrolment thresholds and Space Rank Formula, the defendants argue that many of the Expansion Projects that the CSF requests-- such as those in Vancouver and Victoria-- involve large schools and meet the thresholds. In smaller schools that might not meet the thresholds or generate an approval, the defendants suggest the numbers do not warrant Expansion Projects at this time.

[6016] The defendants concede the CSF also requests Expansion Projects to move out of leased space. However, they suggest that the Enrolment Driver accounts for the CSF by considering that the CSF has no capacity where it leases its space. This, they say, makes those projects a higher Ministry priority than they would otherwise be, showing how the Province prioritizes the CSF's desire to move out of leased and into owned space.

[6017] The plaintiffs acknowledge that the CSF benefits from the Ministry's treatment of the CSF's capacity in leased space. They note that despite that

nuance, the Province has not funded new school facilities in Richmond, Penticton or Squamish, showing that the system is not working to move the CSF out of leased space.

b) Discussion

[6018] Because the Space Rank Formula and the enrolment thresholds are concerned with absolute numbers rather than proportions, it is fair to say that it is harder to generate a capital approval for a small school than a large one. Mr. Miller agreed that because of the Ministry's 50-student enrolment threshold, to be treated as a high priority project, a request for expansion of a 100-student school would require enrolment of 150, or 150% capacity utilization. The expansion of a school with a 500-student capacity would require enrolment of 550 students, or 110% capacity utilization.

[6019] Because the Space Rank Formula likewise operates in absolute numbers, two projects that both involve schools operating 100 students over capacity, one with regional capacity for 1,000 students and one with capacity for 100 students, would receive the same score. Mr. Miller conceded that the effect of the Space Rank Formula is that a large school operating 20% above capacity will rank higher than a small school operating 20% over capacity.

[6020] Nevertheless, there are problems with the plaintiffs' argument that the CSF is disadvantaged by a formula that focuses on the absolute number of students rather than the proportion of students for which space is required. Certainly, if the Space Rank Formula focused on proportions rather than absolute numbers, then the CSF would have an advantage that it does not enjoy under the current framework. However, rightsholders are not entitled to any particular funding framework. The Province is in the best position to establish a funding framework that balances the needs of all parties interested in education. The Province is not required to implement a formula that benefits the CSF more than any other district; it is only required to implement a programme that responds to the needs of rightsholders.

[6021] The real issue is therefore whether the Space Rank Formula ensures that rightsholders receive what they are entitled to in light of the number of children likely to attend a programme.

[6022] In some of the areas where the CSF seeks Expansion Projects, I anticipate that the maximum enrolment would never warrant homogeneous facilities: Whistler (85 elementary students), Pemberton (55 children), West Kelowna (50 students), and North Victoria (98 students). The West Kelowna project would never meet the Ministry's 50-student threshold to be considered a high priority project. I find that based on the Space Rank Formula, the projects in Whistler, Pemberton and North Victoria are also unlikely to be supported because the schools are so small. However, that is not a problem because the numbers will always fall short of warranting homogeneous instruction. The Space Rank Formula does not need to guarantee newly-built schools in those communities.

[6023] In a number of areas, the CSF is requesting more than what it would be entitled to in the early years of a programme: Burnaby, Abbotsford, East and West Victoria and Northeast Vancouver. In those early years, the numbers will also fall short of the 50-student threshold for warranting homogeneous instruction. As I see it, that is not problematic because the numbers initially will not warrant a homogeneous school.

[6024] In several of these communities, as the CSF's enrolment grows, the programmes are likely to eventually come to warrant homogeneous facilities. In those communities, the Space Rank Formula would recognize the CSF's needs as a high priority. This is particularly so because when those programmes start, they are likely to start in leased space and the total enrolment would be considered to be in excess of the CSF's capacity in the region. However, at this point, the plaintiffs have not shown that the Space Rank Formula has not provided rightsholders with what they are entitled to-- the numbers do not warrant those homogeneous facilities yet.

[6025] There are a few projects, though, where the CSF's numbers could immediately justify a homogeneous school: Penticton (175 students), Richmond

(165 elementary students), Sechelt (90 children), Squamish (135 elementary students), and in Vancouver (West) (500 students between two schools). For Vancouver (West), the Space Rank Formula has already generated an approval for the CSF. The evidence subject to a Confidentiality Order persuades me that the Space Rank Formula is not an issue for the CSF's proposed project in Squamish. In Richmond, the elementary facilities are equivalent, the CSF has secure tenure and there is no breach.

[6026] As a result, it is only in Penticton and Sechelt that the numbers are not receiving what they are entitled to, the Space Rank Formula has not generated an approval, and the numbers immediately warrant a homogeneous school. Because the CSF's needs in those communities are being compared to the needs in other areas of the province, and the need is greater in other areas of the Province-- including in other CSF schools-- the Space Rank Formula has not responded to the CSF's needs.

[6027] Notably, the Space Rank Formula almost responded to the CSF's requests for Penticton and Sechelt in about 2005. The Province did not support the CSF's projects in those years even though they compared favourably to projects for SD36-Surrey and SD75-Mission. That is because the two majority boards were able to contribute some capital reserve to their proposed projects. The Minister favoured those projects because it would allow a greater number of projects to go forward all at once. They therefore bumped the CSF's projects.

[6028] Thus, the Space Rank Formula is not to blame for the fact that the CSF's Expansion Projects for Sechelt and Penticton have not gone ahead. The real issue is that the CSF's projects were compared and ranked against the projects of majority school boards with greater ability than the CSF to contribute Local and Restricted Capital Reserve to capital projects. If the CSF is ever going to be able to move from leased to owned space and resolve its capital problems, it is essential that it have secure funding, available only to it, where it will not have to compete for capital projects against majority school boards with greater resources.

[6029] The plaintiffs also argue that the Ministry previously applied a district-wide capacity utilization threshold, then moved away from it starting with the 2009/10 Capital Plan Instructions. They argue that if the Ministry had applied that threshold properly, only the CSF and SD23-Central Okanagan would have been eligible for any capital projects in the 2011 Expansion Programme. Thus, they raise issue with the Province implementing a new system that did not benefit the CSF as much as a previous one did. I do not have any record of the plaintiffs putting this argument to any of the Province's witnesses, nor do the plaintiffs point me to where they raised the change in policy with the Province's witnesses. In those circumstances, it would be unfair to hold the purported change in policy against the Ministry.

C. Justification

[6030] I find that two aspects of the Province's capital funding system with respect to Expansion Projects have materially contributed to the CSF's lack of appropriate facilities: the lack of Expansion Projects between 2005 and 2011, and the Provincial-level ranking that compares the CSF's proposed Expansion Projects against those of majority school boards, who have greater access to Local and Restricted Capital Reserve funds to contribute to capital projects. The remaining question is whether the Province can justify those breaches.

[6031] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". It is my view that the particular infringing measure that weighs the CSF's proposed Expansion Projects against those requested by the majority is likewise intended to further the fair and rational allocation of public funds, as is the lack of funding for Expansion Projects during a period of declining enrolment.

[6032] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing

measure and the valid government objective. I am satisfied there is a rational connection between the fair and rational allocation of public funds and a system that compares the CSF's needs to that of the majority. By weighing the CSF's needs against other needs for space across the province, the Province seeks to ensure that all districts are treated equitably and that funds are spent where they are most needed. I also see a rational connection between fairly and rationally expending public funds and deciding not to build any new spaces for students between 2005 and 2011. Given that the Province constructed tens of thousands of new spaces for students between the 1990s and 2005, it was rational to decide not to devote further public funds to that purpose when enrolment across the Province was declining.

[6033] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[6034] The extent to which the measure minimally impairs the plaintiffs' rights must be determined based on the specific infringing measure and engaged rights in the relevant community. In this case, the fact that the CSF's project requests were weighed against those of SD36-Surrey and SD75-Mission deprived rightsholders of new schools in Sechelt and Penticton in 2005. The Minister was dealing with limited public funds, and was allocating them between districts to achieve the public good of education. As I have noted, it is entitled to some deference in how it went about doing so. At that time, enrolment at École Élémentaire Entre-lacs was only about 80 students, and students had access to a homogeneous school. Enrolment at École Élémentaire du Pacifique was only about 90 or 95 students, and students had access to a homogeneous school on a heterogeneous campus. The Ministry paid those leases.

[6035] Given those circumstances and the deference owed to the government, at that time the comparison between the CSF's needs and that of the majority impaired the s. 23 rights of Penticton and Sechelt rightsholders as little as possible while still allocating limited public funds.

[6036] The lack of funding for Expansion Projects deprived rightsholders of new schools in several communities between 2005 and 2011. In my view, the decision not to fund any Expansion Projects for the CSF in that period, to the detriment of the position of rightsholders in British Columbia, was not minimally impairing of rightsholders' rights.

[6037] The Ministry essentially implemented a blanket prohibition of Expansion Projects in that period. It did not devote any funds to remedying the CSF's position or need for Expansion Projects in that period. In those circumstances, it is entitled to less deference. I acknowledge that the Ministry allowed the CSF to expand its programmes by entering into new leases. However, in my view, the Ministry could have achieved its goal of fairly and rationally allocating public funds while still funding CSF Expansion Projects in some limited way. The Minister was not carefully weighing which capital projects ought to go forward and which should not. It simply decided not to fund any Expansion Projects, at the expense of its constitutional obligations. Here, the Province fails the s. 1 justification test at the minimal impairment stage.

[6038] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[6039] Here, I find that the salutary effects of weighing the CSF's proposed projects against those of the majority include that the Ministry is able to ensure equitable treatment between school districts. It is also able to provide space for the greatest number of students possible in light of available district and Ministry funding. During the Expansion Project freeze between 2005 and 2011 the salutary effects are

primarily cost savings-- the savings the Ministry was able to generate by not funding the CSF's project requests.

[6040] The salutary effects also include those across the system. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF has received more capital funding *per capita* than about 95% of districts.

[6041] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the building condition of the CSF's schools is better than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[6042] The deleterious effects concern the lower enrolment and inferior educational experience afforded to the minority in those communities where the CSF was hurt by a lack of funding and by the comparison between the majority and the minority. In those communities, the deleterious effects also include that students are educated in facilities that are inferior to majority schools: Students often endure long

transportation times, which are compounded by the school's amenities, and not counterbalanced by the Francophone experience and other aspects of the global educational experience.

[6043] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world.

[6044] However, weighing those effects together, I find that the deleterious effects outweigh the salutary effects. The cost savings to the Ministry of remedying the situation do not justify the deleterious effects on the global educational experience for rightsholders. While the system as a whole has resulted in generally fair outcomes for the CSF, that does not outweigh the low cost of remedying the situation and the poor global educational experience afforded to some rightsholders' children across the Province. I therefore conclude that the Province has failed to show proportionate effects associated with its capital funding system for Expansion Projects.

D. Remedy

[6045] The plaintiffs argue that in crafting a remedy, the Court should consider that the Enrolment Driver has failed to do several things: (1) provide minority school facilities required for the CSF to offer homogeneous minority instruction, (2) ensure local equivalence of school facilities and (3) ensure minority language school facilities do not discourage enrolment at CSF schools. Thus, the plaintiffs ask the Court to both make specific funding orders for all communities where the plaintiffs seek to acquire a new school facility, order the specific relief requested regarding the

creation of a capital funding trust, and order the relief sought regarding the Province's capital funding system. The plaintiffs also ask the Court to retain jurisdiction to supervise the implementation of the specific relief ordered.

[6046] I find that the Province has breached s. 23 by implementing a system where the CSF's proposed projects are compared to those of majority boards that have access to greater Local and Restricted Capital Reserves to contribute to capital projects. I also conclude that the Ministry failed to prioritize Expansion Projects during a period when the CSF was growing its programmes, to the detriment of the educational experience of British Columbia's rightsholders in a number of communities.

[6047] I address my approach to remedies in Chapter X, Remedies. Consistent with the approach I outline there, for each community where a rights breach is not justified, I declare what rightsholders are entitled to.

[6048] As in *Mahe*, I am not satisfied it is appropriate to strike down the Province's capital funding system with respect to Expansion Projects. Doing so would create a legislative vacuum that would harm the CSF's interests. Moreover, once the CSF has reached a point of proportional equivalence with the majority, the Capital Funding System is likely to respond to the CSF's needs. However, some remedy is necessary to ensure the Ministry does not continue to prioritize the needs of majority school districts, or fail to prioritize the CSF's expansion needs.

[6049] The plaintiffs urge me to impose a trust remedy to allow the CSF to meet its capital funding needs. As I explain in Chapter X, Remedies, I do not see that as an appropriate remedy because it would infringe the Province's jurisdiction to manage and oversee the capital funding system.

[6050] As I see it, a remedy that would have the same effect as a trust remedy is to order the Province to establish a Capital Envelope for the CSF to respond to the rights breaches identified in this claim. That order would require the Province to address the deficiencies without circumventing the legitimate administrative

requirements of the Ministry's capital funding system. It will also ensure that the CSF's needs are considered separate and apart from the needs of the majority. I discuss this remedy in detail in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF.

[6051] In addition, I will simply declare that the policy unjustifiably infringes s. 23 of the *Charter*. I declare:

- a) The Ministry's policies of not funding Expansion Projects and evaluating the CSF's requests for capital projects against those of Majority School Boards with greater capital resources than the CSF unjustifiably infringes s. 23 of the *Charter*.

[6052] The plaintiffs also seek *Charter* damages with respect to "the failure to include the constitutional obligation to provide French-language education and educational facilities where the numbers warrant as a driver in the Province's capital plan". Here, *Charter* damages are not required to compensate, deter or vindicate rights because the Province will be required to establish a Capital Envelope to respond to the CSF's needs.

E. Summary

[6053] I find that the Ministry failed to address the CSF's expansion needs in a period when it was experiencing significant growth and expanding minority language education into new areas of the Province. This resulted from the lack of funds devoted to Expansion Projects between 2005 and 2011, as well as the fact that the CSF's Expansion Projects were evaluated against projects proposed by majority boards with greater access to Local and Restricted Capital Reserves. Those breaches are not justified pursuant to s. 1 of the *Charter*. As a remedy, the Province will be required to establish a new rolling Capital Envelope to respond to the CSF's capital needs, as I discuss in Chapter XLII, Lack of Funds and a Capital Envelope for the CSF.

XXXVII. BUILDING CONDITION PROJECTS AND THE BUILDING CONDITION DRIVER

[6054] I introduce the concept of Building Condition Projects in Chapter III, Introduction to the Capital Planning Process. Building Conditions Projects are those designed to address deficiencies in building condition as they reach the end of their economic lives. These projects are usually major renovations or full replacements of aging facilities. The Ministry evaluates the requests for Building Condition Projects based on the condition of the building relative to others as measured by FCI score.

[6055] The plaintiffs submit that the Building Condition Driver does not address the CSF's need for equivalent school facilities. Their primary argument is that the FCI metric does not assess building functionality and therefore does not ensure the CSF operates equivalent school facilities. Additionally, the plaintiffs argue that because the Province ranks the CSF's proposed Building Condition Projects against majority Building Condition Projects province-wide, the system does not respect the local focus of the s. 23 analysis. Finally, they argue that the CSF has been disproportionately impacted by a decision to fund Expansion Projects as a higher priority than Building Condition Projects.

[6056] As with the plaintiffs' argument concerning Expansion Projects and the Enrolment Driver, I believe that the success of the plaintiffs' arguments depends on establishing that rightsholders are not receiving what they are entitled to because of the operation of the Building Condition Driver. The plaintiffs raise an adverse effects discrimination claim: that a neutral system disadvantages the linguistic minority. Thus, they must prove the adverse effect in addition to a theoretical disadvantage. So long as the Province has created a system that ensures that rightsholders are receiving what they are entitled to and does not interfere with the CSF's exercise of its right to management and control, the system is a valid one.

[6057] For that reason, when analyzing the plaintiffs' claim concerning the Building Condition Driver, I rely on my conclusions concerning the alleged breach of s. 23 and the findings that I made in the section on "Causation, Responsibility and

Findings Relevant to the Systemic Claims” in each chapter concerning a community where the CSF owns a facility that it claims is or was substandard: Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)); Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)); Chapter XXVI, École Victor-Brodeur (Victoria); Chapter XXVII, École L'Anse-au-Sable (Kelowna); Chapter XXVIII, École Élémentaire Océane (Nanaimo); Chapter XXIX, École Élémentaire La Vérendrye (Chilliwack); Chapter XXX, École Élémentaire Deux-Rives (Mission); and Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam).

[6058] Relying on those findings, I address the plaintiffs’ three arguments: that it is disadvantaged by the use of FCI scores, ranking at the provincial level and deprioritization of Building Condition Projects.

A. FCI Scores and Substantive Equivalence

[6059] The plaintiffs argue that the Province’s method for deciding what Building Condition Projects it will fund does not address the need for the CSF to have facilities that offer a substantively equivalent global educational experience to what is offered at majority schools where the numbers so warrant. They urge the importance of building functionality to the s. 23 analysis.

[6060] The defendants disagree, taking the position that the FCI score adds rationality to the Building Condition Driver, and is correlated with measures important to educational outcomes.

[6061] I begin by discussing the history of the Building Condition Driver, the elements of the FCI metric and the FCI scores of the schools in the claim. Then, I turn to some of the problems with the FCI metric before addressing the parties’ arguments.

1. Facility Audits and the FCI Score

[6062] Prior to FCI scores, the Ministry evaluated building condition using a system of facility condition audits. Both systems assess buildings from a property-management perspective, based on a building's remaining economic life.

[6063] Mr. Miller recalled that, before 1993, the Ministry did not have a way of objectively measuring the relative condition of buildings. Instead, school boards invited Ministry staff to tour their buildings, which did not allow a meaningful assessment and comparison of the condition of buildings across the province. The process became highly politicized; school boards lobbied for Building Condition Projects.

[6064] In 1992 or 1993, the Ministry engaged UBC to assist it to find a better method of evaluating the relative condition of school buildings that would bring greater rationality to the process. This resulted in a two-stage facility audit system. First, school district staff performed their own audit of the building. The buildings in the worst condition based on district evaluation then proceeded to a more detailed second-level audit performed by an independent consultant. Typically, an architect would attend the school and score the condition of the building based on the remaining life in its various systems and subsystems. A lower score suggested less life was left in the building, and a higher score that more life was left in the building.

[6065] According to Mr. Miller, the Ministry relied on the facility audits to sequentially prioritize requests for Building Condition Projects for the purposes of its Consolidated Capital Plan.

[6066] In 2005, Mr. Miller recounted, the Ministry began working toward enhancing the facility audit process. In 2008, the Ministry engaged a company called VFA to assess the facility condition of schools on the Ministry's behalf.

[6067] Mr. Miller and Mr. Frith explained how the VFA assessments work. VFA sends a team of its staff into schools to evaluate the condition of their subsystems: roofing systems, the exterior envelope, interior finishes, boiler systems, heating

systems, the HVAC system and the mechanical system. Each subsystem is broken down into various components. VFA assesses the life cycle of the component pieces, and estimates their remaining life.

[6068] The Court was provided with the score sheet that VFA engineers use when evaluating a school. The score sheet shows that engineers examine the building's substructure, shell, interiors and services like plumbing and HVAC. They also examine equipment and furnishings, and building site work like parking lots and landscaping. Many of the factors they assess are of a structural, engineering nature, like wall foundations, roof finishes, vent piping and ground erosion control measures. At the same time, many factors have a cosmetic or functional aspect, like interior and exterior windows, interior wall finishes, sinks and drinking fountains and landscaping planters.

[6069] By way of their assessments, Mr. Miller explained, VFA is able to provide the Ministry with an idea of how much money is required to address deficiencies in a building. That number is expressed as a ratio of the value of the deficiencies against the replacement value of the building. The ratio results in a number known as the Facility Condition Index, or FCI. As the FCI approaches 1, the building is reaching the end of its economic life. As it approaches zero, the building is fairly new.

[6070] Over three years, ending in 2012, VFA assessed the condition of nearly every school in the Province, including schools leased to the CSF and some school board offices. The Ministry now maintains a database with the FCI score of every school and administrative facility in British Columbia. In addition to the FCI score, the Ministry tracks every school name, facility type, whether it was operating at the time the information was collected, the building's replacement value and the cost required to remedy the deficiencies.

[6071] Mr. Miller conceded the Ministry does not perform any quality control of the VFA assessments. However, he stressed that VFA is a well-respected firm with an accredited methodology. Mr. Frith's evidence is that VFA is wholly independent from

government and does not perform any remediation work, so it has no interest in the outcome of its assessments.

[6072] Mr. Palmer testified that the Ministry relies on FCI scores to determine what Building Condition Projects it will fund. The Ministry begins by assigning requested Building Condition Projects a threshold ranking of low, medium or high. Where a building has an FCI score of greater than 0.6 (meaning 60% of the school's economic life has been depleted), the project is considered to be a high priority. Facilities with an FCI score between 0.4 and 0.6 (where between 40% and 60% of the school's economic life has been depleted) are treated as a "medium" priority, and facilities with an FCI below 0.4 (meaning 40% or less of the building's economic life has been depleted) are treated as a low priority. As with the threshold priority rankings for Expansion Projects, if a project has a medium or low threshold ranking, the Ministry is unlikely to consider it further.

2. Measures Not Captured by the FCI Score

[6073] There is no doubt that the FCI metric is designed to assess buildings from an engineering-based or property management perspective. This was explained by several Ministry officials as well as experts for both the plaintiffs and the defendants, Dr. Roberts and Dr. Earthman.

[6074] Dr. Roberts, whom I introduced in the Chapter XVI, Introduction to Part 3, Community Claims, testified about FCI scores on behalf of the plaintiffs. Dr. Roberts explained that while building condition has an impact on student educational outcomes, the most important building condition factors are functional ones: pedagogical functionality, programmatic suitability, cosmetic appropriateness and factors related to participant wellness. He took issue with the use of FCI score as a means for determining if school facilities would have an impact on educational outcomes. While he acknowledged it to be a common instrument for measuring building condition, he stressed that it was developed to manage capital planning and maintenance budgets. Since the measure has an engineering and property

management focus, he concluded that FCI score bears no systematic relation to teaching and learning outcomes.

[6075] Dr. Roberts took the position that many of the components the FCI metric evaluates have no reliable connection to teaching and learning. Dr. Roberts also observed that some factors relevant to educational outcomes (amount of light or temperature in classrooms) are not captured by the FCI, which examines buildings from an engineering standpoint (do the windowpanes leak; what is the life-expectancy of the school's heat source?). As a result, in his view, FCI scores are largely irrelevant to understanding the educational mission of schools, and school renewal based on the FCI metric is unlikely to systematically improve educational outcomes.

[6076] Dr. Earthman, whom I also introduced in Chapter XVI, Introduction to Part 3, the Community Claims, testified about FCI scores on behalf of the defendants. While he was under cross-examination, Dr. Earthman agreed with Dr. Roberts's conclusion that engineering-based measures, like the FCI, tend to measure many building features with no identified relationship to student learning. He stated that he is of the view that engineering-based instruments are not useful resources for assessing the relationship between school facilities and student outcomes.

[6077] Mr. Frith maintains the Ministry's database of FCI scores. He testified that the FCI assessment involves "[n]o functional assessment whatsoever". Mr. Frith also confirmed that VFA does not evaluate a building's "appearance".

[6078] Mr. Miller likewise acknowledged that an FCI score does not directly take into account whether a space functions for educational purposes. He therefore noted that the Ministry's process for evaluating requests for Building Condition Projects does not take into account factors related to building functionality, such as the size of a gymnasium, library or classrooms, or the presence or absence of amenities like a music room. Additionally, FCI scores do not take into account whether a building meets the Ministry's Area Standards. The Ministry views capital

expenditures to bring buildings up to current standards as being a medium or low priority.

[6079] In his discovery evidence, Mr. Miller conceded that it would be desirable to consider building functionality, but he did not think it was critical. He maintained that the Ministry expects there is a correlation between a building that is in good condition from a property-management perspective and a functional building.

[6080] Mr. Miller's evidence was that in the 1990s, the Ministry considered adding a functional assessment to its capital planning system. He also recalled that the Ministry and VFA discussed the idea of extending their model to include a building functionality assessment. The Ministry did not pursue those ideas.

[6081] Mr. Miller also recalled that SD39-Vancouver and VFA worked together to develop criteria and a tool for assessing building functionality that they used in connection with SD39-Vancouver's seismic programme. The Ministry was not involved in that work, but Mr. Miller expressed some interest in incorporating the tool into its processes if it proved successful. The Ministry has not followed up with SD39-Vancouver in that respect.

[6082] Mr. Palmer testified that many districts complain to the Ministry that their buildings are not functional. However, he suggested it would be difficult for the Province to prioritize building functionality above the types of projects necessary when a building is at the end of its economic life. He also thought the Ministry would find it challenging to evaluate building functionality objectively.

[6083] Mr. Palmer's evidence is that once a Building Condition Project is underway, building functionality becomes relevant insofar as the Province attempts to build a school that will be highly functional.

3. Application of the FCI Metric to the CSF

[6084] The Ministry evaluates the CSF's request for Building Condition Projects in the same manner as it does those from other school boards: based on the buildings'

FCI scores. The CSF was not involved in the steering committee that led to the Ministry's decision to use of the FCI metric.

[6085] The evidence reveals that none of the schools in the Community Claims have an FCI score of above 0.6. Those closest to the threshold are École Élémentaire Anne-Hébert (Vancouver (East)) with an FCI score of 0.56, École Élémentaire La Vérendrye (Chilliwack) with a score of 0.58, École Élémentaire Rose-des-Vents with a score of 0.59 and the leased facility housing École Élémentaire des Navigateurs (Kilgour Elementary, Richmond), with an FCI of 0.59. Thus, the Ministry would not consider any of the schools in the claim to be a high priority for a Building Condition Project.

[6086] In October 2014, Mr. Allison sent Mr. Cavelti a Positioning Letter and took issue with the Ministry's use of FCI scores to determine whether the CSF's schools were in need of replacement or renovation. He stated the CSF's position that FCI scores are an incomplete reflection of the CSF's functional building needs. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the CSF brought its concerns to the Ministry's attention.

4. Discussion

[6087] The plaintiffs raise issue with the Ministry's reliance on FCI scores when deciding which Building Condition Projects it will support, arguing the metric is not suited to determining whether the CSF is operating in substantively equivalent facilities. The plaintiffs take the position that FCI is "completely inadequate for determining, and rectifying, the lack of equivalence" of minority schools, and for "determining whether the functionality, appearance, and accessibility of [CSF] school facilities have a negative effect on enrolment."

[6088] In the plaintiffs' submission, by choosing to prioritize buildings based on replacement value, the Province decided not to consider the impact school facilities have on the quality of education the CSF offers its students. They suggest the

Province took that position without regard for the fact that CSF schools might be less functional, and not equivalent, to majority schools.

[6089] The plaintiffs suggest that because FCI does not assess a building functionality, the Ministry's system will never recognize the factors important to student learning and to reasonable parents, like undersize classrooms, a lack of natural light, challenging acoustics or an undersized, or lack of, gymnasium. They also note that VFA does not consider a building's appearance, even though that might make a school more attractive to parents and influence educational outcomes.

[6090] In the plaintiffs' submission, because none of the schools at issue in this claim have an FCI score above 0.6, it is unlikely that any of the projects in this claim will be funded by the Ministry as Building Condition Projects. They take the position that many of those schools do not offer an equivalent global educational experience when they ought to. Thus, they say that the operation of the Building Condition Driver prevents the CSF from occupying equivalent school facilities.

[6091] The defendants' view is that FCI is an objective, empirical measure of building condition that was put in place to remedy a lack of rationality in the funding system as it existed previously. They suggest that FCI is a useful tool because it promotes the public value in keeping buildings in use over the course of their lifetime rather than replacing or disposing of them.

[6092] The defendants also suggest that while the FCI metric focuses on the remaining life in a building, some of the subsystems it considers relate to building functionality. They give the examples of the FCI tool's evaluation of interior finishes, heat generation systems, cooling systems, other HVAC systems and playing fields, which are not totally unrelated to the factors that might be important to a reasonable, well-informed rightsholder parent.

[6093] It appears to me that since about 1993, the Ministry has been focused on ensuring the fair and rational allocation of capital funds targeted to Building Condition Projects. Given a history of capital projects proceeding because of

qualitative observations and lobbying efforts, the Ministry began using facility condition audits followed by FCI scores to ensure fairness between school districts. The move toward an objective measure in 1993 is a benefit to the CSF. Given that the CSF is a provincial school board and represents the linguistic minority, it is very unlikely it would have achieved the same lobbying support as majority boards.

[6094] The Ministry's Building Condition Driver has worked for the CSF and generated replacements in the past. This occurred for École Victor-Brodeur, but pursuant to the former, less detailed Facility Audit Process. Additionally, in about 2004 and earlier, whenever the CSF acquired a new school, the Ministry funded renovations to bring a building up to health and safety standards.

[6095] Since about 2005 or 2006, the FCI score has been the primary driver the Province uses when deciding whether to approve a requested Building Condition Project. Schools with an FCI score higher than 0.6 are treated as high priority projects, and the worst of them are funded when capital funds are targeted to Building Condition Projects.

[6096] The evidence establishes that the FCI measure does not directly take into account whether a building is functional for educational purposes. Thus, it does not consider all the factors that a reasonable rightsholder parent would take into account when making enrolment decisions for their children. However, while many of the factors assessed in the FCI score relate to the structure and engineering of a building, some factors also have cosmetic or functional aspects, which are correlated to matters that would be of concern to a reasonable rightsholder parent. Although the experts suggested there was no systematic relationship between FCI scores and educational outcomes, they did not go so far as to say that none of the factors measures in the FCI assessment are related to educational outcomes.

[6097] I am of the view that the FCI metric provides a wholly objective picture of the remaining economic life of the school based on the lifecycle of its component pieces. It provides the Ministry and school districts with a portrait of the cost of remedying all the deficiencies in a building, expressed as a ratio of the value of the deficiencies

against the replacement value of the building. It considers whether a building continues to function as a building: whether it continues to have a functioning roof, walls, structure, plumbing, electricity and other elements necessary for buildings to be safely occupied by children.

[6098] Thus, while the FCI score does not take into account a building's functionality as a school and whether buildings are equivalent to one another, it evaluates something even more basic and essential to providing education: the building's functionality as a building. If a building does not function as a building, then the question of whether it functions well as a school is of secondary and lesser importance. If the building intended to house students does not meet the most basic standards of a building, it is incapable of providing a venue for education at all, let alone a setting for a high-standard global educational experience.

[6099] Given that none of the CSF's schools have an FCI score above 0.6, the Building Condition Projects in the CSF's claim are unlikely to be considered for Provincial funding devoted only to Building Condition Projects in the immediate future. Moreover, given that the FCI score does not take into account building functionality, where CSF schools have undersized gymnasiums or classrooms that are too small to be functional due to the fact that they are older schools built under predecessors to the current Area Standards, the Ministry's Building Condition Driver will not respond to those needs.

[6100] In my view, the evidence shows that in recent years, the Ministry's Building Condition Driver has not responded to the CSF's requests for Building Condition Projects to improve building functionality. For example, it has not responded to the CSF's requests for Building Condition Projects to improve the functionality of École L'Anse-au-Sable by replacing it as a K-12 school and adding permanent secondary facilities. It has not responded to the CSF's requests for improved facilities at École Élémentaire Océane in Nanaimo. However, I conclude that the facilities in those communities meet the appropriate standard; the minority is receiving what they are entitled to in light of their numbers.

[6101] In Chilliwack, the very low number of children is receiving more than what they are entitled to: a homogeneous school. However, there are problems with the facility. The Building Condition Driver does not take into account that École Élémentaire La Vérendrye uses an adjacent, leased community hall as a gymnasium. École Élémentaire La Vérendrye has an FCI of 0.58. Thus, the Ministry will consider it to be a high-priority capital project very soon. Then, depending on its condition relative to other facilities in the province and the availability of capital funding for Building Condition Projects, it will eventually become eligible for a Building Condition Project and be renovated or replaced in a manner that will bring it up to current, functional standards.

[6102] Similarly, the system has not responded to the CSF's request for a Building Condition Project at École Élémentaire Deux-Rives to build a larger, more functional gymnasium. The Building Condition Driver will not do so because it is based on FCI score rather than functionality. With respect to École Élémentaire Deux-Rives, I assume without deciding that the size of the gymnasium breaches s. 23.

[6103] Overall, I find that there is some evidence to suggest that the Building Condition Driver will not fix all the functional problems with the CSF's facilities, just as it will not assist in Mission or Chilliwack. Further, it would not lead the Ministry to add space for secondary programming in Nanaimo or Kelowna. Of course, at this point, rightsholders in those communities (except possibly Mission) are receiving what they are entitled to given their numbers. The operation of the Building Condition Driver has yet to cause a breach of s. 23.

[6104] I also note that this is not to say that those problems will never be remedied by the capital funding system. For one, an FCI score is not static. As buildings age, their FCI scores tend to worsen. While the CSF's schools currently do not have an FCI score higher than 0.6, with time they will. At that point, they will be considered by the Ministry, ranked against other projects, and eventually be renovated or replaced. When those buildings are replaced, they will be built to a current, highly functional standard.

[6105] The evidence also provides examples of the Ministry's other Capital Drivers responding to the CSF's building condition needs. For example, the Ministry's Expansion Project driver responded to the CSF's need for a new school to replace École Élémentaire Rose-des-Vents in 2011. Once a site and school are acquired on the west side of Vancouver, it will fix some of the functional limitations at École Élémentaire Rose-des-Vents.

[6106] Similarly, the Ministry's seismic programme driver responded to the CSF's request for a replacement project for École des Pionniers. Although the Ministry did not fund Building Condition Projects between 2005 and 2011, when École des Pionniers was considered for a seismic replacement, Ministry staff advocated with Treasury Board for a full-scale replacement project because the school was nearing the end of its economic life.

[6107] Overall, I find that although the CSF tends to be receiving what rightsholders are entitled to in the areas where it pleads a lack of building functionality, there is some evidence to suggest that the Building Condition Driver will not respond to situations where buildings do not meet the standard of local majority schools. While that has yet to engender any breaches of s. 23, I can see how the system could potentially interfere with rightsholders' needs in a given community.

B. Provincial Project Ranking

[6108] The plaintiffs' second complaint is that the Province's system for ranking Building Condition Projects is inconsistent with s. 23 because it compares the CSF's proposed projects to all other projects in the Province, rather than local comparator schools.

[6109] As occurs with the Enrolment Driver and the Space Rank score, the Ministry sequentially prioritizes all high-priority Building Condition Projects against one another based on the FCI score (or, before that, the facility audit score).

[6110] While enrolment does not play a role in ranking Building Condition Projects, the Ministry will look at enrolment to ensure that a Building Condition Project is truly

required. Thus, for the highest-ranked projects, Ministry staff also calculate the Space Rank Score to ensure enrolment could not be accommodated in another way.

[6111] The Ministry typically recommends funding the projects that are in the worst condition in the Province based on the projects' FCI score. If Treasury Board provides the Ministry with a Capital Envelope for Building Condition Projects, the highest-ranked projects are usually those that are funded.

[6112] The plaintiffs argue that system contravenes the *Charter* because it is based on a province-wide assessment rather than a local comparison. They point to *Association des Parents- SCC*, where the Court held that s. 23 guarantees substantive equivalence between minority and majority schools based on an assessment of the educational experience at the local level. The plaintiffs urge that the defendants' system of province-wide ranking runs contrary to the Court's statement that "... it is necessary to think locally, as the linguistic and cultural benefits of minority language education accrue to the local community", and that comparing minority facilities to facilities outside the area would not realistically capture the choices available to parents (at paras. 36-37).

[6113] The plaintiffs argue that the Province's assessment of the condition of the CSF's school facilities breaches s. 23 because it does not take into account the need for the CSF to offer an education that is substantively equivalent to that offered in competing local majority schools. In particular, they note that the system has no way of evaluating how CSF schools compare to majority schools in the same area. Rather, the minority's projects are only built if they are among the worst schools in the Province in a given Capital Planning Cycle. Thus, the plaintiffs say, the CSF's school facilities are assessed based on the wrong comparator group.

[6114] In my opinion, the Province is entitled to create a capital funding system that compares the CSF's needs at the provincial level so long as it does not result in a lack of equivalence at the local level. The Province must think provincially about what the relative needs are for all districts across the Province. It is entirely possible that when comparisons are made at a provincial level, projects may be funded in a

way that local equality is enhanced. Indeed, the Ministry's decision to fund the École Victor-Brodeur Replacement Project based on the CSF's relative need compared to all other districts improved École Victor-Brodeur's position relative to local comparator schools.

[6115] The plaintiffs' claim is one of effects-based discrimination. It must show that the Ministry's neutral policy of provincial-level ranking has the effect of denying the CSF local equivalence.

[6116] As I explain above, the plaintiffs have not wholly persuaded me that the provincial-level ranking has yet resulted in the CSF operating substandard facilities at the local level. However, I can see the potential for the provincial-level ranking to fail to remedy substandard facilities.

C. Prioritization of the Building Condition Driver

[6117] The plaintiffs' final argument in connection with Building Condition Projects is that the CSF is disadvantaged by the defendants' failure to prioritize those projects since at least 2005.

[6118] Mr. Miller's evidence on discovery was that because the Ministry and school districts have a legal obligation to provide a space for every student, government typically views Building Condition Projects as a lower priority than Expansion Projects. Mr. Miller confirmed in his discovery evidence in the fall of 2012 that the Ministry did not anticipate approving any Building Condition Projects for some time.

[6119] Additionally, the evidence is clear that, like Expansion Projects, the Province has not funded Building Condition Projects since about 2005. The Ministry did not begin announcing Building Condition Projects in 2011 as it did with Expansion Projects. Mr. Palmer confirmed that the Province has not funded any school replacement projects (outside self-insurance claims, health and safety issues and the seismic programme) for many years. As a result, in his experience, most districts complain they have old buildings in need of replacement.

[6120] In the plaintiffs' submission, since the Province currently does not fund Building Condition Projects, regardless of how the Building Condition Driver operates, it will not respond to the CSF's need for equivalent facilities.

[6121] The defendants say that, to the extent the plaintiffs urge the construction of Building Condition Projects above Expansion Projects, it would result in disproportionate results, even among the CSF's proposed projects. They point to the absurdity of funding the construction of a new gymnasium at École Élémentaire Deux-Rives (Mission) before the construction of a new school to accommodate enrolment growth at École Élémentaire Rose-des-Vents (Vancouver (West)).

[6122] As I see it, the Ministry's capital funding system prioritizes capital projects to address health and safety first. Then, it prioritizes constructing buildings to house all students. Then it prioritizes ensuring that those buildings continue to function as buildings. If there were additional funds (which is unlikely to ever occur), then the Ministry would fund building functionality projects.

[6123] However, the issue the plaintiffs raise is not with the priorities that the Ministry has established. The CSF needs both Expansion and Building Condition Projects. If the Ministry prioritized Building Condition Projects above Expansion Projects, the CSF would complain that prioritization scheme would never respond to the CSF's requests for more student spaces. The plaintiffs actually seem to be concerned that the Ministry is not devoting sufficient funding to Building Condition Projects, regardless of whether they are prioritized before or after Expansion Projects.

[6124] However, in my view, the prioritization of Expansion Projects as compared to Building Condition Projects and the amount of funding devoted to each are secondary concerns. The real problem is the Ministry's thresholds and form of ranking for Building Condition Projects. Even if the Province devoted more funds to Building Condition Projects, or prioritized Building Condition Projects above Expansion Projects, the CSF's Building Condition Projects would not be funded because they do not meet the FCI threshold and will not rank highly against other

Building Condition Projects in the Province. Thus, I find that this argument is without merit.

D. Justification

[6125] I am prepared to accept that the Ministry's capital funding system regarding Building Condition Projects is not ideally suited to ensuring the CSF's schools offer a global educational experience equivalent to what is offered at local majority schools where the numbers so warrant. The particular measure is the provincial ranking based on FCI score. The remaining question is whether that measure is justified.

[6126] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". As I see it, the provincial ranking based on FCI score is likewise intended to further the fair and rational allocation of public funds.

[6127] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective. I am satisfied that there is a rational connection between the fair and rational allocation of public funds and a system ranks Building Condition Projects provincially based on FCI score. By allocating funds using that measure at a provincial level, the Ministry ensures objectivity (not lobbying) governs the approval process, and that funds are allocated to the schools in the province that where, based on the school's replacement value and the cost of repairs, a Building Condition Project is truly justified. It also leaves more room in Capital Envelopes to address Expansion and health and safety projects, while promoting the value of using buildings through their economic lives rather than disposing of them.

[6128] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[6129] The extent to which the measure minimally impairs the respondents' rights must be determined based on the specific infringing measure and engaged rights. As I see it, the Province has found ways of ensuring that the CSF's needs are minimally impaired. The Ministry provides the CSF with AFG funding annually, which it can use to improve building functionality as well as extend the economic life of its facilities. The Province has also found ways of responding to the CSF's needs in other ways. The Ministry advocated to Treasury Board for a full replacement of École des Pionniers as a seismic project, for example.

[6130] I also note that proposed projects designed to bring projects up to a more functional standard are not completely ignored. Buildings that lack functionality are also likely to be older and have poor FCI scores, and may very well be replaced. If a school only lacks functionality and is not at the end of its economic life, the Ministry considers them to have a medium or low threshold priority ranking, which makes them unlikely to receive Ministry support and funding. However, as those schools age, they will eventually become entitled to funding for a renovation or replacement.

[6131] The final stage considers the proportionality of the effects of the infringing measure. This goes beyond the purpose or objective of the measure, and examines its salutary and deleterious effects.

[6132] As I see it, the salutary effects of focusing on FCI score at the provincial level are strong. By using a provincial FCI ranking, the Ministry is able to prioritize Building Condition Projects that will ensure that buildings continue to function as buildings. The Ministry prioritizes the most basic needs of students-- the need for

space in which to learn-- rather than enhancements to adequate buildings that house students. What limited capital dollars are made available for Building Condition Projects are targeted to ensuring that buildings continue to stand and meet the basic minimum requirement for the buildings to operate. In light of that, there are insufficient dollars for the Ministry to additionally ensure that buildings are also highly functional and enhance educational outcomes.

[6133] The salutary effects are also reflected in what the CSF has been able to achieve in a system that does not fund projects designed only to address building functionality. How those results compare to what the majority achieved demonstrates the extent to which the Province is meeting its goal of fairly and rationally allocating public funds. I discuss what the system has yielded for the CSF in Chapter XII, Public Funds. As I see it, Capital Planning Cycle funding has appropriately favoured the CSF, providing it with more absolute capital funding than it provided to the average majority board, and far more *per capita* than the majority receives. Since 2001/02, the capital funding system has yielded for the CSF more than \$20,000 per student enrolled in 2014/15. That is nearly quadruple the \$4,649 per student that majority boards received. Even taking into account that a few majority school boards benefited from transferring schools to the CSF in that period, the CSF received more capital funding *per capita* than about 95% of districts.

[6134] With respect to the quality, quantity and value of the CSF's assets, I find that the system has yielded for the CSF a similar asset base to what the majority has, although it falls at the low end of the range. The CSF has a similar amount of space per student to what the majority has (18.29 square metres per student for the CSF; 20.19 square metres per student for majority school boards). Further, the replacement value of the CSF's assets, *per capita*, is below average (\$24,597 *per capita* for the CSF; \$37,656 *per capita* for the average majority board), but about 11 districts, most of them in the Lower Mainland and southern Vancouver Island, fare worse than the CSF. As I conclude in Chapter XIII, The Annual Facilities Grant, the CSF's schools are in better condition than average: the average CSF school has an FCI score of 0.29, while the average majority school has an FCI score of 0.38.

[6135] The deleterious effects, at the local level, concern the inferior global educational experience for students attending CSF schools for which it has requested Building Condition Projects. At École Élémentaire Deux-Rives (Mission), older students have a substandard physical education experience. The gymnasium tends to suffice for children in primary grades; it is particularly problematic for the admittedly small number of children enrolled in upper years, about Grades 4 through 8. Additionally, the educational experience for secondary students in Kelowna and for all students at École Élémentaire La Vérendrye (Chilliwack) is not ideal; however, given the small number of children in those communities and grade levels, rightsholders are receiving appropriate amenities. Moreover, the deleterious effects in these communities are temporary. As the CSF's schools age, they will become eligible for renovations and replacements that will improve both the schools' economic lives as well as their functionality.

[6136] The deleterious effects at the systemic level must take into account the assimilative impact of the breach, which I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia. I find that the force of assimilation is strong in British Columbia. The exponential growth of minority language education between about 2000 and 2015 has not had a significant impact on the assimilation rate. I agree with Dr. Castonguay's conclusion that given the strength of the assimilative pull in British Columbia, Francophone schools, might, at most, delay the inevitable assimilation that will occur as generations of native-born speakers set up their independent home lives and join the working world. The issues are not severe because rightsholders have owned, homogeneous schools in those communities.

[6137] Weighing those effects together, I find that the salutary effects outweigh the deleterious effects. While the Ministry has chosen a system that prioritizes buildings continuing to stand and meet the minimum standards of a functional building before educational functionality, that decision allows the Ministry to address the most pressing building condition needs in the Province. The relative impact on rightsholders-- buildings that provide basic space that is possibly not entirely ideal at

a functional level-- is worth the cost of ensuring that students everywhere have basic, acceptable space in which to learn. I therefore conclude that the deleterious and salutary effects are balanced, and the breach passes the proportionality test.

E. Remedy

[6138] If I had found that there was an unjustified breach of s. 23, then the analysis would have shifted to the appropriate remedy. I address the framework for crafting remedies in Chapter X, Remedies. Because I have done so, I do not find it necessary to craft a remedy.

F. Summary

[6139] The Province's system for prioritizing Building Condition Projects is not ideally suited to remedying situations where the CSF's facilities offer a substandard global educational experience as compared to local majority school facilities. The system prioritizes buildings province-wide based on FCI score. The FCI metric does not address building functionality *per se*, although I accept there will be a correlation between buildings that are at the end of their economic lives and those that lack functionality. Moreover, the provincial ranking of school building projects is not ideally suited to determining if CSF schools meet a local standard.

[6140] However, in my view, any breach of s. 23 is justified. The Ministry provides the CSF and all districts with an annual allocation that can be used to improve building functionality and extend their economic lives. Moreover, by prioritizing buildings based on FCI score, the Province ensures something more basic and important than educational functionality and equivalence: that all learners in the province have space to learn in buildings that meet the minimum requirements for buildings to operate. Thus, in my view, the limit is one that is reasonably justified in a free and democratic society.

XXXVIII. SITE AND SCHOOL ACQUISITION PROJECTS

[6141] Except in rare instances, the CSF has not pursued true Expansion and Building Condition Projects. Because the CSF is a new school board, it has been

acquiring an asset base for the first time. For that reason, an essential aspect of the CSF's capital programme is the acquisition of sites-- often the acquisition of a surplus school from a majority school board ("School Acquisition Project").

[6142] For most school boards, Site Acquisition Projects are linked to Expansion Projects. They generally proceed in two stages. First, the district acquires a site. Then, following a second capital project request, the school district builds a school on that site. The same applies when the CSF acquires a majority board school: First, the CSF acquires a majority school. Then, if the CSF wants to rebuild or renovate the school, it is expected to request a separate Facility Condition or Expansion Project, which is evaluated against project requests by other districts across the Province. The Province must approve funding at both stages.

[6143] The plaintiffs challenge the Ministry's historic decision to provide the CSF with an asset base by way of School Acquisition Projects. They also raise issue with both stages of this system, arguing they do not respond to the CSF's unique needs.

[6144] I begin with an explanation of how Site Acquisition Projects proceed for all districts. Then I turn to School Acquisition Projects specifically, explaining the significance of those projects to the CSF. I then consider the CSF's argument that it is disadvantaged by the Ministry's historic decision to provide the CSF with an asset base by way of School Acquisition Projects, and their arguments concerning both stages of the two-step process for funding those projects.

A. Site Acquisition Projects

[6145] Mr. Miller gave evidence about how Site Acquisition Projects typically work. If a school district wants to construct a new school-- one type of Expansion Project-- then, as a pre-condition for approval, the school board must identify an appropriate site. If the school district does not already have a site, then the project begins with a Site Acquisition Project.

[6146] Site Acquisition Projects are rare. Due to their long history as land owners, most school boards have sites. Mr. Miller's evidence was that fewer than 5% to 10% of the Expansion Projects he was involved with included a Site Acquisition Project.

[6147] When an Expansion Project involves a Site Acquisition Project, the Ministry approves the project in two phases: the district requests the Site Acquisition Project first. Once it has been approved and is complete, it requests the Expansion Project on the site. According to Mr. Miller, this ensures that capital funds are not tied up pending the acquisition of a site. Sometimes many years pass before a school board is able to acquire an appropriate site, and several more years pass before the Ministry approves the design and construction of the school. On an exceptional basis, though, the Ministry may approve a Site Acquisition Project and an Expansion Project at the same time. Mr. Miller emphasized the Ministry only does so if there is tremendous need, and the Ministry is sure a site can be acquired relatively quickly.

[6148] The Ministry requires school boards to identify potential sites in their PIRs. Mr. Miller acknowledged this can be challenging for school boards. Districts cannot acquire sites until the Ministry approves the Site Acquisition Project. Due to the Ministry's three-year rolling Capital Envelopes, districts identify sites in their PIRs and receive project approvals three years before funds actually flow for the site acquisition. In that time, a site identified by a school board in its PIR may be sold to someone else. This can result in some lost opportunities. However, Mr. Miller also advised the Ministry is usually open to a school board acquiring a different site than the one in its feasibility work once the Ministry supports the project.

[6149] The evidence reveals this approach applies across the Province. The Court saw evidence of several SD36-Surrey Expansion Projects that proceeded in this manner. For example, an SD36-Surrey project for a South Newton West Area Elementary involved approval of a Site Acquisition Project in May 2003, for purchase in the 2005/06 budget year, followed by approval of the Expansion Project in 2005 for the 2007/08 budget year.

B. School Acquisition Projects

[6150] The plaintiffs' argument in connection with Site Acquisition Projects is manifest in its arguments concerning a particular form of Site Acquisition Project: the School Acquisition Project.

[6151] The plaintiffs take the position the Province has shown a strong preference for the CSF to acquire sites and former schools from majority school boards. The evidence reveals that the vast majority of the CSF's owned schools were acquired from majority boards. The plaintiffs do not seem to argue that this is inappropriate. Indeed, they state that "[s]urplus [majority board] properties should be used to support the [CSF]'s long-term capital planning". The issues they raise relate to the multi-stage process, and the lack of funding available to support them.

[6152] Like Site Acquisition Projects, School Acquisition Projects for the CSF are expected to proceed in more than one phase. First, the majority board must close a school and resolve to dispose of it to the CSF, and the Province must fund the transfer. Once the CSF acquires the asset, it is expected to request Facility Condition or Expansion Projects in a subsequent Capital Plan Submission. The Ministry weighs that project against the needs elsewhere in the Province.

[6153] The plaintiffs argue the CSF is disadvantaged by the Ministry's historic decision to build the CSF's asset base by way of School Acquisition Projects with compensation to majority school boards, as well as both phases of School Acquisition Projects.

[6154] The success of the plaintiffs' arguments depends on establishing that rightsholders are not receiving what they are entitled to because of the School Acquisition Project framework. The Province has the residual discretion in s. 93 of the *Constitution Act, 1867*, to establish a capital funding system that balances the unique blend of linguistic and educational dynamics in the province. So long as the system they create ensures rightsholders are receiving what they are entitled to and does not interfere with the CSF's management and control, the system is a valid

one. The plaintiffs raise an adverse effects discrimination claim: that a neutral system disadvantages the linguistic minority. Thus, they must prove that adverse effect-- a breach of s. 23-- in addition to a theoretical disadvantage.

[6155] For that reason, when analyzing the plaintiffs' claim concerning School Acquisition Projects, I rely on my conclusions concerning the alleged breaches of s. 23 and the findings that I made in the section on "Causation, Responsibility and Findings Relevant to the Systemic Claims" in each chapter concerning a community where the CSF has pursued School Acquisition Projects both successfully and unsuccessfully: Chapter XX, École Élémentaire du Pacifique (Sechelt); Chapter XXIII, École Élémentaire des Navigateurs (Richmond); Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)); Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)); Chapter XXVI, École Victor-Brodeur (Victoria); Chapter XXVII, École L'Anse-au-Sable (Kelowna); Chapter XXVIII, École Élémentaire Océane (Nanaimo); Chapter XXIX, École Élémentaire La Vérendrye (Chilliwack); Chapter XXX, École Élémentaire Deux-Rives (Mission); Chapter XXXI, Abbotsford French-Language Education; Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam).

[6156] I also take into account the evidence concerning the CSF's successful School Acquisition Projects in four other communities: SD36-Surrey, SD44-North Vancouver, SD71-Comox Valley, and SD72-Campbell River, which I summarize here.

1. SD61-Greater Victoria

[6157] In Surrey, the CSF operates École Gabrielle-Roy, an owned, homogeneous elementary/secondary school. I do not reach any conclusions about whether it offers a global educational experience equivalent to what is offered to the majority.

[6158] The CSF began requesting capital projects in Surrey in its earliest Capital Plan Submissions. A Site Acquisition and Expansion Project in Surrey was among

the CSF's highest-priority capital projects until June 1999, when it became the CSF's highest-priority project.

[6159] Mr. Stewart testified that the CSF initially leased space from SD36-Surrey at William F. Davidson Elementary. On October 31, 1999, that school and its contents were destroyed by fire. As a result of the fire, CSF students in Surrey were temporarily absorbed into several SD36-Surrey schools, as well as a church.

[6160] Mr. Stewart testified that Ministry staff "dropped everything" to help the CSF. Mr. Stewart advanced the CSF's claim through the Province's self-insurance programme. By early 2000, the Ministry funded a modular facility for the CSF on bare land pending the construction of a new CSF school. In the summer of 2000, SD36-Surrey transferred a 12-acre vacant site to the CSF; Dr. Ardanaz's evidence was that SD36-Surrey brought forward that site as one the CSF could acquire. Funding for the site transfer was intended to be based on the site's appraised value of \$3.967 million. Later documentation suggests that SD36-Surrey was actually compensated with \$4.21 million in the form of capital approvals. Because of that, no funds actually changed hands. The CSF received \$247,703 to plan the project.

[6161] The Ministry supported the construction of a 600-capacity K-12 school on that site, but applied the middle school standards, which allowed for a total space of 8.4 acres. Since the CSF acquired a much larger site, the CSF was expected to eventually subdivide and sell a portion of the site, with the proceeds flowing to the CSF's Restricted Capital Reserve for future capital projects. The CSF later asked to retain a further two acres to serve as secondary school playfields and to create better school bus access. Since approval had been conditional on subdivision, Ministry staff took the project back to Treasury Board, where Mr. Stewart explained the CSF's unique needs. In the end, the CSF was given the extra site allowance to recognize its unique situation.

[6162] Mr. Stewart's evidence, which was confirmed by Mr. Bonnefoy, was that the CSF did subdivide and sell a small portion of the site, as was required following the

second approval by Treasury Board. The CSF applied the proceeds to the acquisition of Weaver Elementary to serve as École Élémentaire du Bois-joli (Delta).

[6163] École Gabrielle-Roy was eventually constructed, and opened in 2002/03 with enrolment of 334 students.

[6164] Ms. Bédard, the current principal at École Élémentaire Océane, described École Gabrielle-Roy. An elementary/secondary school, École Gabrielle-Roy has separate wings for elementary students on the bottom floor, and secondary students on the top floor. There are two spaces for physical education: a full-sized gymnasium for secondary students and a multipurpose room for elementary students. The multipurpose room doubles as a stage for the gymnasium. The entire school can be accommodated in the gymnasium. Secondary students have access to specialty classrooms, including a music room, as well as a separate lounge and terrace. The school has considerable space for the community, including a large theatre, with a separate entrance to facilitate community access.

2. SD44-North Vancouver

[6165] In North Vancouver, the CSF operates École André-Piolat, an owned, homogeneous elementary/middle school. I do not reach any conclusions about whether it offers a global educational experience equivalent to what is offered to the majority.

[6166] Ms. Galibois-Barss, a long-time official with the FPFCB and the CSF, explained that the earliest Programme Cadre in North Vancouver began in the late 1970s. It moved to North Star Elementary in 1988, becoming a homogeneous Francophone elementary school. Eventually, the Programme Cadre in North Vancouver added a heterogeneous secondary programme at Carson Graham Secondary.

[6167] Ms. Galibois-Barss described North Star Elementary as a “terrible place”. While the site was beautiful, there were problems with the building’s HVAC system, water damage requiring roof repairs, concerns about asbestos, and a “gravel pit” for

a playfield. The Programme Cadre shared the facility with the local Maison de la francophonie, English and French playschools, a sports association, the local Scouts organization, and others.

[6168] The CSF began requesting projects in North Vancouver immediately after it was created. Beginning in 1997, the CSF planned to acquire North Star Elementary, then replace it with a new elementary/secondary school on the existing site. That project was a mid-level or unranked project through 1998.

[6169] In about 1998, when the project was the CSF's fourth-highest priority project, the Province funded the CSF's acquisition of the school. Mr. Miller explained that SD44-North Vancouver was compensated for the full appraised value of North Star Elementary because the school was entirely a local asset.

[6170] Beginning with its June 1999 Capital Plan Submission for 2000/01, the CSF requested a new elementary/secondary project at École André-Piolat as its third-highest ranked project (the "École André-Piolat Replacement Project"). As the CSF did not make any capital requests associated with the project after June 1999, it was likely approved in 2000 following that request. The project cost about \$8 to \$9 million. The federal government contributed an additional \$1.5 million to the project. Those funds were used to build an expanded gymnasium and multipurpose room, and to add space for childcare.

3. SD71-Comox Valley

[6171] In Comox, the CSF operates a newly-built, owned homogeneous elementary/secondary school, École Au-cœur-de-l'île. I do not reach any conclusions about whether it offers a global educational experience equivalent to what is offered to the majority.

[6172] When the CSF took jurisdiction in Comox, the CSF's students attended a heterogeneous Programme Cadre at Airport Elementary. Sometime later, the CSF programme moved to Robb Road Elementary, which was a better facility in a better

location that also included a French Immersion programme. Over the years, that programme grew crowded, too.

[6173] The CSF requested projects in the Comox area every year, beginning with its September 1998 Capital Plan Submission for 1999/00, when it asked to acquire an SD71-Comox Valley school (the “Comox Valley Acquisition Project”). The CSF requested some variation of an acquisition in Comox as a low priority or unranked project through its October 2003 Capital Plan Submission for 2004/05, when it was the CSF’s eighth-highest ranked project. In those early years, though, the CSF had been told that SD71-Comox Valley did not have any surplus sites available.

[6174] With its October 2004 Capital Plan Submission for 2005/06, though, the CSF made the Comox Valley Acquisition Project its second-highest priority. In accordance with the Capital Plan Instructions, the CSF asked for project funding to begin in the third year of the capital budget, 2007/08.

[6175] In April 2005, the Ministry announced that it would support \$2.5 million for the Comox Valley Acquisition Project in the third year of its budget, 2007/08. The approval was only for the first phase of the project: the site acquisition, not an expansion or facility condition aspect of the programme. The CSF would be expected to request that aspect of the project in a future Capital Plan Submission. The Ministry did not accelerate funding for the site acquisition because the CSF had not identified a site. (The Ministry did not require school boards to provide PIRs identifying sites until 2009/10.)

[6176] After the approval of the Comox Valley Acquisition Project, Mr. Bonnefoy met with SD71-Comox Valley staff, who seemed to understand and support the CSF’s need to find space. At that time, SD71-Comox Valley was reconfiguring its facilities by doing away with middle schools, which would likely lead to some school closures. The CSF was left to await a decision by SD71-Comox Valley following its school closure consultations.

[6177] In January 2007, Mr. Miller advised, the Ministry was managing its capital cash flow by accelerating and rescheduling capital projects. As a result, the Ministry accelerated funding for the second phase of the CSF's project in Comox. He wrote to Mr. Bonnefoy and allowed that the CSF could proceed with the planning and construction of a new school in March 2008.

[6178] However, progress with the site acquisition was slow, and had reached an impasse by January of 2007. Meanwhile, Robb Road Elementary had grown crowded, creating conflict between the majority and the minority programmes.

[6179] On January 30, 2007, Ms. Bourgeois, President of the CSF Board of Trustees, wrote to Minister Bond in connection with the Comox Valley Acquisition Project. She explained the problems that the CSF was having sharing spaces at Robb Road Elementary. She advised that SD71-Comox Valley would bring forward its district reconfiguration plan in April 2007. However, it had been made clear to the CSF that the reconfiguration plan would be developed to meet the needs of the majority, rather than Francophone students. Further, the plan would not allow the CSF a new school until 2008/09. She sought the Minister's assistance finding a solution to meet the needs of both the majority and the minority.

[6180] Mr. Miller explained that as a result of the letter, Deputy Minister Dosdall established a working group with senior staff from both districts and the Ministry to try to resolve the issues. Mr. Miller and Mr. Bonnefoy participated in the process.

[6181] Over the course of the working group's deliberations in 2007, SD71-Comox Valley informed the CSF and the Ministry of the 10 schools it was considering for closure. The CSF had the opportunity to express its views on which of those schools it preferred. Over the course of the negotiations, Mr. Bonnefoy attempted to persuade SD71-Comox Valley to close the school it was most interested in, Courtenay Middle.

[6182] Mr. Bonnefoy explained that Courtenay Middle was not made available to the CSF. Instead, SD71-Comox Valley identified Cape Lazo Middle for closure.

While the school was not in a perfect location for the CSF's entire student population, parents in the Comox area were "ecstatic" about the prospect of acquiring Cape Lazo Middle. The CSF was allowed to occupy Cape Lazo Middle as a temporary solution pending the closure given the space problems at Robb Road Elementary. At Mr. Bonnefoy's request, in February 2008 the Minister confirmed \$10 million support for the site acquisition: 25% for SD71-Comox Valley's Local Capital Reserve and 75% for its Restricted Capital Reserve.

[6183] Ultimately, the sale of Cape Lazo Middle to the CSF was blocked by public opposition. Comox citizens brought a petition for judicial review challenging SD71-Comox Valley's decisions concerning the elimination of middle schools, the closure of two schools, a decision to redraw catchment area boundaries, and the anticipated sale of Cape Lazo Middle to the CSF. The resulting decision, *Comox Valley Citizens v. School District No. 71 (Comox Valley)*, 2008 BCSC 1071, was decided by Mr. Justice Johnston on August 6, 2008. Johnson J. quashed the decision to close Cape Lazo Middle because of a denial of procedural fairness (at paras. 72-75).

[6184] According to Mr. Bonnefoy, the long delays with the Comox Valley Acquisition Project were causing disappointment and uncertainty for the CSF's community of parents and students in Comox. A group of parents told Mr. Bonnefoy they had learned another local school, Village Park Elementary, had been closed, and suggested parents were interested in acquiring it.

[6185] Mr. Bonnefoy advised that Village Park Elementary was an elementary school that lacked specialty classrooms to offer a secondary school enrichment programme. As a result, he thought it would likely need to be rebuilt. He also anticipated some issues related to an adjacent eco-sensitive area.

[6186] In Mr. Bonnefoy's view, Village Park Elementary was not an acceptable option for the CSF. Nevertheless, in October 2008, Mr. Bonnefoy wrote to Mr. Miller and told him about parent interest in Village Park Elementary. The Ministry was open to the idea.

[6187] Meanwhile, SD71-Comox Valley continued with its school reconfiguration plan. SD71-Comox Valley passed a new bylaw to close Cape Lazo Middle, and implemented its disposal process. Immediately thereafter, the SD71-Comox Valley Board of Trustees was almost entirely replaced following an election. The new board revisited the school closure process for Cape Lazo Middle.

[6188] The CSF wrote to the new SD71-Comox Valley school board and protested the decision. The CSF also sought an update on closed schools available for immediate acquisition if SD71-Comox Valley no longer considered Cape Lazo Middle to be surplus. The CSF received a response on January 30, 2009, that SD71-Comox Valley had not committed to disposing of Cape Lazo Middle. SD71-Comox Valley also provided a list of surplus properties, which included Village Park Elementary.

[6189] Mr. Bonnefoy explained that after years of negotiating with SD71-Comox Valley, the CSF believed it had reached another impasse. As a result, the CSF initiated the *Education Mediation Regulation* to attempt to find a mediated solution. SD71-Comox Valley asked to meet outside the formal mediation. Officials from both districts spoke by telephone, and tentatively agreed the CSF would acquire Village Park Elementary. Mr. Bonnefoy terminated the formal mediation process.

[6190] From there, things proceeded quickly. The CSF commissioned feasibility work for École Au- Coeur-de-L'Île at the former Village Park Elementary. Architects recommended a full replacement of the school as the least expensive option. The Ministry supported that plan. On April 1, 2009, the CSF and the Province signed a Project Agreement for the construction of a new 320-student nominal capacity elementary/secondary school, with a total project budget of about \$25 million.

[6191] The CSF constructed École Au- Coeur-de-L'Île on the Village Park Elementary site. Mr. Bonnefoy described the finished building as “magnificent”. It has separate wings for elementary and secondary students, with elementary students on the main floor and secondary instructional space on the second storey. Its gymnasium was described as “spectacular”, with glass windows to one side.

[6192] Mr. Miller advised that no federal funds were available for this project. However, Mr. Bonnefoy advised that École Au- Coeur-de-L'Île has a daycare facility that it was able to construct with the assistance of a grant for NLC space.

4. SD72-Campbell River

[6193] In Campbell River, the CSF operates École Élémentaire Mer et Montagne, a newly-built, homogeneous elementary/middle school. I do not reach any conclusions about whether it offers a global educational experience equivalent to what is offered to the majority.

[6194] The CSF's programmes in Campbell River were initially housed in heterogeneous leased space at a majority secondary school with a separate building for the CSF elementary programme. The CSF first requested a project for Campbell River in its June 1999 Capital Plan Submission for 2000/01, when it sought an unranked project to acquire a school in Campbell River (the "Campbell River Acquisition Project"). The CSF did not make requests in connection with Campbell River again until its September 2002 Capital Plan Submission for 2003/04, when it sought the Campbell River Acquisition Project as a medium-term, unranked project. It was consistently a lower-ranked project up to the CSF's October 2004 Capital Plan Submission for 2005/06, when it was the CSF's sixth-highest ranked project.

[6195] Shortly after the CSF submitted its October 2004 Capital Plan Submission for 2005/06, the CSF's Planning Officer suggested to Mr. Bonnefoy that the Ministry would support projects for the CSF in both Comox and Campbell River if the CSF made the Campbell River Acquisition Project its third-highest priority. The CSF made that amendment.

[6196] In April 2005, the Ministry announced \$2.5 million in funding to support the Campbell River Acquisition Project. Funding would flow in the third year of the capital budget (2007/08). The Province did not fast-track funding because no site had been identified.

[6197] According to Mr. Bonnefoy, SD72-Campbell River identified at least three sites the CSF could acquire. The CSF chose the one it preferred, the former Rockland Elementary, a closed school located near a main artery which was ideal for the CSF's transportation needs. The CSF negotiated with the municipality to subdivide part of that site to use to create a new housing development.

[6198] Mr. Miller advised that by 2007, the Ministry was managing its capital budget by accelerating projects as economic stimulus. In January 2007, the Province approved the second phase of the School Acquisition Project, allowing any necessary renovations or replacements to proceed concurrently with the acquisition.

[6199] Mr. Bonnefoy explained that after the CSF prepared feasibility work, the Province supported a full replacement of Rockland Elementary. The CSF retained the old gymnasium because it was larger than what the CSF would have been allowed pursuant to the Area Standards.

[6200] According to Mr. Miller, the Province provided \$8.9 million in funding for the project. In February 2011, the Federal Government agreed to provide the CSF with an additional \$1.2 million, which the CSF used to construct a daycare.

[6201] Mr. Bonnefoy acknowledged that École Élémentaire Mer et Montagne ran into cost overruns, particularly with respect to the retained gymnasium. Additionally, some of the sub-trades presented issues, particularly plumbing and mechanical. As a result, the project was over budget by "a few" hundred thousand dollars.

[6202] École Élémentaire Mer et Montagne was constructed as a Kindergarten to Grade 7 facility. An access road that was built to service the subdivided parcel of land allowed for a purpose-built bus drop off route. The library is centrally located in an open space at the entrance to the school. The building has four classrooms, which can be combined by sliding walls.

[6203] École Élémentaire Mer et Montagne was originally built to be an elementary school. However, some rooms are now used for students up to Grade 8. The building does not have specialty classrooms for middle or secondary students.

C. The Historic Role of School Acquisition Projects for the CSF

[6204] The plaintiffs argue the CSF has historically built its asset base by acquiring surplus majority-board schools. They relate that to decisions taken by the Ministry at the CSF's inception, and raise issue with the fact that majority school boards were compensated for the transfers.

1. Facts

[6205] As I discuss in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, in 1991 the Task Force made recommendations for implementing s. 23 of the *Charter* in British Columbia. The Task Force envisioned that the new school boards would build their asset base through transfers of existing majority schools, particularly the existing Programme Cadre facilities. However, they foresaw potential problems convincing majority boards to transfer their assets to the minority, and compensating the majority boards for transferring assets to the minority.

[6206] The Task Force Report recommended to the Minister that a tripartite group with representation from the majority boards, the recipient minority districts and the Ministry negotiate the transfer of Programme Cadre facilities. The majority boards would receive "equitable compensation".

[6207] In or about May 1992, staff in Mr. Miller's department estimated the capital costs associated with implementing a minority language school system in British Columbia. Staff considered that the Task Force had indicated that about 20,000 students would be eligible under s. 23, and that the district preferred stand-alone facilities. Based on the enrolment projections, it was considered that a total of 32 new permanent facilities would be required at a cost of \$149.38 million, including \$57.25 million in land acquisition costs and \$92.13 million in construction costs. The

system would require a further 25 portable classrooms at a cost of \$1.09 million and 136 school buses at a cost of \$8.16 million. Thus, it was anticipated that the total cost would be approximately \$160 million over an eight year period.

[6208] The CSF was established as the FEA in 1995. Following *Vickers #1* in 1997, the *Former School Act* was amended to allow the CSF to acquire and hold land and improvements for educational purposes.

[6209] In the fall of 1997, Ministry staff began considering how it would fund asset transfers to the CSF. In October 1997, Mr. Miller was involved in briefing Assistant Deputy Minister Paul Pallan on the FEA's capital issues. Capital Branch staff advised the Assistant Deputy Minister that depending on the procurement strategy, "the cost of acquiring school properties for the FEA could have a major impact on [the Ministry's] capital program, should the cost need to be absorbed within our existing cash flow limits established by government."

[6210] It was suggested to the Assistant Deputy Minister that the Province could compensate majority schools for transferring schools to the CSF with consideration ranging from a notional value of \$1; to a pro-rated current market value based on district contribution to the building; to payment of full market value. Staff also proposed several ways of funding the transfers: a one-time increase to the capital debt; staggered purchases over several years; a trade of the sale of the facilities for funding approval of high priority projects; the sale of existing properties on the market to build new facilities; or a continuation of CSF leases of properties. Mr. Miller advised that, ultimately, the Ministry employed a number of those means of funding transfers.

[6211] At that time, Mr. Stewart was the Regional Manager responsible for the CSF. He conceded that the Ministry's strategy was to acquire assets in a way that would minimize expenditures. He had no concerns about securing funding for the acquisitions because the Ministry was habituated to regular, annual injections of capital funding. The bigger problem was finding sites for the CSF to acquire.

Mr. Stewart confirmed that then, as now, the Ministry could not compel school boards to sell property to the CSF.

[6212] On December 1, 1997, Assistant Deputy Minister Pallan wrote to 10 majority districts where the CSF was seeking asset transfers. He told them the CSF would be looking to acquire schools in their areas either by way of long-term lease, or through the purchase of existing surplus facilities, or through the development of new school facilities where cost effective. The Ministry notified the districts that it had asked the CSF to appraise Programme Cadre facilities to identify their market value, and complete facility audits to identify building condition and future renovation requirements. The Ministry would then work with the districts to ensure they were prepared to dispose of the assets.

[6213] According to Dr. Ardanaz, BCBC completed the audits and appraisals, and submitted that information in support of its first capital plan. The CSF's first Capital Plan Submission, its December 1997 Capital Plan Submission for 1998/99, focused on acquiring surplus majority schools. The submission was made in the same way as requests by the majority boards. The Ministry did not request a separate Capital Envelope for the CSF to acquire property, nor did the Ministry receive one.

[6214] In the introduction to its December 1997 Capital Plan Submission for 1998/99, the CSF explained that it hoped to accommodate as many of its students as possible in homogeneous schools as warranted by the clusters of student population. The FEA had determined that homogeneous schools were justified and viable in Vancouver, Surrey, Delta, Mission, Abbotsford and Coquitlam, as well as at the existing homogeneous Programmes Cadres in North Vancouver, Chilliwack and Victoria.

[6215] Mr. Miller worked with Dr. Ardanaz to identify majority schools for the CSF to acquire, and was directly responsible for negotiating those transfers. Between 1997 and 1999, a number of school buildings were transferred to the CSF.

[6216] In May 1998, SD75-Mission transferred Windebank Elementary to the CSF, which became École Élémentaire Deux-Rives. SD75-Mission was compensated with \$750,000, reflecting 42% of the appraised value of the site, equivalent to SD75-Mission's Local Capital contribution to the school's acquisition. The Minister also supported SD75-Mission's request to use the capital funds to replace its school board office on its existing site: a project that would not otherwise have been approved. The school was renovated at a cost of \$1.3 million prior to its transfer.

[6217] Atchelitz Elementary, which had operated as a homogeneous Programme Cadre in Chilliwack, was transferred to the CSF from SD33-Chilliwack. SD33-Chilliwack was compensated with \$420,000 from the Province's 1998/99 capital plan based on the property's appraised value and the proportion of its local contribution. The Minister approved use of those funds for a project concerning SD33-Chilliwack's transportation facility in the Ministry's 1998/99 or 1999/2000 capital budget. That project would not have otherwise been approved.

[6218] Gordon Elementary in Kelowna was transferred from SD23-Central Okanagan to the CSF for compensation of \$400,000 from 1998/99 capital based on the property's appraised value and the proportion of its local contribution. École L'Anse-au-Sable was allowed to apply those funds to the redevelopment of Kelowna Secondary, one of its priority capital projects.

[6219] In 1998, École Victor Brodeur in Victoria was transferred to the CSF from SD61-Greater Victoria, for total compensation of \$4 million in minor capital projects from 1999/00 capital. That represented slightly more than the proportion of SD61-Greater Victoria's local contribution to the appraised value of the school and site.

[6220] École André Piolat in North Vancouver was transferred to the CSF from SD44-North Vancouver for compensation of \$5.5 million toward Local Capital provided over five years beginning in 1998/99.

[6221] In addition to those schools and sites, SD36-Surrey transferred a site to the CSF for compensation of \$4.21 million in capital project approvals in about 2000.

[6222] By November 1999, the CSF operated 47 leased, shared or owned facilities throughout the Province. The CSF owned five of those facilities: École Élémentaire La Vérendrye (Chilliwack), École Victor-Brodeur (Victoria), École André-Piolat (North Vancouver), École Élémentaire Deux-Rives (Mission) and École L'Anse-au-Sable (Kelowna). In all cases, those were transferred assets that had been declared surplus by the majority school district.

[6223] Of those owned school facilities, only École Élémentaire Deux-Rives (Mission) had renovations at the time of the transfer. The CSF received an almost immediate replacement of École André-Piolat (North Vancouver). École Victor-Brodeur (Victoria) and École L'Anse-au-Sable (Kelowna) were renovated shortly after the transfers, and were replaced within a few years: École Victor-Brodeur on the same site, and École L'Anse-au-Sable on a different site.

2. Discussion

[6224] The plaintiffs argue the Ministry's approach to the CSF's early asset transfers was problematic. They suggest the Province was aware of the potential cost of the asset transfers, but chose to focus on acquiring existing school facilities from majority schools instead of funding the 32 new, permanent facilities and land acquisitions that were considered in about 1992. This, the plaintiffs say, made the CSF dependent on the majority's willingness to part with its surplus property.

[6225] The plaintiffs also raise issue with the fact that the Ministry compensates majority boards for the transfer of surplus properties to the CSF. They suggest the Ministry could have taken other routes, but chose not to and has not deviated from that practice.

[6226] As I interpret the facts, the Ministry considered the cost of building 32 new school facilities in about 1992. However, the analysis at that time focused on the total universe of eligible students: an estimated 20,000 children. The CSF's 2014/15 enrolment is only 5,382 students. Thus, the Ministry's estimate of the cost

to respond to the CSF's needs was not accurate. Its analysis was not one that it should have acted on.

[6227] I also find that while the Ministry chose to pursue a process whereby the CSF acquired surplus majority schools, it took that decision on the recommendation in the Task Force Report. The Task Force envisioned that the CSF would acquire its asset base by acquiring former Programme Cadre schools, and that majority boards would be compensated. That is exactly the approach the Ministry took. The CSF similarly focused its capital plans on the acquisition of former schools. It was entirely appropriate for the Ministry to implement a policy consistent with what the Task Force recommended, and what the CSF requested.

[6228] It is also important to bear in mind the temporal context. At the time the Ministry took the approach of funding site acquisitions for the CSF from majority schools, it was receiving regular, annual injections of capital funds and approving many capital projects every year. Thus, it was appropriate for Ministry staff to assume regular capital funding would continue and allow it to finance the CSF's acquisition of former schools and provide the CSF with necessary Expansion and Building Condition Projects once the CSF acquired the old schools.

[6229] I do not fault the Minister with choosing to compensate school boards for transferring surplus schools to the CSF. The Minister has the jurisdiction under s. 93 to craft an education funding system that responds to the unique interplay of language dynamics between the majority and the minority in British Columbia. In British Columbia, that interplay includes that when the CSF was created, as now, majority school boards, not the Ministry, owned all schools. One can only imagine how challenging the CSF would find it to work with majority school boards to identify sites if the Ministry had implemented a system where majority school boards were forced to depart with their property for no compensation.

[6230] It is my view that the Ministry's decision to compensate school boards did not infringe the CSF's right to management and control and did not prevent the CSF

from realizing what the numbers warrant. The Ministry, not the CSF, paid school boards for their properties. Thus, in my view, the policy was constitutionally valid.

D. The Current Role of School Acquisition Projects for the CSF

[6231] In the CSF's view, the Province continues to prefer that the CSF build its asset base using School Acquisition Projects. They note that all of the CSF's Expansion Projects except the acquisition of Central Okanagan Academy in Kelowna were School Acquisition Projects. I agree that is the case.

[6232] Mr. Miller acknowledged the role that the Ministry sees School Acquisition Projects playing for the CSF. He advised that due to declining enrolment across the Province, many schools have closed. Therefore, School Acquisition Projects are a cost-effective and appealing option. Minister Bond acknowledged the same in a letter to the CSF, stating that "[i]n many cases CSF projects are opportunity driven, and related to activities of the Anglophone school district which owns the asset of interest."

[6233] The plaintiffs generally do not take issue with the fact that the CSF expands its asset base through School Acquisition Projects. In fact, they favour it where it is appropriate. They suggest the evidence illustrates many opportunities for the CSF to leverage declining enrolment to acquire surplus schools. They also concede that acquiring a surplus school removes concerns around site zoning, and that school sites tend to be less costly than private sites. In their view, surplus school sites are essential to the CSF's long-term capital planning.

[6234] However, the plaintiffs are concerned the current framework for School Acquisition Projects does not ensure the facilities the CSF acquires meet the appropriate standard. This is because the CSF lacks control over both phases of a School Acquisition Project: school closures and their acquisition, and the subsequent renovation and replacement of acquired facilities.

[6235] There are two threads to the plaintiffs' argument in connection with the acquisition of surplus schools from the majority. The threads align with the two phases of the School Acquisition Project process.

[6236] First, the plaintiffs suggest the CSF has been unable to pursue its preferred School Acquisition Projects because of the lengthy process for majority boards to close schools, declare them surplus and dispose of them to the CSF.

[6237] Second, the plaintiffs raise issue with the process for requesting a Building Condition or Expansion Project on an acquired school site. They suggest the process does not respond to the CSF's needs because the two aspects of the process do not proceed simultaneously.

E. First Phase of a School Acquisition Project: School Closure and Disposal to the CSF

[6238] The plaintiffs take issue with the first phase of a School Acquisition Project-- the closure, disposal and acquisition of a surplus school-- with connection to both Ministry policy and failure to take specific actions.

[6239] With connection to the policies concerning school closures, disposals and acquisitions, the plaintiffs argue the CSF is disadvantaged in three ways. First, they say the policies encouraged the disposal of surplus properties, without considering the impact on the CSF. Second, they urge that the policies supported the repurposing of surplus facilities for non-educational purposes, without considering the CSF's needs. Finally, they say the policies restricted the disposal of surplus properties, without considering the impact that would have on the CSF.

[6240] Additionally, the plaintiffs raise issue with three aspects of the Ministry's practice concerning school closures, disposals and acquisitions. First, they say the Ministry has not assisted the CSF to identify surplus government or majority board sites for the CSF to acquire. Second, they say the CSF was disadvantaged because the defendants did not ensure the Ministry could control school closures and

disposals. Finally, they suggest the Province does not provide funding far enough in advance to allow the CSF to seize opportunities to acquire sites.

[6241] The defendants' deny the plaintiffs' allegations. In their submission, the plaintiffs have not demonstrated that the CSF missed out on any opportunities due to government policy or actions taken or not taken by Ministry officials.

[6242] I begin with an overview of the process for closing and disposing of surplus schools. Then, I discuss the two threads of the plaintiffs' argument: the argument concerning school disposal policies, and the argument that the defendants' actions have harmed the CSF.

1. School Closures and Disposals

[6243] Before a school can be transferred to the CSF, it must be closed and declared surplus by the district that owns it. Mr. Miller described this process.

[6244] When a school board decides that a school is no longer sustainable, it may choose to close the school as an operating facility and accommodate students in other buildings. Those decisions are typically driven by enrolment. However, school boards will take into account other factors, like facility condition, the cost of operating the building and transporting children to the school, as well as community input. Mr. Miller acknowledged that school boards often choose to close schools that are in poor condition because they tend to be older and located in areas where the population is declining.

[6245] In Mr. Miller's experience, school closures are challenging decisions for school boards. School closures can reflect the viability of a community. They are controversial and elicit strong views. He confirmed that the Minister considers that locally-elected school boards are in the best position to deal with school closures because they have local knowledge and are accountable to local constituents.

[6246] Before 2002, the Minister was responsible for approving all school closures. Mr. Miller explained that in 2002, the *School Act* was amended to allow school

districts to close schools without ministerial approval, although they are required to inform the Minister following the closure.

[6247] Due to the confluence of deregulation and enrolment decline since 2001, the number of schools closed across the Province has increased dramatically. Mr. Miller advised that about six British Columbia schools closed in 2001. After the change, school boards closed about 50 schools. Between 2002 and 2013, about 200 schools were closed across the Province.

[6248] A school closure does not mean that the district will sell the school. A school board may anticipate an enrolment increase in the future, or need a school building to serve nearby areas. On most occasions, Mr. Miller explained, closed schools are mothballed or leased, and therefore retained for future use.

[6249] In other instances, a school board might declare the school to be surplus and resolve to dispose of it.

[6250] Once a district has resolved to dispose of a school, if the school board decides to sell it to the CSF, the Ministry will become involved in the transfer. The Ministry and the school board agree on a price for the purchase of the school. The transfer is funded through a Capital Planning Cycle, and the CSF acquires the asset.

[6251] Mr. Miller admitted the Ministry has limited involvement assisting the CSF to acquire surplus schools. Since school closures are sensitive and challenging decisions, the Ministry tries not to intervene in the negotiations until the asset has been declared surplus to the district's needs and can be transferred.

2. School Disposal Policies

[6252] The plaintiffs take issue with the Ministry's various policies concerning school disposals. There are three points in time relevant to these proceedings: the period between 2002 and 2007, when districts were able to close and dispose of school facilities without the Ministry's involvement; the period beginning in about 2007/08, when the Ministry re-exerted its control over school disposals; and a period

beginning in about 2012, where government encouraged disposal of surplus school and other government facilities pursuant to the Release of Assets for Economic Generation, or “RAEG”, programme.

[6253] In the plaintiffs’ submission, at each stage the policies failed to prioritize the CSF’s capital needs. The defendants counter that the plaintiffs have not referred to a single serious missed opportunity caused by the three policies.

a) 2002-2007: Deregulated School Disposals

[6254] Prior to 2002, school boards could not dispose of surplus property without prior approval from the Minister. Mr. Miller advised that when the Minister considered whether to allow a district to dispose of a site, he or she would consider whether the school might be needed for educational purposes into the future.

[6255] When the Minister deregulated school closures in 2002, it also delegated to school boards the authority to dispose of property without approval. This was a time of declining enrolment, and the Minister hoped to encourage school closures and consolidations so districts could become more efficient. It coincided with the move to the Enrolment-Based Funding Model that was intended to have the same effect.

[6256] Thus, school boards no longer required approval from the Minister for a disposal. They were, however, required to implement and comply with a school disposal policy that would involve consultation with the community.

[6257] The plaintiffs observe that this period began shortly after the first surplus majority schools were transferred to the CSF from majority boards. In the plaintiffs’ submission, the change came at a time when the CSF was attempting to secure sites across the Province. They say the Province divested itself of the means of assisting the CSF to identify surplus majority properties that might be of interest to it.

[6258] The plaintiffs led evidence of one such opportunity that might have been of interest to the CSF that “slipped away”. Mr. Palmer’s evidence was that SD61-Greater Victoria disposed of Blanshard Elementary by way of two 99-year leases in

about 2005. When the CSF began looking for new space in the same area in 2013, the Blanshard Elementary sites were not available to the CSF.

[6259] For the reasons I gave in Chapter VI, *The Respective Roles of the Province and the CSF*, the Ministry has the jurisdiction to regulate the education system except to the extent that it interferes with the minority's exercise over management and control over matters going to the minority language and culture, or to the extent that it prevents rightsholders from realizing what they are entitled to. In my view, there is no evidence that the deregulation of school closures in 2002 had any detrimental impact on the CSF's ability to acquire school sites.

[6260] I agree with the defendants that the plaintiffs have not shown that the CSF missed any opportunities in the period between 2002 and 2007. To the contrary, in that period Dr. Ardanaz and Mr. Bonnefoy were highly involved in site searches in those areas where the CSF wanted to grow its programmes. The CSF was discussing surplus school sites with senior district staff in those areas, and seeking information about what surplus schools were available. The evidence shows that the CSF was able to acquire surplus school sites in SD72-Campbell River and SD68-Nanaimo-Ladysmith, and was able to open new schools in leased surplus space in SD38-Richmond, SD67-Okanagan Skaha and SD8-Kootenay Lake. The CSF was also working with SD71-Comox Valley to acquire a site, although the actual acquisition did not proceed until 2009. Thus, the evidence seems to suggest that despite the policy, the CSF was able to learn about and acquire school sites in that period.

[6261] With respect to Blanshard Elementary in Victoria, it must be borne in mind that the CSF received approval for a replacement project for *École Victor-Brodeur* in 2004, and was in the process of planning and constructing a new regional school in 2005 when Blanshard Elementary was disposed of. The Ministry had accepted the CSF's enrolment projections, and the school was being built to that capacity.

[6262] As a result, when the Blanshard Elementary site was being disposed of, it is very unlikely that the CSF would have had any interest in that facility. There is no

evidence to suggest the idea of having multiple schools in Victoria was within the CSF's contemplation. Nor was there evidence that the CSF was interested in changing sites. Indeed, the CSF hesitated when the Ministry had asked it to consider acquiring a closed school in Victoria instead of rebuilding École Victor-Brodeur on the same site. Blanshard Elementary can hardly be considered a "missed opportunity".

[6263] As a result, I find that the deregulation of school disposals in 2002 did not deprive rightsholders of the minority language educational facilities to which they are entitled, nor did it deprive the minority of its right to management and control over matters going to language and culture. It therefore is consistent with s. 23 of the *Charter*.

b) 2007/08: Re-Regulation of School Disposals

i. The 2007 Disposal Order

[6264] Mr. Stewart's evidence was that by about 2007, the Ministry developed an interest in slowing school disposals. The Ministry was considering incorporating early childhood education programmes and full-day Kindergarten into schools. The Ministry also anticipated that enrolment would begin increasing in coming years. According to Mr. Stewart, at the same time, the Province developed an interest in preserving existing assets across all government agencies.

[6265] In 2007/08, Mr. Miller recounted, the Province developed a process to ensure public lands were retained in the public sector for public use. It was implemented and overseen by ARES (the successor to BCBC; which is now known as Shared Services BC). Mr. Stewart's evidence was that the programme was developed and administered externally from the Ministry by ARES. The Ministry implemented it by way of the 2007 Disposal Order.

[6266] I introduced the 2007 Disposal Order in Chapter XXIII, École Élémentaire des Navigateurs (Richmond). As I explain there, pursuant to the 2007 Disposal Order, whenever school districts and other public bodies wanted to dispose of

surplus property, they were first required to consult with ARES to determine whether the property could be put to use by another public body. If there were another interested government agency, the Asset Matching Programme applied, and that agency would acquire the property. If the process did not generate a match, then the school board was required to consult with municipal governments. If local government did not express an interest, then the school board could dispose of the school in the ordinary course. ARES also planned to develop an inventory of surplus government properties: the Asset Inventory Programme.

[6267] The Asset Matching Programme and the Asset Inventory Programme did not focus specifically on matching surplus education properties with other educational uses. Its broader focus was to match assets with different government uses. Even so, according to Mr. Stewart, by October 2007, ARES and Ministry staff agreed informally that ARES should prioritize matching schools with need in the educational sphere, including the CSF's needs.

[6268] If the Asset Matching Programme paired an asset with an alternative government use, the process contemplated government agencies receiving compensation for their assets, theoretically based on the property's appraised value. The Ministry planned to compensate school boards with a credit in the Ministry's Capital Planning Cycle that it could apply to a future capital project. However, Mr. Stewart testified that the Minister never fully established how that would function.

[6269] Mr. Stewart was hopeful the Asset Matching Programme and the Asset Inventory Programme would assist the Ministry to identify sites surplus to other government agencies' needs that could be used for school sites. He confirmed the programme created an opportunity for school districts to identify their site needs to ARES, which would help to match the district with appropriate sites.

[6270] The Court heard considerable evidence about the CSF's involvement in the ARES Disposal Process, particularly regarding an attempt by the CSF to acquire Kilgour Elementary, a site it leases from SD38-Richmond, for École Élémentaire des

Navigateurs. That evidence is described in more detail in Chapter XXIII, École Élémentaire des Navigateurs (Richmond).

[6271] As I conclude there, in 2007 and 2008, SD38-Richmond attempted to use the Asset Matching Programme and its relationship with the CSF to extract a market-value sale of Kilgour Elementary from the Province. I find that SD38-Richmond was acting in its own interest to take advantage of Ministry processes and the CSF for its own financial benefit.

[6272] To summarize, Mr. Morris, the Secretary-Treasurer of SD38-Richmond, suggested to Mr. Bonnefoy that the CSF might acquire Kilgour Elementary from SD38-Richmond through the Asset Matching Programme. SD38-Richmond offered the property as surplus, and the CSF expressed interest. In the interim, SD38-Richmond took to the media to exert pressure on the Ministry to move forward.

[6273] The Ministry was prepared to support the acquisition for the CSF in 2008 pursuant to the Asset Matching Programme due to the challenging relationship between the CSF and SD38-Richmond. The transfer did not go forward because the Ministry did not receive a Capital Envelope for Expansion Projects it could have used to compensate SD38-Richmond. Given the purchase price, the Ministry also could not find savings to move forward with the transfer. The project did not go forward at that time.

[6274] Despite this, the CSF has never faced any serious risk it would be evicted from or lose its lease of Kilgour Elementary. From 2007 until 2014, SD38-Richmond has made many assertions that the CSF might be able to acquire Kilgour Elementary outright. École Élémentaire des Navigateurs continues to lease the school as a homogeneous facility.

[6275] I also find that all parties agreed on several occasions that the best long-term option for the CSF in Richmond involves Kilgour Elementary. Both the Ministry and SD38-Richmond seem to support that option for the CSF.

[6276] Mr. Miller affirmed that the Ministry used the 2007 Disposal Order for about 12 to 14 months. Although ARES identified matches for several district properties, no school boards proceeded with asset transfers. Although about 30 school boards identified some 340 surplus assets, Mr. Miller was not aware of any school assets ever being acquired by the Province through the 2007 Disposal Order.

[6277] Mr. Stewart suggested the Asset Matching Programme was a poor fit with the education sector because it did not contemplate the additional layer of delegated authority whereby school districts own real property used for education. It also allowed school boards to dispose of property without notifying the Ministry, and without considering the needs of other school districts, particularly the CSF. In Mr. Stewart's view, the process did not appreciate the finer points of school acquisitions and disposals in the education sector. Eventually, both ARES and the Minister agreed the process was not working, and the process was terminated.

[6278] When the process was terminated, the Ministry retained very little of the Asset Matching Programme or the Asset Inventory Programme. School boards did not continue as customers of the Asset Matching Programme, who would be notified of properties that other agencies wanted to dispose of. The Ministry did not consider retaining software and systems associated with the Asset Inventory Programme.

ii. The 2008 Disposal Order

[6279] In October 2008, the Ministry promulgated the 2008 Disposal Order, which launched a requirement for ministerial approval of real property disposals. However, it creates an exemption that allows school boards to transfer assets to the CSF and independent schools without ministerial approval. School boards are allowed to dispose of assets for below market value to any purchaser, which was previously prohibited.

[6280] Like the 2007 Disposal Order, the 2008 Disposal Order also reflected government policy at the time of retaining public assets for public use. In a September 2008 letter to all school districts, Deputy Minister Gorman cited that

policy and informed districts the Minister would only approve school disposals in exceptional circumstances.

[6281] By 2010, the policy rationale underlying the Minister's exercise of discretion to approve school disposals changed. In about January 2010, Deputy Minister Gorman wrote to all school districts and reconfirmed a "strong belief" by Government that school lands should be retained for a public use. He also alluded to new purposes underlying the programme: the need to retain space for NLC space, full-day Kindergarten, expanding opportunities for three- and four- year olds, and an anticipated return to enrolment growth over time.

[6282] Mr. Stewart testified that as a result of the 2008 Disposal Order, school disposals became very rare.

[6283] Mr. Miller confirmed that, when the Minister considered whether to approve a school disposal under the 2008 Disposal Order, he or she considered, among other factors, whether the CSF could make use of the property. If the Minister thought the CSF might be interested in and could make use of a school put forward for disposal, he or she would engage the majority district and the CSF in discussions.

[6284] Mr. Stewart gave more evidence about how the Minister went about considering the CSF's needs. Ministry staff examined the CSF's most recent Capital Plan Submission. Depending in part on whether the CSF has an identified need in the area, Ministry staff would recommend to the Minister that the disposal be either approved or not approved. According to him, Ministry staff did not, as a matter of routine, take the extra step of asking the CSF if it was interested in each property.

[6285] Mr. Miller was responsible for signing off on school disposals. His evidence was that he always considered the CSF's needs whenever a school was being disposed of. He testified that few, if any, schools disposed of after 2008 would have been appropriate for the CSF.

iii. Discussion

[6286] In the plaintiffs' submission, the Ministry took an "arm's length approach" to disposals through the 2007 Disposal Order, thus failing to fulfill its obligations under s. 23. The plaintiffs argue that the evidence concerning Kilgour Elementary demonstrates that the 2007 Disposal Order did not meet the CSF's needs. They take the view that, although both districts proceeded through the ARES process under the impression the CSF would be matched with Kilgour Elementary, the Ministry did not commit to funding the project. They characterize this as a "missed opportunity".

[6287] The plaintiffs acknowledge the ARES process was eliminated with the 2008 Disposal Order. However, they suggest the 2008 Disposal Order was implemented for the primary purpose of retaining assets for early learning. Thus, they say the Ministry's new disposal process was designed to prioritize majority district interests, not the CSF's interests.

[6288] In my view, the CSF's experience attempting to acquire Kilgour Elementary through the Asset Matching Programme falls short of establishing the 2007 Disposal Order did not work for the CSF. To the contrary: as I conclude in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), the problem at that time was a lack of Ministry funding to move forward with the project. As with other parts of the plaintiffs' argument, what appears at first glance to be an issue with a capital planning policy ultimately boils down to a simple lack of funds being put toward the CSF's interests.

[6289] In any event, the CSF continues to lease Kilgour Elementary as a homogeneous school. There was no missed opportunity there. The school is well-located and equivalent to the facilities afforded to the majority. The CSF's tenure is secure. All parties, including SD38-Richmond, agree Kilgour Elementary forms part of the CSF's long-term operations in Richmond. Thus, the 2007 Disposal Order neither deprived the CSF of its right to management and control, nor rightsholders of the minority language educational facilities to which they are entitled.

[6290] Further, the fact that the 2008 Disposal Order advances the interests of retaining facilities for public purposes and for early-learning programmes does not make it invalid. The Ministry is entitled to pursue policies that promote interests other than minority language education. Indeed, that is the Province's duty under s. 93 of the *Constitution Act, 1867*. The plaintiffs do not argue the 2008 Disposal Order deprives the CSF of appropriate facilities or its right to management and control. Indeed, the 2008 Disposal Order makes an exception that allows school boards to dispose of assets to the CSF without approval by the Minister, thus recognizing the CSF's unique need to acquire former school sites.

[6291] As a result, I conclude that neither the 2007 Disposal Order nor the 2008 Disposal Order is contrary to s. 23.

c) 2012: RAEG Programme

i. The RAEG Programme

[6292] Mr. Miller acknowledged the 2008 Disposal Order now links to a larger asset disposal programme implemented in 2012: RAEG. The RAEG programme applies to government as a whole and is intended to identify surplus assets for sale into the private sector to raise funds and generate economic activity.

[6293] Mr. Miller testified that the RAEG programme was managed by the Ministry of Labour and Citizens' Services. One of their staff, Mr. Colyn Strong, assisted the Ministry to identify potential sites for sale. If a sale went forward, the proceeds remained with the school board, but for accounting purposes were booked as revenue to government, helping the Province to balance its budget.

[6294] According to Mr. Stewart, the Ministry implemented RAEG at the direction of the Province; Ministry staff were not directly involved in its development. Mr. Miller advised that neither the CSF nor any other district was consulted with respect to the RAEG programme.

[6295] Mr. Miller conceded the RAEG programme was intended to generate revenue. Sales of properties to the CSF do not advance that goal. Mr. Stewart

likewise confirmed that given the RAEG programme's goal of selling properties outside government, it would not assist the CSF to identify sites. Because of that, in his experience, Ministry staff did not examine properties identified for sale by other government agencies to see if they would be of use to the CSF.

[6296] Mr. Stewart confirmed that in the spring of 2012, he grew concerned that government sites in Vancouver might be disposed of by way of the RAEG programme. At the time, the CSF was actively searching for- and struggling to identify- sites in Vancouver (West). As a result, in May 2012, Mr. Miller wrote to an official involved in the RAEG Programme and expressed the CSF's needs. The official responded that the request did not tie in with the programme's goals.

[6297] The CSF learned of the RAEG Programme with all other districts, by way of a November 2012 letter from Deputy Minister Gorman. Deputy Minister Gorman explained that all districts were still required to comply with the 2008 Disposal Order. However, the Ministry would simplify the process for ministerial approval. For obvious reasons, the Minister's policy of only approving disposals in exceptional circumstances would no longer apply.

[6298] Mr. Allison thought the RAEG policy was encouraging, and hoped some districts would be willing to dispose of surplus properties to the CSF. On November 28, 2012, he sent a Positioning Letter to Mr. Miller seeking a right of first refusal before any school board-owned properties were disposed of pursuant to the RAEG Programme. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[6299] In his response to Mr. Allison, Mr. Miller advised that the RAEG programme did not change the conditions for approval in the 2008 Disposal Order, and confirmed that the Minister would take into account the CSF's needs before approving of any disposals.

[6300] Since August 2011, the Minister has approved a number of school disposals. Ministry records show that SD8-Kootenay Lake disposed of Wynndel Elementary, in Wynndel, which was closed in 2008. In 2013, the Minister also approved the disposal of Steveston Secondary by SD38-Richmond, a school that was closed in June 2007. SD62-Sooke disposed of Belmont Secondary sometime after June 2013. SD63-Saanich disposed of two schools: Old North Saanich Middle School and McTavish Elementary, both disposed of after June 2012. Mr. Miller confirmed the Minister would have approved these transfers.

[6301] Mr. Miller acknowledged that no properties were identified for the CSF through the RAEG programme. According to Mr. Allison, the CSF was never notified of property disposals related to RAEG.

[6302] The plaintiffs raise particular issue with one disposal pursuant to the RAEG programme: that of Steveston Secondary by SD38-Richmond. They state the CSF was interested in the property, and suggest the CSF's needs were not considered.

[6303] The details of that incident are explained in detail in Chapter XXIII, École Élémentaire des Navigateurs (Richmond). The CSF was interested in acquiring a portion of Steveston Secondary to build an elementary/secondary school and a school board office. I conclude that the Minister was justified in refusing the CSF's requests to acquire that school and approving the disposal. The cost of acquiring Steveston Secondary would have been about \$40 million before considering the cost of construction of a new school. In 2008, the cost of acquiring Kilgour Elementary was estimated to be about \$8.5 million. Given the cost and that SD38-Richmond assured the Ministry that the CSF would have access to Kilgour Elementary in the long term, the Ministry was correct to reject the CSF's proposal.

ii. Discussion

[6304] The plaintiffs argue that the RAEG programme directly impacted the disposal of surplus government assets to the CSF. They point out that the CSF was unable to acquire any properties under the RAEG initiative, and in most cases was

not informed of the disposal. They note that Mr. Stewart confirmed that RAEG was unlikely to help the CSF. In their submission, the CSF cannot know how many opportunities it missed because of this programme.

[6305] The defendants' view is that the CSF did not miss out on any serious opportunities due to the RAEG programme. They maintain that Steveston Secondary was no a cost-effective option.

[6306] The plaintiffs have not established that the CSF missed out on any opportunities because of the RAEG programme. On the contrary, both Mr. Stewart and Mr. Palmer confirmed that the Minister always considered the CSF's interests and capital requests when it decided whether to approve disposals after the RAEG programme began. Moreover, the RAEG programme did not do away with the exception made for the CSF whereby school boards could dispose of property to the CSF without ministerial approval. The only instance where the CSF suggests it has truly missed an opportunity was in connection with Steveston Secondary, in an area where the CSF already operates out of equivalent facilities.

[6307] Thus, in my view, the RAEG programme did not infringe the CSF's right to management and control, nor did it deprive rightsholders of the minority language facilities that are warranted given the CSF's numbers. It is therefore consistent with s. 23. The Province has the jurisdiction under s. 93 of the *Constitution Act, 1867*, to set policies concerning school disposals. The RAEG programme, like the disposal policies that preceded it, appropriately considered the CSF's need for school sites.

3. Actions Not Taken by the Province

[6308] In addition to the problems with the Ministry's three policies, the plaintiffs point to a lack of action by the Province in three respects: in respect of assisting the CSF to identify government surplus sites; implementing new policies to assist the CSF; and funding time-sensitive school site acquisitions.

a) Failure to Identify Sites

[6309] In the plaintiffs' submission, the defendants have not assisted the CSF to identify surplus sites - school sites or other government sites - that it may want to acquire. They point in particular to the defendants' failure to assist the CSF to identify and acquire non-school government sites in Abbotsford and Vancouver, and a failure to create a database of surplus government and school assets that could be acquired by the CSF.

[6310] With reference to Abbotsford, as I describe in Chapter XXXI, Abbotsford French-Language Education, in 2008, the CSF developed an interest in the MSA Site, a provincially-owned site that was in the course of being redeveloped. The CSF told the Minister about its interest in the site. Ministry staff were directed to explore with the Ministry of Health whether there would be an opportunity for the CSF to build a school on the site. Ministry staff simply made an inquiry, and, despite there being a small prospect, did not follow up. The situation shows how Ministry staff left it in the hands of the CSF to identify and secure sites, without providing much in the way of assistance concerning provincially-owned assets.

[6311] However, I am not persuaded that the loss of the MSA Site has disadvantaged the CSF in a significant way. That project did not go forward because of a lack of Ministry funding. The Ministry chose to support the Southeast False Creek Project for Vancouver (West) when funding became available. There is a surplus school site available. The issue in Abbotsford does not appear to be a lack of suitable sites: it is that the CSF is insistent on moving to a larger site than it needs immediately, and a lack of funding from the Province to devote to all of the CSF's priority capital projects.

[6312] I discuss the CSF's desire to acquire a portion of government-owned sites in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)). The plaintiffs' argument focuses on the Jericho Lands (including the West Point Grey Academy) and the Pearson/Dogwood Site.

[6313] With reference to the Provincial Jericho Lands, I find the CSF has largely been unable to acquire a permanent site there because the lands are subject to unresolved land claims and have not been made available. But, the CSF was unable to use the site temporarily because of a lack of political will. As a result of a lack of information sharing between ministries, the Ministry did not know that West Point Grey Academy held Provincial land by way of a long-term lease until shortly before the school's lease was renewed. Politicians were not willing to displace the independent school because doing so would have political consequences. There was no credible reason given why the CSF has not been allowed to place a temporary, modular structure on that site.

[6314] The CSF brought the Pearson/Dogwood Site to the Ministry's attention in 1999, prior to the acquisition of the Oakridge Site. However, the site was considered to be too small for an elementary/secondary school. It was raised again in the CSF's 2009 PIR concerning Vancouver (West). The CSF specifically raised its desire to acquire a portion of the Pearson/Dogwood Site with the Ministry in 2013, when École Secondaire Jules-Verne and École Élémentaire Rose-des-Vents were together operating at about 110% capacity.

[6315] The CSF was unable to acquire a portion of the Pearson/Dogwood Site for a school because the Province chose to prioritize other uses for the site. The site was not owned and controlled by the Ministry, and Ministry staff had no power to direct how the site was dealt with. While both Ministry staff and the CSF brought the CSF's need for part of the site to the attention of senior government officials, the Province declined to provide the site to the CSF because it was slated for use by a health authority.

[6316] The plaintiffs argue the situations in Abbotsford and Vancouver reveal that the Ministry failed to pursue possible site acquisition opportunities for the CSF. They note that the Ministry did not assist although staff had many years' notice that the CSF had an interest in those sites.

[6317] I find that the plaintiffs are correct in those assertions as they apply to Vancouver. The Ministry has typically relied on the CSF to identify sites in the areas where it wants to start programmes. This has led to challenges in Vancouver (West), in particular, due to the lack of available, suitable land in the area. As I develop in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), it is troubling that the Ministry failed to assist the CSF by canvassing other land-holding ministries prior to 2013. Indeed, it appears to have only done so after the CSF chastised Ministry staff for its dealings with West Point Grey Academy.

[6318] The plaintiffs suggest the Province could assist by creating a centralized repository of surplus government properties to inform the CSF's capital planning. In their submission, the defendants have failed to do so, contrary to s. 23 of the *Charter*.

[6319] In his discovery evidence, Mr. Miller recounted that since school boards own assets in the education sector, the Ministry did not have a comprehensive inventory of school district assets. Nor was there a positive obligation for school districts to provide the Ministry with an inventory of their asset bases. Since then, things have changed, and now the Ministry has a database of FCI scores for most, if not all, school assets in the Province.

[6320] Beyond that, though, the Ministry does not have access to an inventory of surplus government assets in the Province. Mr. Stewart confirmed there is no government-wide inventory of surplus facilities. As explained previously, the ARES Asset Inventory Programme envisioned creating that type of inventory. The Ministry did not consider continuing to participate in that process, or retaining some of the tracking tools used by ARES.

[6321] The plaintiffs argue it is unreasonable that the Province has not obtained an inventory of surplus facilities to assist the CSF. They say that is particularly so because the Ministry has taken such an inventory for other purposes. For example, when the Ministry enacted full-day Kindergarten, it took an inventory of all surplus educational spaces to know what space would be available for the programme. In

the plaintiffs' submission, since districts must inform the Minister after schools are closed, it ought to be possible for the Ministry to compile such an inventory.

[6322] The plaintiffs take the position that the lack of such an inventory has harmed the CSF. They say that if there were such an inventory, the CSF might have learned of a possible Crown grant at the UEL Site in Vancouver much earlier.

[6323] While it might be helpful for the Ministry and the CSF to have access to an inventory of surplus properties across the Province, s. 23 does not place an obligation on government to create one. Section 23 does not entitle rightsholders to any particular education system; it does not entitle rightsholders to any particular manner of identifying and securing space.

[6324] Indeed, the CSF is in the best position to know where its population is located, where it needs new schools, realistically estimate their numbers, and communicate that information to the Ministry. Once that information is communicated to the Ministry, if the CSF requires assistance identifying sites, then the Ministry should have some flexibility with respect to how it assists the CSF. While an inventory might be one way for the Ministry to assist the CSF, it is disproportionate to require the Ministry to take a government-wide inventory of all assets to assist the CSF to find space in a few communities. The Ministry could also assist the CSF through simple conversation with other Ministries as required.

[6325] The larger issue is that the Ministry has failed to have those conversations, to the detriment of the position of rightsholders in Vancouver (West), at the very least. As I see it, for that reason, the Ministry's policy requiring the CSF to identify sites without assistance is contrary to s. 23.

b) Failure to Implement Policies to Assist the CSF

[6326] The plaintiffs take the position that majority boards use their surplus properties in accordance with their own priorities, without regard for the CSF's needs. They note that majority boards decide whether to close a school and put it

forward for disposal. In the plaintiffs' submission, districts are unlikely to make sites available to the CSF: they are more likely to use them for their own purposes.

[6327] Mr. Miller and Mr. Stewart both acknowledged that school boards are likely to use surplus space in their own self-interest. The Court has seen evidence of surplus schools that are used for school board administrative space (in SD41-Burnaby, for example) and international education programmes (in SD61-Greater Victoria, for example). A school might also be leased to a third party like an independent school to generate revenue (as was the Oakridge Site in SD39-Vancouver). Further, districts may also seek to generate revenue by selling property privately to a high bidder (as SD38-Richmond did with Steveston Secondary).

[6328] In the plaintiffs' submission, the evidence establishes that the CSF's ability to acquire surplus schools is contingent on a majority board's inclination to collaborate with the CSF. They point to challenging negotiations that made it difficult for the CSF to acquire sites from SD46-Sunshine Coast, SD71-Comox Valley and SD38-Richmond.

[6329] The evidence shows that the CSF's ability to acquire schools is contingent on majority school boards' operations.

[6330] The CSF's first School Acquisition Projects were former Programme Cadre schools. That is how the CSF acquired École Victor-Brodeur (Victoria), École Élémentaire La Vérendrye (Chilliwack) and École André-Piolat (North Vancouver), for example. In that way, the CSF's earliest acquisitions were contingent on where majority schools had chosen to accommodate minority language programmes.

[6331] Since then, the CSF has continued to acquire surplus schools contingent on majority boards' decisions to close a school. In a few areas, the CSF had some choice with respect to what surplus majority school sites it acquired. When SD68-Nanaimo-Ladysmith went through a school closure process in 2003, it identified five schools for potential closure. The CSF chose to acquire the former Princess Anne Elementary as the one best suited to its needs. The CSF was also able to choose

its preferred school from among several options when it constructed École Élémentaire Mer et Montagne (Campbell River). The CSF chose Rockland Elementary because it was convenient for transportation services. However, the CSF was still limited: it could only choose from among the schools that SD68-Nanaimo-Ladysmith and SD72-Campbell River chose to close.

[6332] In other areas, the CSF has acquired surplus schools that it had no option about, but that it believed at the time would respond to its needs. This was the case with the CSF's acquisition of Gordon Elementary, the first facility to house École L'Anse-au-Sable (Kelowna), in about 1997 or 1998. In Port Coquitlam, after several other opportunities fell through, the CSF was in favour of acquiring Terry Fox Secondary despite it being in a location remote from its community because the school was very large, was located on a large site, and would allow it to consolidate its programmes. While SD36-Surrey provided the CSF with a site for École Gabrielle-Roy, there was no indication that the CSF thought the site was in an inappropriate location.

[6333] On one occasion, with SD71-Comox Valley, the CSF was able to express its views concurrently with a school disposal process. The results were not, however, positive. The CSF tried to persuade SD71-Comox Valley to close and provide it with Courtenay Middle, then Cape Lazo Middle. While SD71-Comox Valley was open to that idea and moved forward with the closure of Cape Lazo Middle, the public vigorously opposed the process. The decision was overturned on judicial review, and then the majority of the SD71-Comox Valley Board of Trustees was replaced after an election. In the end, the CSF had to initiate the Education Mediation Regulation to resolve the impasse, and acquired a school that required a full reconstruction. The parties were in frequent negotiations for about two years before the CSF acquired a site.

[6334] This is not to say that the CSF is without recourse. The CSF, too, has the option of acting in its self-interest. In some areas, the CSF chose not to take options presented to it. The CSF had a few options among surplus schools available from

SD23-Central Okanagan when it wanted to replace École L'Anse-au-Sable (Kelowna) on a different site. The CSF did not want any of those options, and decided to acquire a former independent school, Central Okanagan Academy, privately. In Vancouver (West), SD39-Vancouver has offered the CSF several schools that would temporarily relieve space pressures at École Élémentaire Rose-des-Vents, which the CSF has refused because the CSF did not find them to be ideal. The CSF preferred schools that SD39-Vancouver was not willing to make available. The CSF also did not favour any of the surplus schools it was offered in SD41-Burnaby and SD43-Coquitlam in 2008 and 2013. Similarly, in Sechelt, the CSF refused the schools that SD46-Sunshine Coast presented to it, and the CSF was unable to acquire its preferred site in the area, Selma Park, because SD46-Sunshine Coast would not declare the site surplus to its educational needs.

[6335] Thus, it appears that the CSF and majority boards are, at times, in conflict about the transfer of schools to the CSF. Majority boards act in their own best interest with respect to school closures and disposals. The CSF has very limited involvement in what schools are presented to it. Sometimes it is interested in the schools; sometimes it is not. Regardless, the CSF is left to acquire whatever schools a school board decides it no longer wants. Sometimes, a school board hesitates to dispose of schools to the CSF, as SD39-Vancouver has due to its long-standing policy of not disposing of school sites.

[6336] The problem is also manifest with respect to the CSF's need to lease schools. As I describe in Chapter XXXV, Leases, the CSF has no input into school closure decisions, and therefore has limited choice in what leased facilities are available for its use. It must wait until a majority board chooses to close a school, and take whatever becomes available. That is why the CSF leases an equivalent facility 10 kilometres outside Nelson. I also note that the CSF has been unsuccessful in persuading some districts, like SD73-Kamloops/Thompson, to allow it to lease closed facilities that it would prefer to the one it occupies.

[6337] The plaintiffs argue that since majority boards tend to act in their own self-interest, a process is required to facilitate the CSF's access to surplus assets. The plaintiffs suggest that Ministry officials have failed to craft a policy to assist the CSF to identify and acquire sites from majority boards.

[6338] The plaintiffs suggest a number of ways that the Ministry could do this. They propose that Government might give the CSF a right of first refusal over surplus school properties. Alternatively, the plaintiffs say that the Ministry could have considered allowing the CSF to pay less than fair market value for surplus assets.

[6339] The plaintiffs also point to the recent amendments to the *School Act*, which they say could provide a means of resolving the problems the CSF has faced acquiring surplus school facilities. In the plaintiffs' submission, due to the operation of the new s. 74(1) of the *School Act*, the Minister has broad plenary authority to intervene in the public interest to marshal the surplus resources of the majority for the benefit of the CSF. As I explain in Chapter X, Remedies, I do not consider that the amendments give the Minister that power.

[6340] Mr. Miller gave some evidence about considerations that Ministry staff have had in connection with directing school boards to dispose of assets to the CSF.

[6341] Mr. Miller's evidence was that since the CSF has been in existence, Ministry staff had numerous discussions about strengthening the Ministry's ability to direct school districts to dispose of assets to the CSF. The evidence shows that in at least one briefing note dating back to the time of the CSF's inception, staff suggested a legislative amendment might be required to direct transfers to the CSF.

[6342] Mr. Miller's evidence was that, in around 2008, when the Ministry introduced the 2008 Disposal Order, Ministry staff discussed the idea of allowing the Ministry to direct disposals of property. Mr. Miller acknowledged such a power would be helpful to the Minister and the CSF. However, in his view, the Minister was able to leverage

its capital programme to encourage transfers to the CSF in many instances. He was not certain a directive power would have resulted in any different outcomes.

[6343] Mr. Miller advised that in about 2012, the Ministry considered giving the CSF a right of first refusal over the acquisition of school district assets in areas where the CSF was seeking a school or a site. According to Mr. Miller, that legislative amendment did not go forward because of the timing relative to the legislative cycle.

[6344] With respect to the idea of not compensating school boards for asset transfers, Mr. Miller advised that the Ministry's position has always been that since school boards own all assets, and in many instances contributed local funds to their acquisition, the Province must compensate school boards for transfers to the CSF. Given that the CSF depends on majority boards' willingness to work with it on school disposals, this strikes me as a wise policy.

[6345] In my view, the current system relies on the CSF to identify sites. The CSF is in the best position to know its needs and what schools and sites are appropriate for its programmes. It appropriately often looks to surplus majority schools as ones to acquire. This is a reasonable approach. As Dr. Ardanaz testified, the CSF has long favoured this approach due to the long delays associated with re-zoning properties.

[6346] While it is logical for the CSF to take the lead in site identification, the Province is ultimately responsible for ensuring rightsholders acquire sites and open schools where the numbers so warrant. Arguably, s. 23 also binds school boards just as it binds the Province. Since school boards are elected bodies exercising delegated provincial authority, they, too, may have a duty to help ensure that the minority has access to minority language education facilities where the numbers so warrant. To date, the CSF has not sought to enforce its rights by challenging school board decisions not to provide it with space.

[6347] The Province is required to do whatever is practical to assist the CSF to acquire space and open programmes for rightsholders. In my view, though, s. 23

does not go so far as to require the Ministry to enact any specific policy for how it goes about offering that assistance.

[6348] Indeed, until quite recently, Ministry staff were willing to exercise the Minister's powers of influence to assist the CSF to acquire sites. In the CSF's earliest asset transfers, the Ministry linked the transfer of acquisitions to project approvals for Majority school boards to provide the CSF with an asset base without stretching Capital Envelopes. The Ministry took a similar approach to secure the transfer of École Élémentaire Anne-Hébert (Vancouver (East)) to the CSF in 2009, making a project approval for SD39-Vancouver contingent of the transfer.

[6349] The Ministry has helped in other ways. In 2000 or 2001, when the CSF was looking to acquire the Oakridge Site from SD39-Vancouver, the Ministry engaged an independent facilitator and approved several projects for SD39-Vancouver that would not have otherwise been approved.

[6350] When the CSF sought to acquire a school from SD71-Comox Valley as part of its reconfiguration plan, the Ministry assisted the CSF by implementing a tripartite working group that negotiated concurrently with the timing of SD71-Comox Valley's school reconfiguration. While the process was unsuccessful, this was the result of public pressure, not the fault of any of the parties.

[6351] In a similar vein, the Ministry tried to help the CSF to acquire the former Bellevue Creek Elementary from SD23-Central Okanagan before the CSF discovered the former Central Okanagan Academy by suggesting that SD23-Central Okanagan might be eligible for another capital project if it provided the school to the CSF.

[6352] In more recent years, though, the Ministry has not been as willing to assist the CSF. I find that the Ministry could have, but did not, facilitate a transfer of Kilgour Elementary to the CSF by linking it to the approval of the disposal of Steveston Secondary.

[6353] Especially since 2010, the Ministry has taken a more passive approach than it did in the CSF's early years, and tried to maintain neutrality between the CSF and other districts. This was manifest in the CSF's negotiations with SD39-Vancouver concerning space for Vancouver (West). The Ministry's view has been that the districts must reach agreement between themselves, and then the Ministry will support that agreement. That position left the CSF at a disadvantage as the party with all the need, and very few bargaining chips. During an SD39-Vancouver facilities review in 2010, the Ministry took a hands-off approach to respect SD39-Vancouver's autonomy, favouring such an approach over advocacy for the CSF's needs in Vancouver (West).

[6354] Ultimately, I find that the Ministry's failure to act in negotiations since 2010 has hurt the CSF. The CSF is at a disadvantage negotiating for sites with school boards acting in their own self-interest. While the Ministry was willing to serve as that advocate in the CSF's early days, it has since taken a position of neutrality.

[6355] I find that s. 23 does not require the Ministry to implement the precise types of policies that the plaintiffs say it ought to. However, the Ministry must assist the CSF in its negotiations with majority school boards in some way. Implementing a policy like a right of first refusal is one way of ensuring the Ministry meets that obligation while maintaining neutrality. The Ministry might also show a willingness to refer matters to the *Education Mediation Regulation*, another way of maintaining neutrality. The Province could take a more interventionist approach by legislating the Minister a directive power, or by continuing to use its influence to ensure the CSF has access to space as it has in the past.

[6356] What the defendants cannot do is continue to sit idly by and refuse to assist the CSF to secure suitable sites. The Province has created a system that gives majority school boards complete control over their school sites. The CSF depends on their decisions concerning those sites in order to secure sites for itself. The Minister must act to assist the CSF and ensure it can secure school sites where the numbers so warrant.

c) Failure to provide funding for Time-Sensitive Acquisitions

[6357] Finally, the plaintiffs submit that the Province has failed to fund time-sensitive opportunities to acquire school sites. In their submission, an opportunity to acquire a surplus school will often arise on short notice. They say the CSF must be able to act quickly to secure the site. They note that the capital planning system approves projects three years before the funding flows, and requires sites to be identified prior to approval. That, they say, creates too much lead time and results in the CSF missing out on opportunities to acquire sites.

[6358] In that connection, the plaintiffs point to several examples of what they see as “missed opportunities” for acquisitions: Kilgour Elementary, Steveston Secondary and the South McLennan Properties from SD38-Richmond; Dunach Elementary from SD34-Abbotsford; Burquitlam Elementary from SD43-Coquitlam; McTavish Elementary from SD63-Saanich; and Belmont Secondary from SD61-Greater Victoria.

[6359] As I explain above, all parties agree that Kilgour Elementary is an appropriate site for the CSF. That project has not moved forward because the Ministry has not been devoting public funds to Expansion Projects. However, the opportunity to acquire Kilgour Elementary has not dissipated, and I find no rights breach in that area. The absence of immediate funding to pursue the acquisition did not eliminate the opportunity; it only delayed it.

[6360] For the reasons I gave in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), I am satisfied that given that Kilgour Elementary is appropriate for the CSF in Richmond, the Ministry was justified in rejecting the CSF’s requests to acquire the South McLennan Properties and Steveston Secondary.

[6361] In 2011, there was an opportunity for the CSF to acquire Dunach Elementary from SD34-Abbotsford. That project did not go forward because of a lack of funding for Expansion Projects-- including Site and School Acquisition

Projects-- at that time. There is no evidence to confirm whether Dunach Elementary might still be on the table if funds were to become available.

[6362] While the CSF was unable to acquire Kilgour Elementary and Dunach Elementary immediately in 2011 due to a lack of funds, the evidence is less clear that a lack of funds contributed to the CSF's problems in Burnaby and Victoria.

[6363] When the CSF searched for sites to start a Burnaby programme in 2008 and 2013, it did not find any surplus schools located in an ideal location for the CSF. On the other hand, the CSF did not seek assistance from the Ministry to identify sites in Burnaby. The Ministry learned that Burquitlam Elementary might become available from SD43-Coquitlam, and I find that the Ministry likely brought it to the CSF's attention. The CSF was not interested. Thus, the lack of funding to immediately pursue the site acquisition did not hurt the CSF. Its own lack of interest did.

[6364] The CSF also complained it was unable to acquire McTavish Elementary in North Victoria in 2013. The Ministry did not approve that project because it had already agreed to the disposal of the site before the CSF made a capital request for the area. Moreover, when he actually saw the site, Mr. Allison realized the CSF did not want it. Also, I have found that the numbers will likely never warrant homogeneous instruction in North Victoria. As a result, I do not find that a lack of immediate funding to pursue McTavish Elementary disadvantaged the CSF in the proposed North Victoria Catchment Area.

[6365] The Court heard limited evidence about the disposition of Belmont Secondary. It appears to have been disposed of privately sometime after June 2013. The CSF was not informed prior to that transaction although it had sought a site in the West Victoria Catchment Area since its 2010/11 capital plan, and had asked for a right of first refusal over property being disposed of in the area.

[6366] However, this particular transaction does not appear to have been put to Ministry witnesses while they were under cross-examination. Mr. Palmer was asked in his evidence-in-chief whether any schools had been disposed of that would have

met the CSF's needs. His response was that while some sites were available, they were not legitimately cost effective, giving Belmont Secondary as an example. He testified that Belmont Secondary, like Steveston Secondary, was a very large site whose value was very much part of it being sold as a whole rather than in parts. In any event, since the CSF had not been pursuing this site, a lack of funding played no role in the CSF's ability to acquire it.

[6367] The plaintiffs take the position that a lack of speedy funding outside Capital Planning Cycles is the CSF's largest obstacle to acquiring surplus schools. In the plaintiffs' submission, the Province's failure to provide the CSF with funding to acquire surplus school facilities or other properties that become available outside the Ministry's regular Capital Planning Cycles is a result of the Province choosing to prioritize other things.

[6368] The defendants do not appear to disagree that the capital funding system, specifically regarding sites, is not nimble. However, in their view, school districts must nevertheless make a solid case for spending capital funds. They point out that in many cases, the CSF sought to acquire surplus sites it ultimately did not want, pointing to the CSF's pursuit of McTavish Elementary. In the defendants' submission, the plaintiffs have not identified any serious missed opportunities.

[6369] I agree with the plaintiffs that a lack of funds is the primary reason that the CSF was unable to acquire either Kilgour Elementary or Dunach Elementary when it wanted to do so in 2011. That year, the Ministry approved some limited Expansion Projects. Included in that, the Minister chose to support the Southeast False Creek Project in Vancouver (West), where the CSF had the greatest need. Because the Ministry has been pursuing other priorities, as I develop in Chapter XLII, Lack of Funds and A Capital Envelope for the CSF, it has devoted limited funds to School Acquisition Projects for the CSF.

[6370] On the other hand, the CSF has sought a number of projects that were not justified. In my view, the Minister was fully justified not approving the use of funds for the Steveston Secondary Site, the South McLennan Properties or McTavish

Elementary. It was also justified not providing the CSF with funds to acquire Belmont Secondary, which the CSF never requested, and Burquitlam Elementary, which the CSF was not interested in.

[6371] In any event, the CSF has not fully lost its ability to acquire either Kilgour Elementary or Dunach Elementary. More importantly, the lack of funding has not resulted in rightsholders not receiving what they are entitled to. École Élémentaire des Navigateurs provides an educational experience equivalent to that afforded to the majority. The CSF's programme in Abbotsford does not exist yet, and the numbers do not yet warrant a homogeneous school. Thus, while the CSF may want to have access to funding outside the Capital Planning Cycle process, the evidence falls short of showing that the lack of such funding has infringed on any s. 23 rights.

4. Conclusion: The First Phase of a School Acquisition Project

[6372] In the CSF's submission, all the evidence reveals that the CSF has particular problems acquiring school sites. They point in particular to the Province's preference for the CSF to acquire surplus majority facilities, the requirement that projects be approved for funding commencing three years in advance, and the Province's tendency not to get involved in matters in aid of the CSF.

[6373] In my view, the Province rightfully favours the CSF acquiring surplus school sites above private sites, just as the CSF does. The Ministry is also fully justified in compensating majority boards for those transfers. I find that the CSF has not been disadvantaged by any of the Ministry's three policies concerning school closures and disposals. I also find that while a lack of speedy funding outside the Ministry's Capital Planning Cycle creates challenges for the CSF, it has not caused the CSF to miss out on any serious opportunities to acquire former schools, to the detriment of rightsholders.

[6374] The larger issue is the Ministry's policy requiring the CSF to identify sites without Ministry assistance. The Ministry is obligated to ensure that the CSF has access to space where the numbers so warrant. By relying on the CSF to identify

sites and recently denying the CSF assistance, the Ministry's capital funding system concerning School Acquisition Projects is contrary to s. 23 of the *Charter*.

F. The Second Phase of a School Acquisition Project: A Renovation or Replacement

[6375] After the CSF acquires a former school site, it may want to request a renovation or a replacement. In particular, the CSF often requests an elementary/secondary school, and requires an addition, renovation or replacement to convert an existing school into one that offers both elementary and secondary school amenities. In accordance with the Ministry's process for Site and School Acquisition Projects, the CSF must request that aspect of the project by way of a second capital request. The plaintiffs take the position that separation of those two steps creates a system that does not respond to the CSF's needs.

1. Facts

[6376] Mr. Miller advised that, after the CSF acquires a surplus school, the Ministry often supports some immediate renovations to prepare the asset for occupancy and to perhaps improve the functionality of the building. Renovations at the time of transfer are intended to put the facility into a state where it could be occupied and used, but not to remedy all deficiencies.

[6377] If the CSF wants to expand the building or to make major changes like a full renovation or replacement, the CSF, like all other school districts, is expected to make those requests in its Capital Plan Submission. Those requests are compared to other requests for Facility Condition and Expansion Projects across the Province. The Province funds the highest-priority projects within the Capital Envelopes allocated to it by Treasury Board.

[6378] This practice is borne out in the evidence. Oftentimes, when the CSF acquires a former school, the Ministry will fund renovations at the same time as the approval of the first phase of the School Acquisition Project to ready the school for occupancy by the CSF. When the CSF acquired Windebank Elementary (now École

Élémentaire Deux-Rives (Mission)) from SD75-Mission, the Ministry funded renovations that allowed SD75-Mission to ready the school for use by the CSF. The Ministry also funded cosmetic and functional renovations to the former Princess Anne Elementary (now École Élémentaire Océane (Nanaimo)) to prepare it for occupancy when the CSF acquired it from SD68-Nanaimo-Ladysmith. When the CSF acquired Terry Fox Secondary (now École des Pionniers (Port Coquitlam)) from SD43-Coquitlam, the Ministry funded \$1 million in immediate health and safety renovations.

[6379] In the early years, when capital funding was readily available, the CSF also frequently received funding to renovate their schools in the years immediately following an acquisition, as well as relatively fast approval for necessary renovations or replacements. After the CSF acquired École Victor-Brodeur (Victoria) in about 1998, the Ministry funded health and safety renovations, then a full replacement as a Building Condition Project once it had sufficient funds to do so, in 2004.

[6380] The situation with École des Pionniers (Port Coquitlam) was similar. The Province funded millions of dollars of renovations to École des Pionniers between 2000 and 2007. The CSF began requesting a replacement in 2009. In 2012, the Ministry announced the École des Pionniers Replacement Project on the same site as a seismic project. The tendering process for the École des Pionniers replacement project finished in the spring of 2016.

[6381] When capital funding was readily available, the Province tended to approve the second phase of projects rather quickly. The CSF acquired École André-Piolat (North Vancouver) in 1998. It requested a replacement of the school in 1999. That project was approved in 2000. In 1999 or 2000, the CSF also received speedy approval of both a site acquisition and a new school construction in Surrey. Of course, this largely resulted from the fact that the CSF had lost its leased facilities in SD36-Surrey to fire.

[6382] When the CSF was working toward its project in Comox, the Ministry approved the second phase of the CSF's proposed School Acquisition Project

quickly after it approved the first phase. Indeed, that aspect of the project was approved well before the CSF and SD71-Comox Valley agreed on a site for the CSF to acquire. As a result, there was no break between the first and second phases of the School Acquisition Project. The same occurred when the CSF was working toward its School Acquisition Project in Campbell River: the Ministry expedited the second phase of the project, allowing both phases to proceed at the same time.

[6383] In more recent years, though, the CSF has seen less success having the second phase of its School Acquisition Projects approved.

[6384] There has been a delay with the second phase of work on École Élémentaire Océane (Nanaimo), but I do not find the Ministry responsible. The CSF acquired École Élémentaire Océane in about 2004. The school was acquired with a view to accommodating both elementary and secondary students. Although the CSF foresaw the need for renovations to add space for secondary programming, it did not inform the Ministry of those needs. The CSF did point to the need for an addition for secondary students or a reconstruction of the school in its feasibility work, but only as a “future option”.

[6385] Thereafter, the CSF never requested the addition it believed it would need to accommodate secondary students at École Élémentaire Océane. It was only in 2010 that the CSF began seeking space for middle school students, and in 2013/14 that the CSF began seeking secondary space at École Élémentaire Océane. Thus, I find that the Ministry’s capital planning system is not at fault for the second phase not proceeding expeditiously. Of course, given the lack of capital funding in this period, it is unlikely that it would have gone forward. I also find that the facilities in Nanaimo meet the appropriate standard, so the two-phase process has not interfered with s. 23 rights.

[6386] Kelowna presents a similar situation. When the CSF acquired the former Central Okanagan Academy, the CSF did not tell the Ministry it anticipated the need for a secondary addition. It told the Ministry that acquiring Central Okanagan Academy would provide “a unique opportunity to acquire a property that offers the

CSF with the ability to immediately offer a full complement of K-12 programs to our students.” Then, the school met the CSF’s secondary needs for a short period of time. The CSF did not begin requesting an addition for a secondary programme for two Capital Planning Cycles.

[6387] While the Ministry saw the need for a secondary school Expansion Project as a high priority, the project went unsupported because the Ministry had no capital funding available for the project. When the project changed to a Facility Condition rather than an Expansion Project, the Ministry no longer saw it as a high priority because the school’s FCI score was relatively strong. In any event, I find that the facilities in Kelowna meet the appropriate standard, so the two-phase process has not interfered with s. 23 rights in Kelowna.

[6388] With École Élémentaire Anne-Hébert (Vancouver (East)), the CSF did not receive any renovations along with the transfer of the school to the CSF. The CSF prepared feasibility work examining the cost of upgrading the school, but was informed the renovations would not be performed along with the transfer. Thereafter, the CSF began seeking a renovation or replacement to the school. To date, those projects have not gone forward because of a lack of funding for Building Condition Projects. Of course, I am also satisfied that École Élémentaire Anne-Hébert is in equivalent condition to majority schools subject to overcrowding that would be remedied if the CSF were to start a programme in the Proposed Northeast Vancouver Catchment Area-- a project for which it has not actively sought to acquire a site. Indeed, it refused some sites on the east side of Vancouver offered by SD39-Vancouver.

[6389] Mission and Chilliwack present different situations in the sense that the CSF has long requested Building Condition Projects, but the projects they request are not the type that the Ministry’s capital funding system will respond to. In Chilliwack, the CSF acquired École Élémentaire La Vérendrye as one of its earliest capital projects in the late 1990s. Despite repeated capital requests to build an addition or replace the school, the École Élémentaire La Vérendrye Replacement Project never went

forward. This is largely because the Ministry's Building Condition Driver focuses on a building's economic life rather than building functionality. The facility's condition-- particularly its lack of owned gymnasium space and its library located in a portable-- is not ideal. However, despite those problems with the facility, in my view the numbers are receiving more than what they are entitled to: homogeneous instruction.

[6390] Similarly, the CSF acquired École Élémentaire Deux-Rives in Mission from SD75-Mission in the late 1990s, which allowed it to consolidate heterogeneous Programmes Cadres in Abbotsford and Mission. The Ministry funded renovations to the school when the CSF acquired it. The school has a very small gymnasium. The Ministry has not funded a second set of renovations or an addition of a new gymnasium because the Ministry's Building Condition Driver focuses on the building's economic life rather than building functionality.

2. Discussion

[6391] The CSF raises issue with the two-phase process for School Acquisition Projects.

[6392] The plaintiffs say there are only three instances where the CSF was able to successfully achieve an immediate replacement project along with a School Acquisition Project: in Comox, Campbell River and Surrey.

[6393] The plaintiffs attempt to downplay the successful two-phase process in Comox by arguing that the CSF was at the mercy of SD71-Comox Valley and its desires regarding its surplus properties. They say SD71-Comox Valley was placing the needs of its students ahead of the needs of the CSF's students, necessitating intervention by the Ministry. They note the long period of time between project approval and construction. In my view, the CSF was not at the mercy of SD71-Comox Valley, as the CSF was exceptionally involved in the school closure process in that community, and was able to have some input into the decisions taken. In any event, the relationship between SD71-Comox Valley and the CSF says nothing

about the two-phase process for School Acquisition Projects. In fact, the second phase of the project was expedited, mitigating any impact from the process proceeding in stages.

[6394] The primary issue that the plaintiffs refer to in connection with Campbell River is the delay between project approval and construction. They also note the lack of Ministry involvement. Again, this does not relate to the two-phase approval process. It is apparent that the delay arose out of the fact that the Minister approves capital expenditures three years in advance. In this instance, the three-year delay gave the CSF time to identify an appropriate site and negotiate a subdivision with the municipality. I do not find the delay problematic. I find it appropriate.

[6395] In connection with École Gabrielle-Roy (Surrey), the plaintiffs argue the acquisition and replacement were anomalous. The plaintiffs therefore take the position that it cannot be taken as suggesting that the Province's capital funding system will fix any of the facility condition problems at issue in the claim. I agree that is the case.

[6396] The plaintiffs acknowledge three instances where the approach of requesting a replacement for an old majority asset has resulted in funding for a replacement. They mention the replacements that went forward at École André-Piolat (North Vancouver), École Victor-Brodeur (Victoria), and the planned replacement of École des Pionniers (Port Coquitlam).

[6397] I conclude that the two-phase process resulted in successful replacement projects for École André-Piolat and École Victor-Brodeur. The delay in those two cases was not extreme: since the Ministry was receiving regular injections of capital, the Ministry approved the second phase of the projects in short order. École des Pionniers is similar. The CSF only began requesting a replacement of École des Pionniers in 2010; the project was approved in 2012 as a seismic project and the Ministry advocated with Treasury Board for a replacement facility given the state of the school.

[6398] The plaintiffs take the position that the situation at École André-Piolat cannot be taken as evidence that the two-phase process will respond to the facility condition problems at issue in the claim. I disagree-- the replacement was approved in short order, providing an example of the system functioning well for the CSF.

[6399] In connection with École Victor-Brodeur, the plaintiffs point out that the Province attempted to postpone approving replacement. I do not interpret the evidence in that way. The Ministry asked the CSF to examine other options for sites it could acquire. Upon seeing that replacement was cost-effective, they supported the project in short order. The real reason for the short delay between the request and approval was a lack of a Capital Envelope in 2002 following the election of a new government.

[6400] Turning to École des Pionniers, the plaintiffs say the École des Pionniers Replacement Project took some 13 years to generate an approval for a replacement, and even then went forward as a seismic mitigation project. This completely misconstrues the facts. The CSF did not request the École des Pionniers Replacement project until 2010. It was approved in 2012. The project was approved after two years.

[6401] There are several instances where the CSF has requested a second-phase project following a school acquisition, but no project has gone ahead to date. These include École Élémentaire La Vérendrye (Chilliwack), École Élémentaire Deux-Rives (Mission), École Élémentaire Rose-des-Vents (Vancouver (West)), École L'Anse-au-Sable (Kelowna), École Élémentaire Océane (Nanaimo) and École Élémentaire Anne-Hébert (Vancouver (East)).

[6402] In the plaintiffs' submission, the evidence reveals that the capital funding system does not respond to the CSF's needs to have these facilities upgraded or replaced. The plaintiffs take the position that the majority schools that were transferred to the CSF were in poor condition, noting in particular the schools housing École Victor-Brodeur and École Élémentaire La Vérendrye. They also note

that Mr. Miller acknowledged that school districts would tend to close and dispose of their poorest-quality facilities.

[6403] In my view, these failures can be grouped into several categories. For École Élémentaire La Vérendrye (Chilliwack) and École Élémentaire Deux-Rives (Mission), the problem is with the Ministry's Building Condition Driver, not the two-phases for School Acquisition Projects. The Ministry's funding system does not prioritize building functionality; it prioritizes buildings continuing to function as buildings. I address that breach in Chapter XXXVII, Building Condition Projects and the Building Condition Driver, and conclude that it is justified.

[6404] Second, with respect to École Élémentaire Rose-des-Vents (Vancouver (West)) and École Élémentaire Anne-Hébert (Vancouver (East)), the problem with the facilities is not so much building condition or the need for a replacement; it is a lack of space. Those instances invoke the Ministry's Enrolment Driver, not the need for a second approval to remedy building deficiencies on the same site. I address those concerns in Chapter XXXVI, Expansion Projects and the Enrolment Driver, where I conclude that the Ministry's policies of not funding Expansion Projects between 2005 and 2011 and comparison between majority and minority projects at the provincial level are unjustifiably contrary to s. 23.

[6405] École L'Anse-au-Sable (Kelowna) and École Élémentaire Océane (Nanaimo) fall in a third category. It is only with respect to those two schools that the two-stage process is actually at issue. In those instances, the CSF acquired a site and the capital funding system has not responded to the CSF's need for secondary school Expansion Projects. However, the CSF did not request a secondary addition at École Élémentaire Océane until many years after it acquired École Élémentaire Océane. Instead, the CSF asked for a full secondary school that was not justified. The CSF also told the Ministry it had sufficient space for a secondary programme at École L'Anse-au-Sable. The Ministry's two-stage funding system therefore cannot be faulted for failing to provide the CSF with the second phase of those projects. In any event, I find that the minority is receiving what they

are entitled to in those communities, so the two-stage process has not engendered any breach.

[6406] The plaintiffs suggest the Province's approach, which requires the CSF to acquire an asset then compete with the capital funding system to replace or renovate a school facility is not working. They note that due to the operation of the Building Condition Driver, and the relative priority accorded to renovation and replacement projects, "the deck is stacked against the [CSF] when it seeks such funding."

[6407] To put it bluntly, the two-phase process is a red herring. The complaints the plaintiffs raise really have to do with the Facility Condition Driver or a lack of funding for Expansion Projects. In the only two instances where the two-phase process resulted in the CSF not receiving an approval to improve building functionality-- at École L'Anse-au-Sable and École Élémentaire Océane-- the CSF did not ask for those projects. Moreover, the evidence is clear that in the early years, when the Ministry was receiving regular injections of capital to put toward Expansion and Building Condition Projects, the two-stage process worked very well, and resulted in swift project approvals where the CSF asked for them.

[6408] Once again, the Plaintiffs' arguments really boil down to a lack of funds: the Ministry has not been funding Expansion and Building Condition Projects on a regular basis since 2005. If the Ministry were spending more on capital projects, many of the problems that the plaintiffs complain of would be eliminated.

G. Justification

[6409] I conclude that the Ministry's Capital Plan Funding System related to CSF School and Site Acquisition Projects is contrary to s. 23 to the extent that, in recent years, the Ministry has required the CSF to take the lead securing space from majority school boards with insufficient Ministry assistance. The remaining question is whether that breach is justified.

[6410] I set out the justification framework in Chapter IX, Justification. There, I explain that since the plaintiffs' claim is grounded in the unconstitutional effects of facially neutral legislation, the *Oakes* framework rather than the *Doré* framework ought to apply. The purpose of that scheme, which the plaintiffs acknowledge to be pressing and substantial, is the "fair and rational allocation of public funds". While I accept this is part of the purpose, the evidence from Mr. Stewart and Mr. Palmer persuade me that this particular measure is also intended to further the objective of ensuring school board autonomy. In the context of Canada's public law system, the goal of ensuring that statutory bodies like school boards act autonomously from government furthers the rule of law and is therefore pressing and substantial.

[6411] The rational connection step of the *Oakes* analysis aims to avoid arbitrary legislative regimes by asking whether there is a connection between the infringing measure and the valid government objective.

[6412] I am satisfied that there is a rational connection between the goal of furthering school board autonomy and a measure that sees the Ministry relying on school boards to identify sites for acquisition. The CSF is typically in the best position to know its own needs at the local level and identify appropriate sites. The policy ensures that the CSF identifies and acquires sites that are suitable to it, and the Ministry does not intervene in the CSF's operations except when it is appropriate to do so.

[6413] The minimal impairment stage of the test asks whether the infringing measure impairs the right or freedom as little as possible. It asks whether there are less drastic means by which the Province could have achieved its objective in a real and substantial manner. That the Province is engaging in a balancing of interests and an allocation of scarce resources weighs toward giving the Province some deference. It is a middle level of deference that takes into account the social good and value that society places on education.

[6414] In this case, I do not find that the requirement that the CSF identify sites without assistance is minimally impairing. Previously, the Ministry intervened and

advocated for the CSF's and assisted it in negotiations upon request. With that allowance, the measure was tailored to the CSF's needs. More recently, the Ministry has taken a passive approach and refrained from assisting the CSF in favour of maintaining neutrality between school boards. While that goal may be worthwhile, it has created a system whereby the CSF is left to the mercy of majority boards. The Minister could have achieved his objective of respecting autonomy through alternate means. Indeed, the Ministry used many of those alternate means when it assisted the CSF in its early years. It appointed an independent facilitator in Vancouver to assist the CSF to acquire the Oakridge Site. It tied the transfer of CSF assets to capital approvals. It did not sit idly by and wait for the CSF and majority school boards to reach agreement. I conclude that the Ministry's requirement that the CSF identify sites without Ministry assistance fails to be justified at the minimal impairment stage.

[6415] Since the infringement fails at the minimal impairment stage, I consider that the Ministry's policy of neutrality between school districts and requirement that the CSF negotiate for sites on its own is not justified as a reasonable limit in a free and democratic society.

H. Remedies

[6416] Currently, the Ministry's framework requires districts to obtain approval from the Minister before disposing of a school facility, except when disposing of that facility to another district, independent school, or to an agency or organization for an alternative community use. The plaintiffs seek a declaration that framework is of no force or effect to the extent that it does not respond to the CSF's specific capital needs. They also ask for a declaration that the disposal of government-owned property (including majority board property) disadvantages the CSF and does not take into account s. 23 of the *Charter*. Since I find no breach associated with the various disposal policies in place since 2002, I do not find it necessary to grant that relief.

[6417] The plaintiffs also seek an order requiring the Minister to invoke ss. 74(1), 168.04, and 171.1 to 171.3 of the *School Act*, regarding the surplus properties of majority boards, in order to secure sites acceptable for the CSF. As I explain in Chapter X, Remedies, I do not consider that those sections give the Minister the power that the CSF suggests it does.

[6418] It is challenging to craft a remedy to respond to the unconstitutional policy requiring the CSF to identify sites for acquisition without Ministry assistance. The plaintiffs seem to agree that it is appropriate for the CSF to take the lead to identify sites in some circumstances. It is best placed to know where its population lies and where it needs new schools. Many witnesses suggested it would not be appropriate for the Ministry to intervene unless the CSF had made a request. The primary issue is that the Ministry's recent approach has been to refuse the CSF's requests for assistance. As a result, I will simply declare that the policy unjustifiably infringes s. 23 of the *Charter*, and require the Province to craft a policy or legislation to ensure that Government actors comply with s. 23.

[6419] I declare:

- a) The Ministry's policy requiring the CSF to identify and negotiate for site acquisitions without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.

[6420] I address the appropriate remedy for that situation in Chapter XLIII, Duty to Assist the CSF and the Education Mediation Regulation. As I discuss there, rather than striking down the Ministry's current practice, I order the Province to craft a law or policy to assist the CSF to identify appropriate space upon assistance. A formal law or policy is necessary to give the CSF the certainty it needs that the Ministry's assistance will be forthcoming.

I. Summary

[6421] I find that the majority of the Ministry's policies concerning Site and School Acquisition Projects by the CSF are within the Province's jurisdiction to make, and are not contrary to s. 23 of the *Charter*.

[6422] The Minister had the jurisdiction to decide to acquire the CSF's earliest assets from majority school boards, and to compensate majority boards for those transfers. Those decisions did not trench on the minority's right to management and control, nor did they deprive rightsholders of what they are entitled to. They are therefore constitutionally permissible.

[6423] With connection to the first phase of Site and School Acquisition Projects, the Minister's three policies for school disposals were all within the Province's jurisdiction, and did not trench on the minority's rights to management and control or minority language educational facilities. I also find that while a lack of speedy funding outside the Ministry's Capital Planning Cycle creates challenges for the CSF, it has not caused the CSF to miss out on any serious opportunities to acquire former schools, to the detriment of rightsholders.

[6424] In connection with the second phase of Site and School Acquisition Projects, I do not find that the policy of approving Expansion and Building Condition Projects following an acquisition has harmed the CSF. The systemic issues the plaintiffs raise are ones that relate to the framework for approving Expansion and Building Condition Projects, and were addressed in the preceding chapters. The problem is not a two-phase process; the problem is a lack of funds.

[6425] The only real issue with respect to the system concerning Site and School Acquisition Projects is the Ministry's policy requiring the CSF to take the lead identifying sites without Ministry assistance. That policy disadvantages the CSF, and is contrary to the Ministry's duty to preserve and promote minority language education. The policy is not minimally impairing of rightsholders' rights, and therefore is not a reasonable limit in a free and democratic society. To remedy this

situation, I require the defendants to consider a formal legislative amendment or written policy to give the CSF the assurances it needs that Ministry assistance will be forthcoming.

XXXIX. COMMUNITY PLANNING

[6426] Tangentially related to Site Acquisition Projects, the plaintiffs raise issue with the plaintiffs' ability to acquire sites for Expansion Projects from local municipalities.

[6427] The plaintiffs plead that local governments are required to consult with both the CSF and local majority school boards before adopting an Official Community Plan. They also plead that the Official Community Plans of local governments have not incorporated the CSF's present and future facility needs. They urge that Official Community Plans prioritize the needs of majority school districts, but not the CSF. In that connection, the plaintiffs seek a declaration that the defendants' capital planning system is invalid and contrary to s. 23 of the *Charter* because the official community plans have prioritized the needs of majority school boards.

A. Community Planning Framework

[6428] The plaintiffs' legal argument is based in part on the *Local Government Act*, R.S.B.C 1996, c. 323 [*Former LGA*]. Effective January 1, 2016, most of the *Former LGA* was revised and re-enacted as the *Local Government Act*, R.S.B.C. 2015, c. 1. Because all the Official Community Plans they cite were established pursuant to the old legislation, I proceed based on the provisions in the *Former LGA* without considering the extent to which they carry over into the current legislation.

[6429] Part 26 of the *Former LGA* concerns "Planning and Land Use Management". It applies in all the communities in the claim except for Vancouver. Pursuant to Part 26 of the *Former LGA*, municipalities have the power to adopt, by by-law, official community plans (s. 876), which must include designations for "the approximate location and type of present and proposed public facilities, including schools..." (s. 877(1)(f)).

[6430] With regard to the University Endowment Lands, the *University Endowment Land Act*, R.S.B.C. 1996, c. 469, gives the Minister of Community, Sport and Cultural Development (“Minister of Community and Sport”) the power to enact bylaws applicable to UEL, including regarding the development and use of land. Such a bylaw may include any provision that could be made in a bylaw of a municipal council under Part 26 of the *Local Government Act* (ss. 12(1)(a), 12(2)(a)). Thus, the Minister of Community and Sport has the power to enact Community Plans as do other municipalities.

[6431] Vancouver has similar powers and duties. Pursuant to Part XXVII (Planning and Development) of the *Vancouver Charter*, S.B.C. 1953, c. 55, the City of Vancouver has the power to adopt, by by-law, an official development plan, which may designate sites for schools (ss. 561(1), (2)(a)-(b), and (c)(ii); 562(1)).

[6432] With regard to UBC, pursuant to the *Municipalities Enabling and Validating Act (No. 3)*, S.B.C. 2001, c. 44, Part 10 – 2010, the UBC Land Use Plan for the UBC Point Grey campus is the former “UBC Area official community plan” (ss. 35-37). The board of governors of UBC is responsible for developing the land use plan, but only the Minister of Community and Sport may adopt, or reject, a land use plan submitted by the board of governors (ss. 38, 42(1)). The Minister of Community and Sport may also establish the matters to be included in a land use plan and may impose consultation requirements (ss. 38(2)(a) and (b), 40)

[6433] The plaintiffs argue that the Court must take judicial notice of the official community plans for all the communities in the claim because they are municipal bylaws (*Community Charter*, S.B.C. 2003, c. 26, s. 163(1)). The defendants did not dispute this. As a result, I will take judicial notice of, and have considered, the following municipal bylaws pointed to by the plaintiffs:

City of Richmond, by-law no. 9000, *Official Community Plan*, Schedule 1, Moving Towards Sustainability (19 November 2012).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.2A, *Thompson Area Dover Crossing Sub-Area Plan* (19 February 2001).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.2B, *Thompson Area Terra Nova Sub-Area Plan* (19 February 2001).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.4, *Steveston Area Plan* (22 June 2009).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.6A, *Broadmoor Area Ash Street Sub-Area Plan* (19 February 2001).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.10, *City Centre Area Plan* (14 September 2009).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.11A *West Cambie Area Plan* (24 July 2006).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.11B, *East Cambie Area Plan* (21 October 2002).

City of Richmond, by-law no. 7100, *Official Community Plan*, Schedule 2.12, *Bridgeport Area Plan* (14 September 2009).

City of Richmond, by-law no. 9000, *Official Community Plan*, Schedule 2.14, *Hamilton Area Plan* (25 February 2014).

City of Burnaby, by-law 10709, *Official Community Plan* (May 2014).

City of Coquitlam, by-law no. 3479, *Citywide Official Community Plan* (28 April 2014) (esp. Part 3, Area and Neighbourhood Plans).

City of Port Moody, by-law no. 2955, *Official Community Plan* (14 October 2014).

City of Abbotsford, by-law no. 1483-2005, *Official Community Plan* (15 September 2008).

District of Mission, by-law no. 4052-2008, *Official Community Plan* (19 May 2015).

City of Chilliwack, by-law no. 4025, *2040 Official Community Plan* (21 July 2015).

City of Kelowna, by-law no.10500, *2030 Official Community Plan: Greening Our Future* (28 September 2015).

Corporation of the City of Penticton, by-law no. 2002-20, *Official Community Plan* (20 May 2014).

District of Squamish, by-law no. 2100, *Official Community Plan* (2009).

Resort Municipality of Whistler, by-law no. 1021, 1993, *Official Community Plan* (30 October 2012).

Village of Pemberton, by-law no. 654, 2011 *Village of Pemberton Official Community Plan* (2011).

City of Victoria, by-law no. 12-013, *Official Community Plan* (11 June 2015).

Corporation of the Township of Esquimalt, by-law no. 2646, *Official Community Plan* (February 2014).

District of Oak Bay, by-law no. 4620, *Official Community Plan* (2014).

District of Saanich, by-law no. 8940, *Sustainable Saanich: Official Community Plan* (8 July 2008).

City of Colwood, by-law no. 999, *Official Community Plan* (23 June 2014).

City of Langford, by-law no. 1200, *Official Community Plan* (15 June 2015).

City of Langford by-law no. 1201, *Appendices No. "A" to "R" to Zoning Bylaw No. 300: Design Guidelines and Development Permit Areas*, Appendices P and R (March 2014).

Town of View Royal, by-law no. 811, *Official Community Plan* (June 2015).

District of Highlands, by-law no. 277, *Official Community Plan* (November 2013)

District of Metchosin, by-law no. 258, 1995, *Official Community Plan* (June 2012).

District of Sooke, by-law no. 400, *Official Community Plan* (12 November 2014).

District of Central Saanich, by-law no. 1600, *Official Community Plan* (21 January 2013).

District of North Saanich, by-law no. 1130, 2007, *Official Community Plan* (20 April 2015).

Town of Sidney, by-law no. 1920, *Official Community Plan* (May 2007).

City of Nanaimo, by-law no. 6500, *Plan Nanaimo: Official Community Plan 2008* (2008)

District of Sechelt, by-law no. 492, *Official Community Plan* (2010).

City of Nelson, by-law no. 3247, *Official Community Plan* (2013).

City of Vancouver, by-law no. 6754, *Coal Harbour Official Development Plan* (November 2002)

City of Vancouver, by-law no. 9393, *East Fraser Lands Official Development Plan*, (12 December 2006).

City of Vancouver, by-law no. 4812, *False Creek Official Development Plan*, (28 April 2015).

City of Vancouver, by-law no. 6650, *False Creek North Official Development Plan* (10 April 1990).

City of Vancouver, by-law no. 9073, *Southeast False Creek Official Development Plan* (April 2007).

[6434] The plaintiffs also argue that the Court must take judicial notice of the community plan for the University Endowment Lands, which is enacted pursuant to a Ministerial Order, and the UBC Land Use Plan, which was adopted by Order-in-Council (*Evidence Act*, R.S.B.C. 1996, c. 124, s 25), which I accept. I therefore also take into account the UEL Community Plan (Ministerial Order, 14 October 2005 as

amended by Ministerial Orders M096 (9 April 2013), M008 (15 January 2014), as well as the amendment made by *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, S.B.C. 2008, c. 6) and the UBC Land Use Plan (“Land Use Plan: The University of British Columbia | Point Grey Campus”, adopted by O.I.C. 427-2010 (25 June 2010), *Point Grey Campus Lands Regulation*, B.C. Reg. 195/2010, and amended by Ministerial Orders M58-2011 (1 March 2011), M177-2012 (27 August 2012), and M160-2015 (2 June 2015), consolidated to 2 June 2015).

B. Community Planning and School Board Needs

[6435] Pursuant to s. 881 of the *Former LGA* and s. 562.1 of the *Vancouver Charter*, if Vancouver or any of the municipalities in the claim (other than UBC and UEL) adopt an Official Community Plan for an area that includes the whole or any part of any school districts, then the local government “must consult with the boards of education for [those] school districts”. All the municipalities must do so whenever they prepare or revise the community plan, and the City of Vancouver must do so in any event at least once in each calendar year. The plaintiffs say this obligation applies equally to the CSF and majority-language school boards, which the defendants do not dispute.

[6436] There is no evidence of municipalities unilaterally consulting with the CSF about its need for space as part of the community planning process. I note that the City of Vancouver and officials from UBC consulted extensively with the CSF about its need for space and were open to the CSF sharing school sites that had been set aside for SD39-Vancouver. However, those negotiations did not form part of the community planning process.

[6437] Municipalities have not involved the CSF in that process despite efforts taken by the CSF to notify municipalities about the CSF’s operations. In about 2011, the CSF sent a series of letters to municipalities where it operates schools and asked to meet to discuss the CSF’s operations and plans. The CSF specifically wrote to municipal officials in Richmond, Victoria, Chilliwack, Burnaby, New

Westminster and Coquitlam. Those letters led to a meeting with officials from Richmond, and a meeting with and offer of assistance from the Mayor of Coquitlam. Nothing concrete arose out of those discussions. The CSF did not ask to be involved in official community planning.

[6438] Mr. Miller conceded that in practice, Official Community Plans tend to identify sites for majority school districts, and not for the CSF. On my review of the Official Community Plans, none make reference to the CSF except for the Official Community Plan for Esquimalt, where École Victor-Brodeur is located. All of them refer to the importance of schools to serve the local community: sometimes with reference to the need for new school sites, and sometimes with reference to the need to protect schools from closure.

[6439] SD39-Vancouver has sometimes been able to acquire school sites directly through the development process. The evidence in this case shows that school sites were set aside for SD39-Vancouver in the International Village and Southeast False Creek areas of Vancouver and in several places at UBC. SD39-Vancouver was not charged for at least one site identified for it at UBC.

[6440] In other communities, though, Official Community Plans have not had the type of concrete results for majority school boards that SD39-Vancouver enjoys. Mr. Palmer confirmed that Surrey does not set aside sites for SD36-Surrey, so it must compete for sites with real estate developers.

[6441] Mr. Miller further conceded that some majority-language districts have benefited from co-locating schools on municipal park land. The CSF has benefited from this on occasion, too, most notably at École Victor-Brodeur (Victoria) and by using the Capital News Centre for École L'Anse-au-Sable (Kelowna) for a period of time. I also note that the CSF collaborated with the Vancouver Parks Board to build an offsite field for École Secondaire Jules-Verne (Vancouver).

C. Discussion

[6442] The plaintiffs argue the Province has not intervened in community and land use planning in favour of the CSF.

[6443] As one issue, the plaintiffs urge that the Ministry has always left it to the CSF to work with municipalities to identify sites. They argue that municipalities have a greater incentive to assist majority boards to identify sites than the CSF. They suggest the CSF is disadvantaged by the Ministry's policy of leaving the CSF to work with municipalities without Ministry assistance in the same manner as it does majority school boards. I have already addressed this argument in the context of the process for Site and School Acquisitions, where I conclude that the Ministry's policy requiring the CSF to identify sites without Ministry assistance is contrary to s. 23 of the *Charter*.

[6444] The plaintiffs also say the Province has not exercised its powers to supervise Official Community Plans under the *Former LGA* in favour of the CSF. They note that s. 873.2 of the *Former LGA* gave the Province the power to establish policy guidelines governing the process for developing and adopting Official Community Plans, as well as their content. They say the Province should have established policy guidelines requiring local governments to take into account the CSF's need for school sites. Then, local governments would have been required to consider those guidelines pursuant to s. 876(3) of the *Former LGA*. They also suggest the Province could have, but did not, object to Official Community Plans pursuant to s. 874 of the *Former LGA* on the basis that they are contrary to the public interest.

[6445] I note that the Province does not enjoy similar powers over the City of Vancouver pursuant to the *Vancouver Charter*.

[6446] The plaintiffs also argue that when the Minister of Community and Sport exercises its planning authority over UEL and the UBC Point Grey campus pursuant to the *University Endowment Land Act* and the *Municipalities Enabling and*

Validating Act (No. 3), the Minister is required to bear in mind the CSF's school site needs in all of Vancouver (West). They ground this argument in the Province's positive obligation under s. 23 to provide rightsholders with minority language education facilities where the numbers so warrant. They argue that although the CSF had some opportunities to acquire sites outright or in combination with SD39-Vancouver at UBC and the UEL Site, the Province has not exercised its powers of supervision in that area to ensure sites are set aside for the CSF.

[6447] The plaintiffs therefore seek a declaration that the defendants' capital planning system is invalid and contrary to s. 23 of the *Charter* because the official community planning and land use planning of local governments have prioritized the needs of the majority.

[6448] The defendants concede that if municipalities take account of the needs of any school districts in their Official Community Plans, they tend to take account of majority school board needs. However, they note that the CSF did not seek to be part of the community planning process until this litigation. They also suggest that majority school boards do not see a windfall or many benefits at all as a result of community planning. Further, in the defendants' submission, the remedy sought by the plaintiffs-- striking down the capital funding system-- would have no impact on the operations of municipalities, who are not represented in these proceedings.

[6449] As I see it, there is insufficient evidence of the deliberations of the municipalities at issue to rule on whether the Province ought to have taken positive steps to ensure they adequately took into account the CSF's needs. None of the municipalities is a party to this action. Moreover, the relief sought-- striking down the capital planning system for education-- has no link whatsoever to the Province's oversight of municipal community planning. The plaintiffs do not seek relief in the nature of mandamus compelling the government to take action in connection with municipal planning, nor did they present evidence related to that head of damage.

[6450] Moreover, there is no evidence to suggest that if the Province had taken steps to control municipalities' community planning processes the outcome would

have been any different for the CSF. There is little evidence of municipalities setting aside sites for majority schools where they ought to have set aside a site for the CSF. In the only areas where sites were clearly set aside for a majority district and not the CSF-- in Vancouver and at UBC-- both the City of Vancouver and UBC were open to the CSF sharing the sites that had been set aside for the majority. The City of Vancouver was willing to cede the International Village Site it had set aside for SD39-Vancouver to the CSF; it was SD39-Vancouver that objected and prevented that from occurring.

[6451] Usually, Canadian municipalities are held to their delegated statutory authority by way of judicial review. Where an aggrieved party believes a municipality has not complied with statutory requirements for enacting a bylaw like an Official Community Plan, their recourse is to challenge the decision pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. If the CSF is concerned that municipalities, UBC or the Minister of Community and Sport acted contrary to their statutory authority by not properly consulting the CSF in community planning decisions, the CSF should challenge those decisions using that process.

D. Justification and Remedy

[6452] I conclude that the Province's policies concerning official community planning are not contrary to s. 23. If I had found otherwise, then it would have been open to the defendants to justify that breach. If I found a breach was not justified, the analysis would have shifted to the question of remedies. Because I find no rights breach and set out the framework for justification and remedies in Chapter IX, Justification and Chapter X, Remedies, respectively, I do not find it necessary to address how I would have addressed those issues.

E. Summary

[6453] I find there is insufficient evidentiary basis for me to conclude that the Province's framework for community planning is contrary to s. 23. This trial, where the municipalities are not parties, is not the appropriate forum to challenge those plans. Nor would the remedies the plaintiffs seek respond to their concerns. If the

plaintiffs want to challenge Official Community Plans, they ought to do so in the appropriate forum, by way of judicial review.

XL. ADMINISTRATIVE REQUIREMENTS OF THE CAPITAL FUNDING SYSTEM

[6454] The plaintiffs urge that to ensure substantive equivalence, the CSF should be exempt from or treated differently in connection with several aspects of the Ministry's capital planning framework: prioritization, PIRs, Area Standards and enrolment projections. Below, I address each of those aspects of the capital planning system, how the CSF has dealt with them, and the extent to which they have or have not infringed on s. 23 in British Columbia.

[6455] As with many other aspects of the systemic claim, the CSF's complaints invoke the jurisdictional lines between the Province and the CSF, which I discuss in Chapter VI, The Respective Roles of the Province and the CSF and avert to throughout these reasons. To reiterate, British Columbia enjoys broad, plenary power over education pursuant to s. 93 of the *Constitution Act, 1867*. That jurisdiction is limited by s. 23. Section 23 places a unique positive duty on governments to make expenditures out of public funds, and to act promptly to prevent assimilation. The Province is also required to cede management and control over aspects of education going to minority language and culture to the minority community, where the numbers so warrant. If the minority takes a decision within its jurisdiction over language and culture, s. 23 requires that the Province not interfere it.

[6456] The Province does, however, continue to have a legitimate interest in crafting an appropriate, constitutionally-compliant framework within which the minority must exercise both its statutory and constitutional duties. The minority is not entitled to any particular education system, and must operate within constitutionally compliant structures set by Government. If the framework the government creates deprives the minority of appropriate education facilities where the numbers so warrant, or interferes with the minority's exercise of its right to

management and control over language and culture, then the framework is unconstitutional.

A. The Ministry's Prioritization Requirements

[6457] The Ministry expects all school districts, including the CSF, to sequentially rank their projects by order of priority. The plaintiffs argue that requirement should not apply to the CSF. In their submission, it is impermissible to require the CSF to decide "which of the unconstitutional situations in the province ... should actually be remedied". They say there is no valid basis for the Province to claim that s. 23 need only be fully implemented in some communities, while in others, the CSF need not provide substantively equivalent school facilities.

[6458] The plaintiffs make arguments in connection with two aspects of the prioritization requirement. For one, they say the prioritization requirement is generally without merit. They also argue that the CSF should not be required to sequentially prioritize its projects because of its unique circumstances.

1. The CSF's Prioritization Practices

[6459] The evidence reveals that the CSF went through three stages in its approach to project prioritization. For many years it sequentially prioritized its projects. Then, it moved to ward-based prioritization. After about 2010, the CSF ceased sequentially prioritizing projects and maintained that all projects were its "number one priority".

[6460] In the CSF's earliest Capital Plan Submissions, it did not sequentially prioritize projects as required by the Capital Plan Instructions. Dr. Ardanaz explained that the CSF did not believe it was possible for it to sequentially prioritize its projects because it did not own facilities, and considered that all of its projects were its highest priority. Instead, the CSF used a system whereby its projects were all prioritized as Priority 1, 2, 3 or 4.

[6461] Dr. Ardanaz explained that after the FEA submitted its December 1997 Capital Plan Submission for 1998/99, the Ministry was critical of the CSF's

approach. So, beginning with its September 1998 Capital Plan Submission for 1999/00, the CSF used the Ministry's standard form and sequentially prioritized its requests. Dr. Ardanaz testified that the CSF Board of Trustees had great difficulty doing so.

[6462] Following that, the CSF sequentially prioritized its capital projects every year until its November 2006 Capital Plan Submission for 2007/08.

[6463] With its November 2006 Capital Plan Submission for 2007/08, the CSF adopted a regional approach to capital planning. It created regions based on geography and demographics, leading to the creation of seven wards. With the exception of the Greater Vancouver region, the CSF's long-term plan was to construct one regional secondary school and a number of feeder elementary schools in each ward. The Lower Mainland would have four secondary or K-12 schools and several elementary schools of varying sizes. CSF staff discussed this plan with the CSF's Planning Officer at the time, Mr. Woycheshin, who expressed approval.

[6464] While the CSF's planning involved use of a ward system, after developing its plans the CSF sequentially ranked all of its proposed projects from across its seven wards. The CSF took the same approach in its October 2007 Capital Plan Submission for 2008/09.

[6465] After Minister Bond instructed her staff to find new ways of working with the CSF in December 2008, the CSF began to push harder against the prioritization requirement. In April 2009, Mr. Bonnefoy presented a new approach to Ministry staff: henceforth, the CSF would divide its capital plan by ward and would only sequentially prioritize projects within those wards.

[6466] Mr. Miller advised that while the Ministry would have preferred provincial ranking, the Ministry did not object to the CSF undertaking its capital planning on a ward basis. In his experience, many districts did so. He suggested the CSF could have submitted a ward-based capital plan through the WebCaps system, then communicate with the Ministry to ensure capital approvals reflected the CSF's

priorities. However, Ministry staff still wanted to have some prioritization within each ward, as it was unlikely the Province could approve all CSF project requests at the same time.

[6467] The CSF did not receive any concrete instructions with respect to how it should submit its next Capital Plan Submission. Of course, only two weeks passed between that meeting and the CSF's submission of its May 2009 Capital Plan Submission for 2009/10.

[6468] In the covering letter for the May 2009 Capital Plan Submission for 2009/10, the CSF indicated its capital plan was prioritized within each of seven wards. The CSF also stressed that its plan was fluid, and might change based on a number of factors: lease terminations; notice of majority board plans to dispose of property; emergence of other sites or buildings that could satisfy high priority requests; older leased buildings becoming unusable due to disrepair; and Ministry identification of opportunities for the CSF to acquire a site so another district could meet its capital needs.

[6469] The WebCaps system did not allow the CSF to submit its Capital Plan Submission by ward. Mr. Bonnefoy raised the issue with Mr. Cavelti, who confirmed his understanding that all four projects for which the CSF submitted PIRs were the CSF's top priorities: projects to replace École Élémentaire Rose-des-Vents (Vancouver (West)), the École des Pionniers Replacement Project (Port Coquitlam), the École L'Anse-au-Sable Secondary Addition Project (Kelowna) and a renovation to École Élémentaire Anne-Hébert (Vancouver (East)).

[6470] Mr. Miller testified that the Ministry was prepared to accept the CSF's ward-based prioritization. He suggested the CSF could have submitted its plan electronically, then hand-ranked the projects and resubmitted it with a separate letter. Mr. Stewart affirmed that he thought it was rational for the CSF to move to a ward-based approach to capital planning. He agreed the approach was consistent with the high-level discussion that had taken place internally to the Ministry.

[6471] On November 17, 2009, the Ministry returned an Echo Report to the CSF that acknowledged its receipt of the CSF's five-year Capital Plan Submission. However, it suggested the CSF had sequentially ranked its priorities. Mr. Bonnefoy wrote to Mr. Stewart and expressed concern that the Echo Report was incorrect. Mr. Bonnefoy returned the Echo Report to the Ministry, and hand-ranked the CSF's projects.

[6472] Mr. Bonnefoy retired at the end of 2009, and was replaced by Mr. Allison at the beginning of 2010. The CSF submitted its first Capital Plan Submission during Mr. Allison's tenure in June 2010: its June 2010 Capital Plan Submission for 2010/11. That year, the amount of funding the CSF requested nearly doubled, and the CSF requested several projects it had never sought before. Mr. Bonnefoy admitted that this was linked to the commencement of this litigation in the same year. However, he refused to admit the CSF's capital plan philosophy changed.

[6473] When the CSF submitted its June 2010 Capital Plan Submission for 2010/11, Ms. Bourgeois, President of the CSF, wrote to then-Assistant Deputy Minister Gorman, and explained that the CSF was engaging in ward-based planning. She appended the CSF's ward-based capital plan, recognizing that WebCaps did not allow for a ward-based submission. She also explained the CSF's view that its priorities were fluid and would change to respond to emerging opportunities.

[6474] Differing from the CSF's approach in 2009, in 2010 the CSF ranked almost all of its proposed capital projects as number one priorities, although a few minor renovation projects were ranked as second- and third-level priorities.

[6475] Mr. Allison also wrote to Mr. Cavelti to confirm that due to the limitations of the WebCaps system, the CSF's priorities were to be as stated in his email rather than as was generated by the defaults of the electronic system. In the Echo Report, the CSF's projects were nevertheless ranked sequentially from 1-30, and did not reflect the CSF's approach of listing almost all priorities as "number one priority".

[6476] The CSF continued to apply its single-prioritization approach in its November 2012 Capital Plan Submission for 2012/13 and its September 2013 Capital Plan Submission for 2013/14. The CSF ranked all of its projects as its highest priority, and requested accelerated funding. The CSF asked for each of its projects to be funded in the first two years of the capital budget, and sought no project funding in years three through five of the plan: the inverse of the requirements in Capital Plan Instructions, which require districts to seek funding in years three to five of the capital budget. The Echo Report identified the projects as being sequentially ranked rather than as all number 1 priorities. The CSF subsequently complained and reconfirmed to the Ministry that all of its projects were its top priority.

[6477] In 2013, the CSF sought \$351,699,177 in capital funding. According to Mr. Palmer, the total capital plan funding for the entire province that year was in the range of \$300 to \$400 million, including \$92 million in AFG funding. Thus, the CSF's request is roughly the same as all the capital funding distributed to all districts that year, and significantly more than the funding for all capital projects across the Province.

[6478] While the Ministry was prepared to accept the CSF's move to a ward-based approach to project prioritization, it was not prepared to accept that the CSF's need for flexibility required it to rank all of its projects as a "#1 priority".

[6479] In 2011, Minister Abbott responded to the CSF's alternate form of ranking projects in the context of the CSF's desire to acquire a site in West Victoria in 2011. He wrote that the CSF's alternative form of ranking was an abdication of its responsibility to undertake critical assessments, leaving them to be decided by the Ministry. He strongly encouraged the CSF to provide a different ranking if it would better reflect its priorities.

[6480] Since then, the Ministry has cited the rankings as they appear in the Echo Reports in correspondence to the CSF. On several occasions, the CSF sent Positioning Letters to the Ministry to request urgent capital project approvals outside

the Capital Planning Cycle. Occasionally, in denying the request, the Minister or another official would avert to the project's priority as reflected in the most recent Echo Report, suggesting the project was not a true priority for the CSF. Mr. Stewart acknowledged that although staff made those statements, they were well aware the CSF did not believe that those priorities were correctly stated.

2. The Necessity of Prioritization

[6481] Mr. Palmer explained that the Ministry's view was consistently that all districts must rank their projects, and are responsible for making those challenging decisions. He also noted that many districts operate in vast rural areas and must prioritize projects across several communities. Further, in large urban districts, like SD43-Coquitlam and SD36-Surrey, districts must rank projects in different areas against one another. He noted that those districts regularly provide sequentially prioritized lists of project requests.

[6482] Mr. Palmer explained that in his view, the CSF's insistence on ranking every project as a number one priority is "exceedingly unhelpful" as it has deprived Ministry staff of a necessary tool for justifying projects before Treasury Board. He advised that it also makes it difficult for Ministry staff to decide what projects to advance in their submissions to Treasury Board.

[6483] The plaintiffs suggest that prioritization should not be a strict requirement of the Capital Planning System. They note that on several occasions the CSF rearranged its priorities at the Ministry's suggestions to pursue projects that were not originally its top priority, and have funded CSF projects that were not identified as priorities. They also take the view that Ministry staff have been able to decipher the CSF's priorities despite its lack of sequential rankings. Thus, they say that priority rankings are not crucial to the operation of the capital funding system.

[6484] In 2002, the CSF modified its capital priorities when it identified surplus majority schools it could acquire in Powell River and Prince George. Mr. Miller advised that a number of schools were closed in Prince George and Powell River

between 2001 and 2003, and the CSF was interested in several of them. In the CSF's September 2002 Capital Plan Submission for 2003/04, the CSF sought a "near term asset transfer" from each of SD57-Prince George and SD47-Powell River, both as unranked projects. As the CSF did more work to identify sites, the Ministry and CSF staffs worked together to amend the CSF's priorities. By the time the Ministry had prepared the CSF's Echo Report, the acquisition of J. P. Dallos Elementary from SD47-Powell River was the CSF's third-highest project and the acquisition of Seymour Elementary from SD57-Prince George was the CSF's fourth-highest ranked project. The Ministry recognized these as high priorities, and both projects were approved in the 2003/04 capital budget.

[6485] With respect to Campbell River, as I explain in Chapter XXXVIII, Site and School Acquisition Projects, after the CSF completed its October 2004 Capital Plan Submission for 2005/06, Ministry staff informed Mr. Bonnefoy there was potential for the CSF to receive approvals for projects in Campbell River and Comox if it rearranged its priorities. The CSF Board of Trustees approved the idea, and the CSF amended its priorities to make a project in Campbell River its third-highest priority. The Province supported both projects shortly thereafter.

[6486] As I explain in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), in 2007 and 2008 the CSF pursued the acquisition of the Kilgour Elementary from SD38-Richmond pursuant to the 2007 Disposal Order. In early February 2008, the CSF revised its October 2007 Capital Plan Submission for 2008/09, making the Richmond Elementary/Secondary Project its highest priority. Mr. Bonnefoy and Mr. Stewart agreed the Ministry asked the CSF to consider making that change. Despite the amended priorities, as of the time of trial, the CSF still had not acquired Kilgour Elementary.

[6487] In 2005, SD57-Prince George received extra space for about 50 students in its project to replace Duchess Park Secondary to provide space for a CSF instructional programme. A portion of Duchess Park Secondary was being used for a CSF secondary programme at the time. At the time, the CSF was not requesting

secondary space in Prince George, and was not seeking space for a heterogeneous secondary programme. The funding wholly benefited SD57-Prince George, and therefore only indirectly benefited the CSF.

[6488] Finally, as I explain in Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)), in about 2009 the Ministry facilitated the transfer of École Élémentaire Anne-Hébert to the CSF although the CSF had not requested that transfer in its Capital Plan Submissions. However, as recently as June 2008, the CSF had written to the Minister and highlighted the problems that arose out of the fact that École Élémentaire Anne-Hébert was held on a year-to-year lease from SD39-Vancouver. Given that communication, and that the Ministry and the CSF had previously agreed the CSF needed long-term security at École Élémentaire Anne-Hébert, I find it was reasonable to the Ministry to take that step.

[6489] The plaintiffs' view is that the evidence also reveals that Ministry staff can work out the CSF's priorities without the CSF's assistance.

[6490] As is discussed in more detail in Chapter XXVI, École Victor-Brodeur (Victoria), in March and June 2011, the CSF sought funding from the Ministry to pursue a private site acquisition in West Victoria. The Minister denied the request. When testifying about the Minister's response, Mr. Stewart confirmed he had the sense based on other communication with the CSF that the acquisition was not as urgent a priority as some of the CSF's other requested projects. For example, the Province was about to support the Southeast False Creek Project in Vancouver (West), which seemed more urgent.

[6491] As Mr. Stewart did, Mr. Palmer has also relied on communication with the CSF to discern the CSF's priorities. For example, Mr. Palmer was able to determine that a project in Squamish was likely a high priority for the CSF in 2014 due to the CSF's loss of space at Garibaldi Highlands Elementary.

3. Discussion

[6492] The plaintiffs' view is that the CSF cannot sequentially prioritize its capital projects. They suggest that the needs in one community are not relevant to those in others, pointing to the local nature of the entitlement analysis outlined in *Association des Parents- SCC*. The plaintiffs say that even the CSF's ward-based approach to capital planning compromised its actual needs because many wards include schools in disparate communities, where parents would not be concerned about the circumstances in a nearby city or town. For example, the CSF's Southeast BC ward includes schools in Kelowna, Penticton, Kamloops, Nelson, Rossland, Revelstoke and Fernie, which are at some distance from one another.

[6493] The plaintiffs also suggest the evidence shows that the Ministry did not respect the CSF's alternative means of prioritization. They take the view that when the CSF attempted to compromise with ward rankings, Mr. Cavelti did not recognize that the CSF had seven #1 priorities, and focused on only four of them. The plaintiffs also point to the Ministry citing the prioritization assigned by the Ministry's computer system in letters sent to the CSF. They say the Ministry relied on those rankings although the CSF was at pains to indicate all its projects were its top priorities.

[6494] The plaintiffs submit that in any event, prioritization is not essential. They point to the Ministry's willingness to allow the CSF to amend its priorities to seize opportunities. In the plaintiffs' submission, prioritization serves no greater purpose than ensuring the Province and school boards agree on what projects should be funded. The plaintiffs also suggest the Ministry can discern priorities in other ways.

[6495] The defendants' view is that the CSF is not discriminated against by the prioritization requirements. In their submission, the CSF is in no different position from any other district. They note that many districts, like SD48-Sea-to-Sky or SD8-Kootenay Lake, are spread across many communities that compete for resources. Those districts, too, must make tough decisions about what projects to prioritize.

[6496] The defendants take a different view of the extent to which the Ministry was willing to compromise to work with the CSF on prioritization. They suggest that the CSF appears to have come away from meetings in 2008 and 2009 expecting to be “immune from the need to prioritize”. In their view, the fact that there was enthusiasm for new ways of working with the CSF in 2009 did not give the CSF a blank cheque to cease prioritizing their project requests.

[6497] As I see it, the Ministry is responsible for establishing a framework for the capital planning system. It falls within its jurisdiction to do so unless the framework denies rightsholders what they are entitled to or interferes with the CSF’s right to management and control over matters going to the minority language and culture.

[6498] The evidence does not establish that any of the breaches of s. 23 in any of the communities arise out of the prioritization requirement. The larger concern is a lack of capital funds devoted to minority language education. If there were sufficient funds, all of the CSF’s projects could be funded no matter their priority. Indeed, the evidence shows that the Ministry has been willing to embrace -- and even suggest -- changes to the CSF’s prioritization of projects to allow the CSF to respond to opportunities to provide more rightsholders with what they are entitled to.

[6499] This is particularly so because the Ministry has been willing to take into account the CSF’s unique needs around prioritization. The Ministry was willing to work with the CSF on a ward-based planning approach. While Echo Reports and computer systems may have suggested otherwise, clear and forthright communication between CSF staff and its Planning Officer have taken precedence over the sequential rankings reflected in those documents. Mr. Cavelti understood what the CSF’s ward-based priorities were during Mr. Bonnefoy’s time. At Mr. Bonnefoy’s behest, he focused on the four projects Mr. Bonnefoy emphasized. Moreover, the Ministry has been willing to work with the CSF to amend its priorities as necessary. Thus, the prioritization requirement does not deprive the CSF of the flexibility it needs to respond to opportunities as they arise. All it does is provide the Ministry with the support it needs to defend proposed projects before Treasury-

Board and ensure that school districts and the Ministry agree on what the school district believes it needs the most.

[6500] The evidence also does not establish that the prioritization requirements usurp the CSF's right to management and control over matters going to the minority language and culture. To the contrary: it furthers it. As I explained in Chapter VI, The Respective Roles of the Province and the CSF, and throughout these reasons, the right to management and control over matters going to language and culture will in many cases extend to deciding when and where schools are needed and if transportation times are too long. By requiring the CSF to prioritize its projects, the Ministry cedes control over those decisions to the CSF. While the CSF must make difficult decisions about where schools are required most urgently, that is fully within its competence. Indeed, the CSF is best placed to make those decisions.

[6501] I acknowledge that when there is a question whether the entitlement standard is met, the comparison is a local one. In my view, it does not follow that the CSF is incapable of determining whether needs are greater in one community than another. The local comparison is internal to the community. Based on the local comparison, the CSF can compare the deficiencies of the global educational experience between communities. In some communities, the global educational experience may be only slightly inferior to that of the majority. In others, there might be no school or a highly inferior educational experience. Other factors might be relevant, like the number of students who are affected by the situation.

[6502] Indeed, Mr. Allison conceded this is the case. In his evidence, Mr. Allison admitted it might be possible for the CSF to sequentially prioritize projects in urban centres with multiple schools, such as Vancouver. He also conceded the CSF could identify some projects that were more urgent than others. He agreed that by not prioritizing projects, he was asking the Ministry to rank the projects for the CSF.

[6503] By failing to sequentially prioritize its priority projects, the CSF has failed rightsholders. The CSF is responsible for representing rightsholders and for the management and control over matters going to the language and culture of the

minority. It is in the best position to consider where the needs of the minority are greatest, and the best ways of addressing those needs. By failing to sequentially prioritize its projects since 2010, the CSF left it to the Ministry to attempt to determine where projects were most urgently required and what the minority needed most. While Ministry staff were able to infer the CSF's needs on occasion, the CSF would have better fulfilled its duties to rightsholders if it had complied with the Province's legitimate capital framework requiring prioritization.

[6504] I also acknowledge that the plaintiffs believe the CSF should not have to wait for any of its capital projects, and therefore should not have to prioritize its projects. But, s. 23 only requires the Ministry to do whatever is practical to achieve minority language education in British Columbia. While the CSF might want to have new schools built in every area of the Province all at once, that simply is not practical. In recent years, the value of the CSF's requested projects have exceeded the entire capital spending across all districts. Indeed, it is not within the CSF's institutional competence to manage more than \$350,000,000 in capital projects at the same time. The CSF must make the challenging decisions about what projects are required most urgently and prioritize them in order to best enhance the minority language and culture in British Columbia.

B. The Ministry's PIR Requirement

[6505] Since 2009/10, the Capital Plan Instructions have required districts to submit PIRs for their highest-priority project requests. Absent a PIR, the Ministry's position is that it will not assess project requests. The plaintiffs suggest the Ministry failed to review numerous CSF project requests because the CSF did not submit a PIR. They also raise the fact that the Province seems to have funded multiple capital projects for other school districts without a PIR.

1. The PIR Requirement

[6506] Since 2009/10, when a district submits its Capital Plan Submission, it is also expected to submit preliminary feasibility work-- a PIR-- in support of its highest priority projects. The PIR outlines the rationale, scope and costs of a project, and

evaluates options for responding to the district's need. Mr. Miller confirmed that the Ministry seeks PIRs to ensure that the Ministry knows the full cost of a project before approving it, thus preventing significant cost overruns.

[6507] Mr. Miller conceded that each PIR costs about \$10,000 to \$15,000. Due in part to the cost, school boards are told to prepare PIRs for only their highest-priority projects. The Ministry suggests school boards pay for the reports using their AFG funding. Between 2009 and 2012, districts were not reimbursed for the cost of the PIRs. Beginning in 2012, districts were reimbursed for the cost of PIRs for those projects that progressed to a Project Agreement.

[6508] If the Ministry does not receive a PIR, the Ministry assumes the project is a lower priority for the school district. Mr. Miller suggested that if the Ministry does not receive a PIR, it does not undertake any detailed work to evaluate the project because it cannot be sure what the project will entail.

[6509] Mr. Palmer's evidence was slightly different from Mr. Miller's. He suggested the Ministry ranks projects with a threshold ranking of "NPIR" in its Consolidated Capital Plan based on the Space Rank Formula and FCI score provided the Ministry has sufficient information. If the Ministry were to see a high score for a project ranked NPIR as against others, then Ministry staff would consider whether a deficient PIR nevertheless presented sufficient information for the Ministry to justify a project before Treasury Board. Mr. Palmer also conceded that Ministry staff would be willing to consider information from outside a PIR, such as communication with district staff. Thus, Mr. Palmer admitted that the PIR process allows some flexibility.

[6510] The PIR process is not without its problems. Mr. Palmer acknowledged that some districts have suggested the Ministry has been unclear about the expectations for PIRs. Some districts spend too much time and money on PIRs and provide more information than is strictly necessary. As of 2015, the Ministry was undertaking a wholesale review of its capital planning submission process (as I explain later in this chapter), and Mr. Palmer ventured that the Ministry might create a template for PIRs.

2. PIRs and the CSF

[6511] The CSF's approach to PIRs has moved through three phases. In the first year of the PIR requirement, Mr. Bonnefoy provided PIRs for the CSF's highest-priority projects. In the second phase, the CSF, under the direction of Mr. Allison, did not complete PIRs due to the cost. In the third phase, the CSF prepared PIRs in house, and the Ministry assessed many of those PIRs as being deficient.

[6512] When the PIR requirement was first put in place in 2009/10, Mr. Bonnefoy was in his final months as Secretary-Treasurer of the CSF. At that point, the CSF began applying a regional prioritization strategy. Mr. Bonnefoy prepared PIRs for four of the CSF's top priority projects. When the WebCaps system defaulted to ordering the CSF's priorities sequentially, Mr. Cavelti confirmed to Mr. Bonnefoy that he understood the CSF's highest priority projects were those for which it had submitted PIRs.

[6513] Once Mr. Allison became Secretary-Treasurer, it is less clear that the CSF complied with the PIR requirement on a regular basis.

[6514] In 2011/12, Mr. Allison began considering how the CSF would fund PIRs for all of its requested projects. Mr. Allison received a quote that estimated it would cost more than \$331,000 for the CSF to complete 22 PIRs in 10 weeks. I observe that 10 weeks is a very short turn-around time to complete 22 project feasibility reports.

[6515] On July 6, 2011, Mr. Ouimet, President of the CSF, wrote to Minister Abbott to request funding for the 22 PIRs. Minister Abbott responded that districts were required to fund PIRs from their own financial resources, and suggested the CSF focus on its highest-priority projects, and fund the PIRs with its AFG.

[6516] Since the Ministry denied funding, the CSF did not pursue the completion of 22 PIRs. The CSF planned to use its AFG funds for a heating system upgrade in Prince George, to install portables, and likely to fix roofs. Mr. Allison was also frustrated the CSF prepared PIRs for École Élémentaire Anne-Hébert (Vancouver (East)), École des Pionniers (Port Coquitlam), École Élémentaire Rose-des-Vents

(Vancouver (East)) and École L'Anse-au-Sable (Kelowna), and nothing had come of those expenditures. I note, however, that by 2012, the Province had supported both the École des Pionniers Replacement Project and the Southeast False Creek Project.

[6517] Thereafter, Mr. Allison's approach seemed to focus on writing Positioning Letters to press for project approvals outside Capital Planning Cycles. As I explain in Chapter XVI, Introduction to Part 3, the Community Claims, I take from these letters only the fact that the requests were made because I infer they were prepared by counsel for the purpose of positioning for this litigation. They must be treated with extreme caution.

[6518] For some time, this approach meant that the CSF was not providing the Ministry with PIRs in support of many of its project requests. When Deputy Minister Gorman responded to the CSF's request for a site in Victoria (West) in 2011, he pointed to the CSF's failure to submit a PIR in support of the project. Similarly, in 2013, when the CSF pushed back against the Ministry's decision not to acquire Steveston Secondary from SD38-Richmond for the CSF, Mr. Stewart informed Mr. Allison that the CSF was required to submit a PIR and had not done so. In his evidence in chief, Mr. Allison expressed confusion at the response because he had asked the Ministry months earlier if a PIR was required.

[6519] At some point, Mr. Allison learned that SD39-Vancouver was preparing PIRs in-house, and he thought that he could achieve some cost savings if the CSF did the same. Mr. Allison had also recently obtained demographic information from Dr. Landry, and thought he could use that information in the CSF's PIRs.

[6520] In the summer and fall of 2013, the CSF submitted 23 PIRs that were completed in house, known as In-House PIRs. All 23 followed the same format. They began by setting out the purpose of the projects and their rationales, focusing on the school history, catchment area, community and particular challenges. The CSF also provided partial historical enrolment data, and demographic information

from Dr. Landry. The CSF then explained its preferred school capacity and site options, and identified partnership opportunities and cost estimates.

[6521] Mr. Allison explained how the CSF went about estimating enrolment for the In-House PIRs. The CSF relied on Dr. Landry's counts of Mother-Tongue rightsholders' children and children in the Knowledge and Regular Home Use Categories. The CSF also set out its historical enrolment information for the region, and explained its Expanded Admission Policy. Using that information, the CSF estimated a range of school-age children eligible to attend the programme. The CSF then identified factors to suggest enrolment is likely to increase.

[6522] Based on the anticipated enrolment, the CSF set out the space that it wanted to have for its programmes. Those space estimates were based on the types of spaces the CSF would like to have as explained by Mr. Allison to an architect, rather than the Ministry's Area Standards. The CSF usually requested space exceeding what the Area Standards allow. For each school, the CSF also routinely requested about double the 15% NLC space allowed by the Area Standards.

[6523] In each PIR, the CSF also pointed to sites available for purchase. While Mr. Allison was under cross-examination, it became evident that sometimes, the CSF referred to sites that it knew were no longer available. Other times, the CSF identified sites it did not believe to be suitable. Mr. Allison explained the CSF referred to them anyway to show that the CSF had engaged in a site search.

[6524] Mr. Allison also decided the CSF could omit some elements that are normally required in PIRs because in his view, they should not apply to the CSF.

[6525] Mr. Allison did not consider how demand could be met by reconfiguring other facilities because in his opinion the distances between CSF schools prevented reconfiguration of catchment areas. For the same reason, he did not discuss the long-term role of a facility in relation to other schools in the area.

[6526] Moreover, Mr. Allison did not address the relative costs and merits of different development options. For example, when dealing with projects related to leased facilities, he did not discuss options like acquiring a surplus facility or continuing to lease, reasoning that without a facility there were no options to consider besides a new site and school.

[6527] In connection with costs, Mr. Allison did not identify capital that the CSF could contribute, reasoning that the CSF did not have assets to sell to contribute to its projects. Due to the number of PIRs that Mr. Allison was completing, he also did not analyze site conditions sufficiently.

[6528] Mr. Allison conceded while under cross-examination that it would have been possible for him to explain why he was refusing to address those topics rather than omitting them entirely.

[6529] Mr. Palmer explained that when the Ministry receives PIRs, Planning Officers evaluate them and provide school boards with feedback and areas for improvement. The Ministry also issues an Echo Report to reflect to the district the Ministry's threshold priority ranking of a project.

[6530] According to Mr. Palmer, it is highly unusual to receive 23 PIRs from a single school district. He reported that even the largest districts with the most urgent capital needs only prepare PIRs for three to five projects in a given year. Receiving 23 PIRs from the CSF stressed the Capital Branch's human resources. Of course, he conceded that the Ministry told Mr. Allison that it must support its project requests with PIRs for them to be considered. He also testified that the Ministry is less likely to consider projects if a school board does not submit a PIR.

[6531] Mr. Palmer discussed the CSF's In-House PIRs with Mr. Cavelti, and had a number of concerns. For one, the CSF did not provide enrolment projections to the satisfaction of the Ministry. While the CSF provided its interpretation of the total number of eligible students, it provided no evidence of the anticipated market share of students who would be eligible to attend a CSF school. The CSF also proposed

multiple projects in some regions with no analysis of how the construction of one school would influence the need for the other. Mr. Palmer and Mr. Cavelti considered that until the Ministry received that information, the projects would have to be marked NPIR, as the Ministry could not substantiate the need for the projects.

[6532] In addition to those concerns, Mr. Palmer and Mr. Cavelti found other issues with the In-House PIRs. The CSF identified sites that were not realistically available. The CSF also did not include FCI data for its proposed Building Condition Projects.

[6533] The Echo Report for that year gave 16 of the CSF's project requests a threshold ranking of NPIR. The only project that was ranked a high priority from the Ministry's perspective was a replacement for École Élémentaire Rose-des-Vents, which had already been announced in the fall of 2011.

[6534] Mr. Allison received an email from Mr. Cavelti dated January 7, 2014, which explained why the CSF's In-House PIRs were marked "NPIR". Mr. Cavelti made general comments about the PIRs, then set out his concerns specific to each individual PIR. According to Mr. Palmer, this was a usual process for any Planning Officer. The evidence shows that Mr. Cavelti sent comments to other school boards concerning their PIRs using the same format.

[6535] Mr. Allison did not respond to Mr. Cavelti's feedback until October 2014-- 10 months later-- even though he had identified all the capital projects as "urgent". In fact, he did not respond until he had begun testifying in this litigation.

[6536] Although the Ministry did not request Capital Plan Submissions in 2014/15, Mr. Allison wrote to Mr. Cavelti on October 22, 2014, and informed him that the CSF would submit revised PIRs because so many had been ranked NPIR. The CSF provided those PIRs in October 2014.

[6537] In his letter, Mr. Allison responded to Mr. Cavelti's specific feedback. As is evident from my discussion of those responses in the Community Claim chapters,

the responses were indignant and argumentative. In many instances, the CSF simply refused to jump through the Ministry's administrative hoops.

[6538] For example, in response to the Ministry's request that the CSF provide FCI data for its proposed Building Condition Projects, Mr. Allison responded that the "Ministry is well aware of the facility condition of [school], which is detailed in the FCI report... it is the CSF's understanding that the rationale for the FCI process was to obviate the need for continuing and detailed facility audits in the capital plan process." In connection with requests that the CSF consider the relative cost of various options for responding to a problem, like renovating or replacing schools on an existing site, the CSF simply states that neither "are acceptable solutions for the CSF's serious facilities issues". When asked to address how enrolment at a new school in a divided catchment area would impact enrolment at schools currently serving that catchment area, the CSF's response was that it believed the impact would be minimal, with very little, if any, analysis of why the CSF believed that to be the case.

[6539] By the time Mr. Palmer testified in the spring of 2015, Mr. Cavelti had not responded to the CSF's most recent set of PIRs. Mr. Palmer's evidence was that was likely because of when in the course of that year's Capital Planning Cycle the Ministry received the PIRs.

3. Waiver of the PIR Requirement

[6540] Although several Ministry officials suggested the Ministry does not evaluate projects that are ranked NPIR, the evidence shows that some recent CSF projects were approved despite receiving a threshold ranking of "NPIR" or not being requested.

[6541] In 2009, the CSF acquired École Élémentaire Anne-Hébert from SD39-Vancouver despite having never requested or prepared a PIR for the project. The evidence shows that Mr. Miller was aware for some time that the CSF was interested in moving from leased to owned space, but that the CSF was unable to do so

because SD39-Vancouver's policy precluded it from selling any of its school sites. Seeing an opportunity to facilitate a transfer by linking it to an approval of an SD39-Vancouver school, he did so despite a lack of PIR or project request. I also note that 2009/10 was the first year of the PIR requirement.

[6542] The CSF also received approval for a seismic mitigation project in Powell River without having completed a Seismic PIR in advance. While Mr. Allison was being cross-examined, it was suggested to him that it was common for seismic projects to be approved without the completion of a PIR or Seismic PIR because the Ministry had previously assessed the seismic condition of school buildings. Mr. Allison refused to agree, citing his limited knowledge of seismic projects. However, Mr. Allison was shown an affidavit from an earlier stage in these proceedings that shows that he had extensive knowledge of the process for seismic projects around this time.

[6543] The CSF's project approval for École des Pionniers was treated in a similar manner. The CSF submitted a PIR for the École des Pionniers Replacement Project in 2009, in Mr. Bonnefoy's time. In the spring of 2012, the Ministry announced support for the École des Pionniers Replacement Project as a seismic project. The Ministry asked Mr. Allison to provide a Seismic PIR for the project. Mr. Allison testified that the Seismic PIR cost about \$36,000, which was refunded to the CSF.

[6544] The CSF also received approval for the Southeast False Creek Project in October 2011 despite the fact that the Southeast False Creek site was not included in the CSF's most recent PIR for that project. However, while Southeast False Creek was not named in the PIR, the evidence shows that Mr. Allison told Mr. Stewart about the site in conversation and the parties invited Mr. Stewart to participate in negotiations. Thus, he thought the opportunity appeared promising.

[6545] Some of the evidence subject to Public Interest Immunity and the Confidentiality Order supports the idea that an NPIR rating is not fatal to a capital project, at least for the CSF. That evidence suggests to me that where the Ministry has other ways of determining the CSF's priorities and assessing need, it may

consider the project regardless of whether the Ministry assigns a project the NPIR threshold ranking.

[6546] The Ministry also appears to have approved projects with a threshold ranking of NPIR for other districts.

[6547] In 2008/09, SD23-Central Okanagan requested as its fourth-highest priority an addition to Okanagan Mission Secondary, including a site acquisition and an addition. The Ministry saw that as a high priority. In 2009/10, the district considered that project to be its third-highest priority project. However, it no longer sought a site acquisition. That project had a threshold ranking of “NPIR”. I note, however, that 2009/10 was the first year that the Ministry began requiring PIRs. In 2010/11, the project became the district’s fourth-highest priority, and was still listed by the Ministry as NPIR. Mr. Miller explained that Ministry nevertheless announced support for an addition to Okanagan Mission Secondary as an Expansion Project in October 2011.

[6548] In the same announcement, funding was announced for a Site Acquisition Project for SD36-Surrey: the Clayton North Secondary Project. The evidence shows that the Ministry gave that project a threshold ranking of NPIR in 2009/10 and 2010/11. SD36-Surrey had also ranked that project as its thirteenth and thirtieth highest priority in those two years. The evidence does not address why this project was approved without a PIR.

4. Discussion

[6549] The plaintiffs argue that the PIR requirement is a broad strokes prerequisite that does not fit the CSF’s unique needs. They suggest the CSF requires capital projects province-wide. In their view, it is inappropriate for the Province to close its eyes to the CSF’s needs if the CSF fails to provide a PIR for a proposed project.

[6550] The plaintiffs venture that the PIR requirement is only intended to dissuade school districts from seeking funding for projects that are unlikely to be approved. They point to Mr. Palmer’s evidence that responding to all of the In-House PIRs was a burden on Ministry staff. Thus, they say the PIR requirement must have been

intended to “change the system so that the [Ministry] had no responsibility to evaluate and rank the majority of the project requests submitted by school districts”. This directly contradicts Mr. Miller’s discovery evidence, read in by the plaintiffs as part of their case, that PIRs are intended to prevent cost overruns following project approval.

[6551] An additional issue raised by the CSF relates to the cost of PIRs. In the CSF’s submission, only reimbursing PIRs for those projects that are ultimately approved is not a valid approach for the Ministry to take when dealing with the CSF. They suggest the cost of preparing PIRs for all the projects the CSF seeks is burdensome.

[6552] In the plaintiffs’ submission, the Province has used the PIR requirement to absolve itself of responsibility for ranking all projects except those accompanied by PIRs, while maintaining the discretion to assess and recommend any project it chooses. The plaintiffs suggest the Ministry only considered four CSF projects in 2009/10 and 2010/11, two projects in 2012/13 and seven in 2013/14. They base this on the number of projects that are not ranked “NPIR” in the CSF’s Echo Reports.

[6553] The plaintiffs go on to say that, in any event, the PIR requirement is not a real one. They point to the examples of the Ministry considering and approving funding for project requests ranked “NPIR”. Thus, they say the Ministry knows the PIR requirement does not work in all circumstances.

[6554] The defendants’ view is that the PIRs that the CSF prepared are not helpful to the Ministry. They suggest that the PIRs are rife with legal argument, and describe sites that are no longer available. In their view, the PIRs were clearly designed for the eyes of the Court, not to assist the Ministry.

[6555] Like the prioritization requirement, the requirement to submit a PIR to justify proposed projects falls within the Province’s jurisdiction to structure the capital planning framework in its discretion unless it either impedes rightsholders from receiving what they are entitled to, or infringes on the CSF’s right to management

and control over matters going to the minority language and culture. In my view, it does neither. It simply provides a means for the Ministry and school districts to communicate with one another. It is an important document that allows school districts to demonstrate their need for capital projects to the Ministry. It helps the Ministry to justify projects before Treasury Board. It prevents cost overruns following project approvals.

[6556] There is no evidence that any CSF projects have not been supported because of a lack of a PIR; indeed, the evidence subject to a confidentiality order establishes that projects without a PIR will still be considered and may be supported. Moreover, it does not infringe the CSF's right to management and control over matters going to the minority language and culture to have to prepare PIRs. To the contrary, it provides an avenue for the plaintiffs to communicate the minority's needs to the majority: something that is an essential aspect of its mandate.

[6557] In my view, the plaintiffs' argument concerning PIRs approaches frivolity. It is an example of the CSF complaining about an inconvenience that is of no import. This is clear from the contradiction manifest in the plaintiffs' argument. On the one hand they say their rights are threatened because many of their projects are not being considered because of the PIR requirement. On the other hand, they complain that the Ministry considers CSF projects with a threshold ranking of "NPIR". If the Ministry in fact considers projects with no PIR, then the CSF cannot argue that its projects are not being considered because they are marked NPIR.

[6558] It appears to me, and the evidence shows, that the PIR is not, in fact, a hard line requirement. Many projects are approved without a PIR, particularly for the CSF.

[6559] The PIR plays an important role ensuring that the Ministry has sufficient information to understand why a project is needed so it can justify the project to Treasury Board. Because districts are only to provide a few PIRs, it is also designed to show the Ministry what the district's highest-priority projects are. There are other

ways that information can be communicated, including informal discussions with a Planning Officer.

[6560] The evidence does not show CSF projects were not considered at all because of a lack of or deficient PIR, or that the Province “closed its eyes” to the CSF’s needs because of the PIR requirement. Rather, Mr. Cavelti performed a detailed review of all PIRs, despite the anomaly of receiving 23 PIRs from a single district. CSF projects were considered and approved without PIRs. The Ministry has worked around the absence of a PIR where communication between a school district and the Ministry allows the Ministry to justify a project to Treasury Board in some other way.

[6561] While some letters the Ministry sent to the CSF pointed to a failure to provide a PIR, those were not the reasons that the CSF’s project requests in Positioning Letters were being refused. The comments were likely designed to stress that the CSF had not done the work to show the Ministry the requested projects were true priorities for the CSF.

[6562] Moreover, the CSF’s argument that the PIR requirements do not take into account the CSF’s unique circumstances and requirements is without merit. The PIRs do not (yet) require districts to comply with a template, and provide no information going beyond it. One requirement of a PIR is to set out the rationale for a project. It is open to the CSF to include in its PIRs reference to its lack of an asset base in a region, or its needs pursuant to s. 23 in an area. Indeed, this is exactly the sort of information that it ought to provide. To the extent the PIRs ask something the CSF believes does not apply to it, it can explain why it cannot consider those factors. The Ministry cannot be expected to know all the interests of the minority. It is the CSF’s job to educate it through its PIRs.

[6563] In connection with the argument that PIRs are too expensive for the CSF, the answer is simple: the CSF does not need to prepare PIRs for all of its projects. It can prepare a PIR once an opportunity presents itself, and that PIR will be reimbursed if the project is approved. The CSF can likewise seek to amend its list of

priorities to move that opportunity higher on its list. That will give the Ministry the information it needs to take a project forward to Treasury Board. The approach of reorganizing priorities was an effective one in the period between 2001 and 2005. Given that PIRs are not strict requirements for project approval, I do not consider that it will impede the CSF to prepare PIRs for opportunities once they arise.

C. Area Standards

[6564] The plaintiffs argue that the CSF is disadvantaged by the operation of the Area Standards. They make two arguments. First, they say the Area Standards do not provide the CSF with the types of spaces it needs to offer equivalent programmes and facilities. Second, they say the NLC s allowed by the Area Standards do not provide the CSF with sufficient space for early childhood education and community spaces.

1. Area Standards for Schools

[6565] Mr. Wood, Mr. Miller and Mr. Stewart all gave evidence about the Area Standards.

[6566] According to Mr. Wood, the Area Standards control project budgets by specifying the maximum area for capital projects based on the school's planned capacity. It allocates a total allowable area, in square metres, for each amenity to be included in a school: from classrooms, to health space, to storage and gymnasium space, to rooms for special education and mechanical or design space. The Area Standards also stipulate the maximum site size for new schools based on nominal capacity, as well as the maximum size for playfields. Mr. Stewart's evidence was that, generally, the larger the nominal capacity of the school, the more space is allocated to a given area.

[6567] Mr. Miller confirmed that a supported project cannot exceed the area allowed by the Area Standards. However, oftentimes with secondary schools (and to a lesser extent, elementary schools), the schools are built with core areas (like gymnasiums and libraries) large enough to support an eventual addition.

[6568] Mr. Miller recalled that the Area Standards were developed in 1988 and have been reviewed periodically since then. Since the Area Standards have evolved over time, Mr. Miller was frank that B.C.'s schools differ in terms of their compliance to the current Area Standards. Depending on when a school was built, it may be oversized or undersized compared to the standards. Schools built prior to 1988 have smaller libraries and do not have purpose-built computer rooms, multipurpose or rooms for drama and music.

[6569] The standards are generic, so the amendments did not specifically take into account the needs of the CSF or any other district. It is common ground that the Area Standards were never amended to take into account the CSF's specific needs.

[6570] The Area Standards do not contemplate elementary/secondary (K-12) schools. Mr. Miller ventured that when a school board plans to build an elementary/secondary school, the Ministry and school district negotiate a reasonable size for the envelope of that school based on the overall space allowances for each of an elementary, middle and secondary school of similar capacities.

[6571] The site standards also do not contemplate the size of site for a school with less than 200 students, or the site size for a K-12 school. According to Mr. Miller, if a school board wanted to build a school for fewer than 200 students or a K-12 school, the Ministry and District must individually negotiate an appropriate site size.

[6572] The plaintiffs argue that the Area Standards do not provide for the types of spaces that the CSF requires for its small schools. They note that multipurpose rooms are typically not available for elementary schools for fewer than 200 students. However, the CSF needs multipurpose rooms to provide services like Francisation. They also suggest that small CSF schools will have gymnasiums and libraries that are smaller than what the CSF needs because of their smaller capacity. They argue it is unfair that site sizes for small schools are established on a case-by-case basis.

[6573] The plaintiffs have not pointed to any evidence to show that small, newly-built CSF elementary schools (like the one built in Campbell River) do not have the

types of spaces that the CSF needs. It seems to me that the Ministry has willingly accommodated the CSF on a case-by-case basis to ensure its facilities meet its requirements. Indeed, the Area Standards are only funding standards-- the CSF has flexibility to build different-sized spaces to ensure its needs are met so long as the total envelope of the school does not change. In my view, the evidence does not establish that the CSF is disadvantaged by the Area Standards when it builds new, small elementary schools.

[6574] The plaintiffs also argue that the CSF is disadvantaged because the Area Standards do not contemplate K-12 schools. As a result, they say the CSF must engage in greater dialogue than other districts to arrive at an appropriate school site.

[6575] All the evidence suggests that where the CSF has built elementary/secondary schools, they are excellent, functional facilities that meet the CSF's needs. There was no evidence that the CSF has experienced any challenging negotiations about the space allocations in its proposed elementary/secondary schools. In my view, it is entirely appropriate that the CSF, which is in the best position to know the minority's needs in a community, has the opportunity to negotiate to ensure an elementary/secondary school has the types of amenities it needs. The evidence shows that when it has done so, the Ministry has been flexible with the Area Standards. As I explain in Chapter XXXVIII, Site and School Acquisition Projects, when the CSF wanted to retain a larger portion of the site allowed by the Area Standards for École Gabrielle-Roy (Surrey) to provide secondary playfields and create better bus access, the Ministry approached Treasury Board, explained the CSF's needs, and ensured the CSF could retain enough of the site to provide the amenities it needed.

[6576] The plaintiffs also argue that the Area Standards are problematic because the CSF has occasionally acquired older schools with substandard facilities due to changes to the Area Standards, and that the Ministry does not prioritize projects designed to bring schools up to current standards. I address that argument in Chapter XXXVII, Building Condition Projects and the Building Condition Driver,

where I explain that although this can disadvantage the CSF, the disadvantage is justified.

2. NLC Space

[6577] As I explain in Chapter XV, Linguistic and Cultural Programming, today schools are built with additional NLC space to include community services in schools. The Ministry introduced the NLC concept in about September 2008. Following a pilot project in 2009, the Ministry decided to increase the space allotted to new school projects by 15% to fund the construction of community spaces. According to Mr. Miller, school boards have built a variety of early community spaces into schools: spaces for childcare, early learning, health care, multipurpose rooms, theatres, gymnasiums and adult education rooms.

[6578] The CSF has taken issue with the NLC allotments. In an October 2014 Positioning Letter to the Ministry, Mr. Allison complained that a 15% NLC allotment would be insufficient to meet the CSF's needs given its mandate to promote minority language education and communities. For the reasons that I gave in Chapter XVI, Introduction to Part 3, the Community Claims, I take from this letter only the fact that the request was made.

[6579] The plaintiffs argue the 15% NLC allocation is insufficient to meet the CSF's needs. They argue that the Ministry determined how much space it would allow without regard to or consultation with the CSF. They urge that because the CSF operates small schools, it has fewer economies of scale, so it needs a larger NLC allotment to offer equivalent community services. They also urge the importance of early childhood programmes to the CSF. The plaintiffs say the CSF has independently determined that a 30% NLC allotment is appropriate for the CSF, with no explanation of how the CSF arrived at that number.

[6580] The defendants disagree that the 15% NLC allotment is insufficient for the CSF's needs. Mr. Palmer noted that the NLC programme is a new policy, and that

many majority-language districts have schools without any community space. He also observed that a 15% increase in space is significant for any capital project.

[6581] In my view, the plaintiffs have not established that a 15% NLC allotment is insufficient for the CSF's needs. Only one CSF school has been built with NLC space: École Au-cœur-de-l'île (Comox). There is no evidence to suggest that school lacks equivalence with the majority, or that the space was insufficient for the CSF's needs. As a result, there is no way to know if the allocation is or is not sufficient to meet the CSF's requirements. Moreover, the CSF can apply for funding from the Federal Government for community spaces in its new school constructions. As a result, I am not persuaded the NLC allocation is insufficient for the CSF's purposes.

D. Enrolment Projections

[6582] As part of the capital funding system, the Ministry provides all districts with enrolment projections from BC Stats, which school boards and the Ministry use to determine where new schools should be built. The plaintiffs challenge that practice as it applies to the CSF, arguing that the projections provided by the Ministry are at best unhelpful, and at worst harmful, to the CSF.

1. The Ministry's Projections

[6583] According to Mr. Miller and Mr. Lebrun, the Ministry pays BC Stats to estimate enrolment for all districts. Mr. McRae explained that for more than 25 years, BC Stats has maintained a programme of cohort-retention population projections for the territories served by school districts.

[6584] Mr. Lebrun is the primary Ministry contact with BC Stats. He testified that he provides BC Stats with enrolment data from school districts. BC Stats then applies growth factors to those numbers. Once completed, Mr. Lebrun reviews the projections, and raises any concerns he might have with BC Stats. The Province publishes the projections online, so they are available to government and non-government actors.

[6585] The Ministry and school districts use the BC Stats projections for capital planning purposes. According to Mr. Miller, as part of the Capital Plan Instructions, districts are required to complete a form called a CP-3. It lists all the schools in a district and their historical enrolment, and sets out the BC Stats district-level forecasts. Districts are responsible for allocating the projected enrolment among its schools, and using local knowledge to amend the BC Stats projections.

Mr. Bonnefoy conceded school boards are well placed to do that work, since they have better knowledge of the factors that influence enrolment projects at the school level, including how the catchment areas are drawn.

[6586] Once the Ministry receives the completed CP-3 forms from districts, Ministry staff use the BC Stats forecasts as a control to assess whether district school-level projections are reasonable. This facilitates conversations between the Ministry and school boards about whether capital projects are justified. If the school board can rationally justify projections that differ from those of BC Stats, then the Ministry supports the district-level forecast.

2. Cohort Retention Projection Practice for the CSF

[6587] Mr. Miller conceded the Ministry was aware the CSF has added challenges estimating enrolment because it must estimate a participation rate. He confirmed that majority school boards have a very different forecasting model.

[6588] Nevertheless, the Ministry provides the CSF with cohort-retention projections just as it does for all other districts. Recognizing that BC Stats projections for the CSF tend to be low, for several years Ministry staff amended the BC Stats projections for the CSF. They have not done so in recent years. The plaintiffs suggest that the raw BC Stats projections were inaccurate, and were used to the detriment of the CSF.

[6589] BC Stats projects the CSF's enrolment in the same manner as it does for other districts: It applies a growth rate to the CSF's current enrolment based on demographic trends in geographic regions. This form of forecasting is known as

“cohort-retention” forecasting. The forecasts are published on-line and are used for capital planning purposes.

[6590] Mr. Lebrun and Mr. Miller agreed BC Stats’ forecasts for the CSF tend to be low. Lebrun explained that since the CSF’s territory includes the entire province, BC Stats applies provincial demographic trends to existing CSF enrolment. He confirmed that as a result, when the provincial demographic trends suggested declining enrolments through the 2000s, BC Stats projected enrolment declines for the CSF.

[6591] As of 2004, the BC Stats forecasts for the CSF suggested the CSF would see modest increases in enrolment (around 2%) in most years up to 2007. After 2007, BC Stats projected small enrolment decreases (less than 1%) in each year through 2011. The forecasts envisioned that the CSF would have about 3,288 students enrolled in 2012. The evidence shows that the CSF in fact experienced greater than 2% enrolment growth in all of those years.

[6592] Mr. Bonnefoy explained that the CSF’s projections were always higher than the BC Stats projections. This observation is borne out in the documentation. The CSF’s 2003 enrolment projections for the years 2005/06 through 2014/15 vary considerably from the Ministry’s projections. The variance increases steadily over time. The CSF’s projections for 2005/06, for example, suggested the CSF will have 30 more students than BC Stats projected. By 2014/15, the CSF projected 1,414 more students than BC Stats projected.

[6593] In light of the issues with the BC Stats projections for the CSF, for a number of years Mr. Tom Buckham, a member of Ministry staff, amended the BC Stats projections for the CSF before they were published and used for capital planning purposes. After Mr. Buckham left the Ministry in about 2007, Mr. Lebrun adjusted enrolment projections for all districts including the CSF.

[6594] Mr. Buckham and Mr. Lebrun’s projections forecasted enrolment increases for the CSF, and tended to be more accurate than the raw BC Stats projections. In

2007, Mr. Lebrun's amended projections assumed five percent annual growth for the CSF for three years, with enrolment growth leveling off over time. Undertaking the same exercise in 2008, he assumed a three percent increase in CSF enrolment in the near future years, with growth continuing at a lower rate until 2017.

[6595] Mr. Lebrun could not recall the basis on which he adjusted the forecasts. His projections tended to be at a mid-point between the BC Stats projections and the CSF's projections. In the plaintiffs' submission, the adjustments made by Mr. Buckham and Mr. Lebrun, were "made based on no identifiable methodology, and certainly no official, or organized methodology."

[6596] However, at some point Mr. Lebrun ceased adjusting the BC Stats projections for all school districts because districts began reporting enrolment at several points throughout the school year. He therefore ceased adjusting the enrolment projections for the CSF.

[6597] Mr. LeBrun's work was focused on enrolment projections for the purposes of allocating operating funding. Mr. Stewart confirmed that enrolment projections were used in a different way by the Capital Branch. No one in the Capital Branch was officially responsible for working with the BC Stats enrolment projections.

[6598] In any event, Mr. Miller testified that the Ministry tended not to rely on BC Stats' projections for the CSF, and placed greater weight on the CSF's enrolment projections. For many years, the Ministry also gave the CSF's enrolment projections the benefit of the doubt, and built schools to the CSF's projected enrolment without much analysis of whether they were justified.

[6599] The Court saw evidence of some limited instances where the Ministry appeared to have cited the BC Stats projections for the CSF for various purposes.

[6600] For one, the Ministry publishes school district profiles for every district, which includes the BC Stats enrolment projections. The evidence shows that the 2002/03 School District Profile for the CSF, published in January 2004, made note of

the BC Stats projections. Those projections forecasted that the CSF's enrolment would peak in 2007/08, then decrease slightly, resulting in enrolment of 3,288 students by 2012/13. The CSF's actual enrolment surpassed that, reaching 4,742 students that year. BC Stats projected the CSF's enrolment would increase by 11.7%; its enrolment actually increased by about 83%.

[6601] The Ministry also used the BC Stats forecasts to populate the CSF's CP-3. Notably, the CSF then had the opportunity to input its own projections. For example, in the CSF's CP-3 associated with its October 2005 Capital Plan Submission for 2006/07, BC Stats projected that the CSF would have 3,922 students enrolled by 2014/15. The CSF projected 5,347 students by that year. The CSF's projections that year proved remarkably accurate: the CSF had enrolment of 5,382 students in 2014/15 (including about 150 children of non-rightsholders).

[6602] In July 2009, when Minister Margaret MacDiarmid became the new Minister of Education, the Ministry's French Programs Branch briefed the Minister in advance of her first meeting with the CSF. The briefing note suggested that CSF elementary school enrolment might be reaching its peak, although there was still some room for growth at the secondary levels. It is not clear where the French Programs Branch found that information. The plaintiffs imply that it might have come from the BC Stats forecasts. Mr. Miller advised that the Capital Branch would not have agreed with those projections.

[6603] The BC Stats projections were also cited in a confidential document, which was exhibit 1185 in this trial. In light of the approval for the 2011 Expansion Programme including support for the Southeast False Creek Project for the CSF, I am satisfied that although the document makes passing reference to the BC Stats projections for the CSF, they had no significant impact on funding decisions for the CSF or other districts.

3. The Ministry's Efforts to Assist the CSF with Enrolment Forecasting

[6604] The plaintiffs argue that the Ministry ought to provide the CSF with better enrolment projections. They submit that the defendants have not done so despite repeated requests. In the plaintiffs' view, the defendants have numerous tools they could use to calculate the number of rightsholders' children that might avail themselves of CSF schools: census data, survey tools, legislative powers and BC Stats' work.

a) The CSF's Requests for Better Projections

[6605] Although enrolment forecasts are the key driver of decisions concerning CSF facilities, Mr. Miller conceded that the Ministry has not assisted the CSF to collect data concerning the number of rightsholders in British Columbia. According to Mr. Miller, the Ministry has not done so because it views the onus as resting with the CSF to forecast enrolment using local knowledge. The CSF is tasked with deciding if there are sufficient children of rightsholder parents to warrant a programme.

[6606] The CSF's position is that it consistently asked for better projections from the Ministry.

[6607] Ms. Galibois-Barss suggested that in the early days of the CSF, she asked the Ministry for assistance counting Francophone students. However, she does not believe she ever put that request in writing, and did not believe the question was at issue in the FPFCB's litigation in the 1990s.

[6608] Mr. Bonnefoy, too, suggested that he repeatedly tried to identify to Government that it was difficult for the CSF to project enrolment because it had to determine both the total number of students eligible to attend and the potential uptake rate.

[6609] The evidence suggests that some Ministry officials were aware of the emerging issue as early as 2009. In a July 2009 briefing note to the Minister, the

Director of the French Programs Branch wrote that “Alberta requires French Immersion schools to inform parents of Francophone students that their children have the right to attend a Francophone school. The CSF may request such a provision in British Columbia.”

[6610] The CSF made a formal request for better enrolment projections in 2011. On June 16, 2011, Mr. Ouimet, the CSF President, wrote to the Minister to explain the CSF’s view that the Ministry did not provide the CSF with 10-year enrolment projections. He suggested that was contrary to statements in the 2010/11 Capital Plan Instructions indicating the Ministry prepared projections for each district. He formally requested that the Ministry provide student enrolment projections for the CSF, at the Ministry’s expense.

[6611] In his response, Deputy Minister Gorman advised that the Ministry would consider the CSF’s suggestions for providing data in a different format. He also suggested that the CSF engage contractors to assist it with enrolment projections, as other school boards do.

[6612] Mr. Allison admitted that Mr. Ouimet’s June 2011 demand letter was the first time the CSF had ever officially requested better enrolment projections from the Ministry. He also admitted that the CSF only made the demand after the start of this litigation, and that despite what Mr. Ouimet stated in the letter, the Ministry provides the CSF with cohort-retention projections.

[6613] The FPFGB also requested better enrolment projections for the CSF. In September 2012, Ms. Pauline Gobeil, President of the FPFGB, wrote to Minister McRae and requested that he implement a system to identify all rightsholders under s. 23 of the *Charter* who have a child enrolled in a school in British Columbia.

b) BC Stats

[6614] The plaintiffs say that the Province could have worked with BC Stats to collect better enrolment data for the CSF. Mr. Lebrun’s evidence was that although he was the liaison between the Ministry and BC Stats, he had no discussions with

BC Stats regarding the fact that its projection model did not work for the CSF. Similarly, Mr. McRae testified that when he worked for BC Stats, he was never asked to project actual numbers of students who could attend a CSF school.

[6615] As I explained in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam), the Ministry appears to have first considered working with BC Stats on a new methodology for the CSF in about 2012. Shortly after Deputy Minister Gorman refused the CSF's request for better enrolment projections in December 2011, staff in the Ministry's Capital Branch nevertheless began working with BC Stats around enrolment projections for the CSF.

[6616] Initially, Mr. Stewart's evidence was that this was not specifically related to the CSF's request for better enrolment projections. Later, he stated that the CSF's request spurred the Ministry's action. He also related the work to the approval of the Southeast False Creek Project for the CSF in Vancouver (West) around the same time. Mr. Stewart thought that by working on a model for forecasting CSF enrolment in Vancouver, the Ministry could create a forecasting model that would apply to all CSF projects going forward.

[6617] Mr. Stewart confirmed that Capital Branch staff engaged BC Stats to estimate the number of students eligible to attend CSF schools in specific geographic areas. From there, they would consider how to calculate both the number of children eligible to attend CSF schools and the number that would be likely to attend.

[6618] The formal agreement between the Ministry and BC Stats envisioned BC Stats calculating the universe of eligible children in the Vancouver area, and analyzing the CSF's enrolment projections in its PIR for its Vancouver (West) project. By the middle of February 2012, the work broadened to performing similar work for North Vancouver and Surrey, which were also new CSF schools in the Lower Mainland.

[6619] Mr. Cavelti and Mr. Palmer received BC Stats' work in March 2012. According to Mr. Palmer, BC Stats identified the number of Mother-Tongue Rightsholders' children reported by the census. BC Stats staff noted the limitations to the census data, and that relying on census data would tend to undercount rightsholders. Based on MC Stats' work, Mr. Cavelti identified the participation rates that the CSF had achieved. Those calculations led Mr. Cavelti to suggest the CSF was likely to achieve about a 33% proxy participation rate of Mother-Tongue rightsholders in the Vancouver area.

[6620] Mr. Stewart found BC Stats' work disappointing and unhelpful, as it tended to undercount the number of eligible children. Mr. Palmer was likewise aware of the limitation of the BC Stats approach. Since he found the work was not helpful, and the Ministry was prepared to accept that the CSF could expect more than a 33% participation rate, Mr. Stewart did not share BC Stats' work with the CSF.

[6621] In the plaintiffs' submission, Ministry staff only examined participation rates due to the CSF's requests. They suggest the Ministry's initiative was short-lived. In their submission, the initiative did not lead to any results.

c) Survey of Students

[6622] The plaintiffs suggest the Ministry had surveys at its disposal that it could use to collect data on eligible rightsholders' children.

[6623] Mr. Karlic Ho is the team leader of reporting and data quality in the Ministry's Knowledge Management and Accountability Division. In that role, he is responsible for working with and supporting some of the Ministry's data collection processes, including the Education Data Warehouse: a centralized database the Ministry uses to store student demographics and achievement data.

[6624] Mr. Ho deposed that in the ordinary course of its business, the Ministry collects, manages and analyzes data, and maintains records on student demographics and achievement. He points to the School and Student Data

Collection Order (M152/89), a Ministerial Order issued under the *School Act*, ss. 168(2), which requires school districts to provide that information to the Ministry.

[6625] One of the processes for data collection that Mr. Ho describes is the 1701 enrolment count process. In September of each year, districts are required to provide a “snapshot” of student information in the form of an electronic file. Once the information is finalized, it is incorporated into the Education Data Warehouse. The form used for the 1701 data collection process seeks, among other things, data on language programme enrolment, aboriginal education programmes, and career programme enrolment. It also asks if the student is of aboriginal ancestry, and about the student’s primary language spoken in the home.

[6626] Mr. Ho testified that in recent years, other branches of the Ministry have approached him to help collect other types of information, like class size information and data on special needs students at independent schools.

[6627] The 1701 data collection form does not include a question to identify whether a student is eligible to attend a CSF school. According to Mr. Stewart, Ministry staff considered adding such a question, but the proposal never went forward. Mr. Ho confirmed that no one had asked him to look at ways of collecting data on the French language.

[6628] The plaintiffs submit that the Province could use the 1701 data collection process to identify the children of s. 23 rightsholders by asking questions aimed at parents’ educational background, the educational background of the child’s siblings and the parents’ mother tongue. Then, the plaintiffs say, that data could be used by the CSF to determine its enrolment potential in different geographical areas.

d) Legislative Powers

[6629] The plaintiffs urge that the Ministry could legislate a system for counting potential students, which they say was done in other jurisdictions in Canada.

[6630] The plaintiffs point to a legislative scheme that was used in Alberta: the *Student Record Regulation*, Alta. Reg. 225/2006. They point to ss. 2(1)(s) and 7 of the regulation, which they say makes collection of rightsholder status information mandatory, and provides a mechanism for French-language school boards to access the data.

[6631] The plaintiffs imply that the defendants had knowledge that this was a practice that was used in Alberta.

[6632] In a July 2009 briefing note to the Minister, the Director of the French Programs Branch wrote that “Alberta requires French Immersion schools to inform parents of Francophone students that their children have the right to attend a Francophone school. The CSF may request such a provision in British Columbia.” Later, Ms. Gobeil, the President of the FPFBCB wrote to Minister McRae and pointed to the system in Alberta.

[6633] Mr. Palmer confirmed that Ministry staff explored the idea presented by Ms. Gobeil. However, Mr. Palmer was told by a government contact in Alberta that Alberta did not employ the practice suggested by Ms. Gobeil, so he came to believe that the Ministry would not have a model to draw from. He also thought it would be difficult to implement because school boards would be responsible for undertaking the surveys. He conceded, however, that districts are already responsible for collecting data on the Ministry’s behalf in the form of the 1701 enrolment data. In any event, he did not explore the idea any further.

[6634] The plaintiffs also point to a system used in Quebec, where the province collects detailed data regarding eligibility for admission to English-language schools.

e) Census Data

[6635] The plaintiffs note that the Minority Language Task Force referred to some census data concerning rightsholder parents. They also note that the Province’s earliest Capital Plan Submissions referred to census data. The plaintiffs take the

position that despite being aware of this information, the Province did not consider what could be done with census data until 2011.

4. Analysis

[6636] The plaintiffs argue that the Province's approach to projections for the CSF is an example of the Province treating the CSF like all other districts despite its unique circumstances, to the detriment of the CSF and British Columbia's s. 23 rightsholders.

[6637] The plaintiffs concede the system for enrolment projections tends to work well for the majority. In their submission, though, the system does not assist the CSF. They say the evidence shows that the defendants fail to encourage minority language education by helping the CSF to determine demand.

[6638] In the plaintiffs' submission, the CSF's tasks when projecting enrolment differ from what the majority boards must do. Unlike majority boards, the CSF must know both the size of its target population and the number of students likely to attend a CSF school. Thus, the plaintiffs say, the defendants have not only implemented a system that makes bad policy sense for the CSF, but the defendants have also breached s. 23 by treating the CSF in the same way as all other districts.

[6639] The plaintiffs take the position that the Province has failed to assist the CSF by creating projections "that were worse than useless" and harmful to British Columbia's s. 23 rightsholders. They argue that the enrolment projections have contributed to a consistent underfunding of minority language school facilities. They suggest that the projections were used internally in government and published for review and use by others. They say that the BC Stats projections created a false impression with Treasury Board and others that the CSF would not continue to grow, or that its enrolment would decline, and would not require extensive capital funding.

[6640] The plaintiffs therefore seek an order that the Province's failure to collect information regarding potential demand for the CSF's schools breaches s. 23 of the

Charter. They also ask the Court to order that the Province develop and implement, in consultation with the CSF, a comprehensive system for estimating demand.

[6641] The evidence shows that the Ministry provides all districts with cohort-retention enrolment projections that take into account birth rates and other factors relevant to assessing the growth of the student population in the region. There is no evidence from majority school boards showing how they use those projections. The evidence from Ministry officials is that the projections serve as a check against school boards' own enrolment projections, to ensure they are reasonable. It is always open to school districts to present local knowledge to dispute BC Stats' work.

[6642] The Ministry has provided the CSF with BC Stats cohort-retention enrolment projections since its inception. Those projections are based on provincial demographic trends, and do not take into account the many contextual factors that influence enrolment at minority language schools. They tend to be inaccurate, and have projected decreases for the CSF when its enrolment has increased steadily

[6643] Because of the way the BC Stats forecasts are calculated, they take into account only population trends and birth rates. That information is much more important to planning by traditional majority-language boards, as all school-age children are eligible to attend those schools, and almost all of them will. For the CSF, birth rates and demographic trends are less important. Other factors, like the universe of eligible children and the participation rate, tend to dominate over all other factors, as Mr. Wood suggested.

[6644] I conclude that the CSF and majority boards are treated the same with respect to enrolment projections in that they both receive the benefit of BC Stats enrolment projections. The CSF is therefore being treated in a formally equivalent manner to the majority boards.

[6645] However, while the majority receives reasonably accurate enrolment projections to assist it with capital planning, the projections the CSF receives are not reasonably accurate. The projections also target factors that are highly relevant to

the majority -- birth and death rates --- but omit the factors most relevant to enrolment for the CSF-- the universe of potential students and the uptake rate. The Ministry also has not taken steps reasonably available to it to otherwise assist the CSF, such as by collecting data about total potential enrolment using the 1701 data collection process.

[6646] Substantive equality means that sometimes the minority must be treated differently to achieve the same outcome as the majority. In this case, the outcome for the majority is that it receives reasonably accurate enrolment forecasts that it can supplement or counter with local knowledge. The CSF, by contrast, receives inaccurate, irrelevant projections that do not assist it to project its enrolment.

[6647] However, the evidence does not go so far as to suggest that the failure to provide the CSF with better enrolment data has resulted in any other difference in outcome between the CSF and the majority. I accept that the BC Stats forecasts only serve as a check against district-level forecasting, and that the Ministry always relies on districts to challenge and supplement those forecasts with local knowledge. The Ministry likewise relies on the CSF's local knowledge to supplement the BC Stats projections. There is no evidence from other school boards concerning how they use their enrolment forecasts, so it cannot be said to what extent the CSF has been unable to do things with their forecasts that the majority can.

[6648] The projections are not, as the plaintiffs suggest, "worse than useless". The Ministry has always recognized that BC Stats projections were in error. Until 2009, Ministry staff adjusted the enrolment projections. The Ministry consistently relied on the CSF's own enrolment projections when building schools, giving them the benefit of the doubt. The evidence does not reveal that the Ministry ever relied on the BC Stats projections when making funding decisions for the CSF, and only mentioned the enrolment projections for the CSF in passing from time to time, and never in relation to specific decisions to be taken to meet the CSF's needs. While the projections were published in the CSF's School District Profile, there is no evidence that it ever was or would have been relied on by anyone in government.

[6649] Thus, in my view, the CSF has not shown that it has been harmed because it receives the BC Stats enrolment projections or because they were published. At worst, on a few occasions, they were used to give a snapshot of the CSF's enrolment situation, but never in relation to any specific decision or action to be taken concerning the CSF.

[6650] Although the CSF has not experienced any actual harm, the CSF is entitled to receive enrolment projections that are equivalent to what is provided to the majority. At the provincial level, the minority is entitled to the highest degree of management and control, and substantively equal minority language educational facilities. The Ministry has crafted a system that provides the CSF with inaccurate and irrelevant projections while the majority receives accurate and helpful ones. Thus, the system denies rightsholders substantively equivalent minority language educational facilities in the form of enrolment projections. That runs contrary to s. 23.

[6651] I hasten to add that this does not absolve the CSF of the responsibility to engage in proper enrolment forecasting based on whatever forecasts the Ministry provides. The CSF is responsible for justifying the scope of its capital project requests. In recent years, the CSF has forecasted enrolment based only on census data concerning the universe of rightsholders' children. It has not explained the sources of its data or how it arrived at its numbers. It has not been willing to consider factors relevant to the participation rate. It has responded in a rude and hostile way when Ministry staff sought more information. By doing so, the CSF has failed to fulfill its duties to use local knowledge to estimate potential enrolment. If the CSF fails to meet valid provincial standards requiring it to rationally and demonstrably justify its enrolment projections, the Minister is not obligated to approve the CSF's capital project requests.

5. Justification and Remedy

[6652] Having found that the Ministry's enrolment projection practices and policies are contrary to s. 23, the analysis turns to the question of justification. I address my approach to the justification question in Chapter IX, Justification.

[6653] Assuming that the measure has a pressing and substantial objective that is rationally connected to its means, I am unable to find that the measure is minimally impairing because the Ministry had simple means of achieving its goals while providing the CSF with substantively equivalent enrolment projections.

[6654] While the Ministry noticed that the CSF has challenges forecasting enrolment, it has not assisted the CSF. The evidence suggests that Ministry staff were aware that enrolment projections were difficult for the CSF since at least 2009. Indeed, Mr. Miller's evidence was that the Ministry was aware of the problem, and therefore gave the CSF the benefit of the doubt and relied on CSF enrolment projections for many years.

[6655] I do not think it unreasonable that the Ministry did not look to census data in the early years of the CSF, as the CSF did not inform the Ministry there were any problems with the BC Stats projections until 2011. Shortly thereafter, the Ministry attempted to find a new methodology with BC Stats, but did so for its own purposes, not to try to assist the CSF. I find that the purpose of the work with BC Stats was to project enrolment for the Southeast False Creek Project, although it might have been influenced to a lesser degree by the CSF's request for better projections. In any event, the Ministry initially did not rely on those projections.

[6656] However, the Ministry had other tools at its disposal that it could have used to collect information to help the CSF. In particular, the defendants could have added a question to the 1701 enrolment data collection process that would have collected information about the number of children of s. 23 rightsholders in the Province. That information would have helped the CSF to calculate the total universe of potential rightsholders in different geographic areas. While that appears

to be the simplest answer, the government also always has legislative powers that it could use to implement a system.

[6657] To achieve substantive outcomes between the majority and the minority, it is entirely appropriate for the Ministry to collect data on the number of rightsholders in the province as part of its 1701 enrolment process, and provide that information to the CSF in addition to BC Stats forecasts to project those numbers forward. The CSF can then supplement that information with local knowledge concerning catchment areas, participation rates and the Francophone community and programmes in a given region to estimate its potential enrolment. Thus, both the majority and minority will have access to reasonably accurate information about population of students in the area, which they can supplement and improve based on local knowledge. This approach would put the CSF and majority districts on a similar footing with regard to enrolment projections.

[6658] I therefore conclude that the Ministry's enrolment project forecasts unjustifiably fail to provide the CSF with the minority language educational facilities that are warranted in the form of substantively equivalent enrolment projections.

[6659] As a result, I grant the remedy that the plaintiffs seek. I declare that:

- a) The defendants' failure to collect information regarding the potential demand for minority language education in British Columbia, including the numbers of and geographical distribution of children who could enrol in a school of the CSF, unjustifiably infringes s. 23 of the *Charter*.

E. Review of Capital Funding System Requirements

[6660] Since 2014, the Ministry has been reviewing the entire Capital Funding System, which could have an impact on the way that the CSF's needs are taken into account.

[6661] Until about 2014, school boards made their Capital Plan Submissions using the WebCaps system. Mr. Palmer advised that by 2014, the WebCaps system was

aging, and the sole person responsible for administering the system was close to retirement. The Ministry seized the opportunity to transition away from that system.

[6662] According to Mr. Palmer, the Ministry's plans to review the WebCaps system have since expanded. The review will now consider all aspects of the Capital Planning Cycle. The Ministry may evaluate what information it collects from districts, including information on enrolment and forecasting. The PIR format and process will also be reviewed, and may become subject to templates to clarify expectations. He postulated that nothing is free from consideration, although the primary Capital Drivers - Enrolment and Building Condition - are not expected to change.

[6663] As of March 2015, the capital programme review's official purpose was to "review, evaluate and make recommendations for updating the ministry's capital program processes, capital standards, project selection and delivery, monitoring, tracking and reporting". Within the scope of that, the review could extend to the "evaluation criteria" and the "methodology for scoring projects". The Ministry might also re-evaluate its monitoring and tracking of project schedules, cash flow and milestones. It might also extend to setting standards for capital projects to ensure consistent quality across the province.

[6664] Funding allocations are explicitly outside the scope of the project. Mr. Palmer added that since funding allocations are within the realm of the Ministry of Finance and Treasury Board, the review could not realistically extend to those topics.

[6665] The Ministry's Capital Advisory Committee is responsible for the review. That committee, like all Ministry committees, has representatives appointed by the school business organizations, BCASBO and BCSTA. Usually, school districts do not have individual representation on Ministry committees; they are expected to lobby within their associations for their concerns to be brought to the committee's attention. The Ministry has also issued a Request for Proposal seeking a consultant to manage the review. As the review is in its earliest stages, Mr. Palmer was unable to give concrete guidance on the work process or how the review would take place.

[6666] The plaintiffs take issue with the fact that they have not been consulted about the review process. They suggest it is inappropriate for the Ministry to rely on representatives from professional organizations, as they cannot speak to the CSF's unique needs. I note, of course, that Mr. Palmer's evidence was that the Ministry has yet to determine how consultations would take place, and he expected that nothing would stop school districts from submitting ideas or feedback individually.

[6667] At this point, any breach arising out of the structure of the review is speculative. As I discussed in Chapter X, Remedies, the plaintiffs did not plead and did not argue that s. 23 invokes a duty to be consulted about the capital planning system similar to the duty to consult that arises out of s. 35 of the *Constitution Act, 1982*.

F. Summary

[6668] In my view, the administrative requirements of the Ministry's capital funding system are all valid as they apply to the CSF. Neither the requirement that districts prioritize their projects, nor the PIR requirement, nor the Area Standards breaches s. 23. They do not infringe on the CSF's right to management and control, and have not caused rightsholders to fail to receive what they are entitled to given their numbers. It would be speculative to conclude that the Ministry's review of its capital planning framework is contrary to s. 23.

[6669] Only the Ministry's failure to assist the CSF by providing better projections is invalid: To ensure substantively equal treatment of the minority board, the Ministry must find a way of providing the CSF with more helpful projections, such as by requesting information about the number of eligible students through the 1701 data collection process.

XLI. INTRODUCTION TO PART 5: THE PROVINCE'S DEFENCES AND REMEDIES IN SUPPORT OF THE CSF

[6670] In the preceding chapters, I explain how three factors associated with the Province's capital funding system are responsible for the preponderance of the

CSF's problems: a lack of funding devoted to Expansion Projects between 2005 and 2011; competition between majority and minority school boards for capital projects; and the Ministry policies requiring the CSF to identify sites and negotiate with majority boards without Ministry assistance, particularly since 2010.

[6671] The defendants raise two defences that are relevant to those problems. They stress that their ability to move forward with capital projects is limited by the funding allocated to the Ministry by Treasury Board. They additionally plead the *Education Mediation Regulation* as a response to the entirety of the plaintiffs' claim. The limited funding is relevant to the lack of funding Expansion Projects and the competition between the minority and majority. The Education Mediation Regulation is relevant to the duty to assist the CSF.

[6672] While I have partially addressed these defences in the preceding chapters, in the following chapters I explain in full why I find them to be without merit. Against that backdrop, I discuss two orders that are essential to ensuring the declarations I make in this cation are effective: orders requiring the Province to create a Capital Envelope for the CSF and requiring the Minister to enact a law or policy to ensure it meets its duty to assist the CSF to negotiate and acquire sites.

XLII. LACK OF FUNDS AND A CAPITAL ENVELOPE FOR THE CSF

[6673] Some of the *Charter* breaches in this case arise out of a lack of funding devoted to Expansion Projects between 2005 and 2011, and the fact that the CSF must compete for capital projects with majority boards that can contribute more Local and Restricted Capital Reserves to proposed projects.

[6674] In response, the defendants argue they have limited capital funds to devote to projects. However, the evidence shows the Ministry has crafted Capital Envelopes to respond to other capital funding priorities both prior to and during the period since 2005.

[6675] The plaintiffs put particular emphasis on a series of meetings and exchanges between CSF and Ministry officials in 2008 and 2009. Over the course

of those discussions, the plaintiffs say, Minister Bond recognized the CSF's unique capital planning needs. They say that despite those meetings, the Minister did not seek a Capital Envelope for the CSF.

[6676] Below, I address the defendants' argument they have limited funds to devote to the CSF's capital projects and the efforts toward a Capital Envelope for the CSF in 2008 and 2009. Then, I address the remedy requiring the Province to create a Capital Envelope to respond to the CSF's unique needs.

A. The Lack of Funding for the CSF's Capital Projects

[6677] The defendants plead that the funding it can allocate to the CSF is limited by the envelopes provided to it by Treasury Board. They do not seriously press this as a defence in their argument. However, the plaintiffs suggest, and I have found that, in many instances, a lack of capital funds is responsible for the CSF's current situation.

[6678] In the plaintiffs' submission, a lack of funding is no excuse. They note that the Province has pursued other policy endeavours over the years when they could have attributed more funds to the CSF.

1. Capital Envelopes

[6679] As I explain in Chapter III, Introduction to the Capital Planning Process, the Province funds school board capital projects out of Capital Envelopes that Treasury Board allocates to the Minister. The Capital Envelopes are established following a dialogue between the Minister and Treasury Board concerning the needs across the education sector. In the course of a typical Capital Planning Cycle, the dialogue focuses on expansion and building condition needs. Additionally, Treasury Board occasionally crafts Capital Envelopes to respond to particular priorities.

a) Capital Envelopes in a Typical Capital Planning Cycle

[6680] In the course of a typical Capital Planning Cycle, the Ministry explains the capital needs across the education sector to Treasury Board by way of a

Consolidated Capital Plan and an associated strategic overview. Treasury Board relies on that information to determine how much funding it will allocate to Facility Condition and Expansion Projects. The plaintiffs argue the Ministry has failed to use that system of dialogue to communicate the CSF's needs to Treasury Board, and to seek sufficient capital to respond to the CSF's needs.

i. Facts

[6681] As I described in Chapter III, Introduction to the Capital Planning Process, Introduction to Capital Planning, when the Ministry crafts its Consolidated Capital Plan, it also communicates its needs to Treasury Board by way of a written document outlining its strategic capital needs. The strategic overview consists of a narrative that explains the broad-picture capital needs across all school districts. Together, the Ministry's Consolidated Capital Plan and strategic overview justify the need for Capital Envelopes for particular purposes. In its strategic overview, the Ministry typically recommends what priorities it should pursue. For example, in periods of growing enrolment, the Minister will explain its need for a Capital Envelope to address expansion needs.

[6682] Treasury Board decides what capital priorities the Ministry will pursue, and establishes spending targets for those priorities. Treasury Board considers Government's financial resources and goals, as well as the capital submissions from Education and other ministries. Then, it allocates Capital Envelopes to the various ministries. Along with the Capital Envelope, Treasury Board informs the Ministry what its strategic capital priorities should be. It may accept or reject the priorities suggested by the Ministry.

[6683] The Court had the benefit of evidence about many of the strategic overviews and Consolidated Capital Plans the Minister submitted to Treasury Board between 1999 and the present day.

[6684] With one exception, the strategic overviews made no mention of the CSF or its unique needs. Mr. Miller urged that this is not uncommon: the strategic

overviews tend to make very little reference to any individual school districts because they offer a high-level summary of the education sector's capital needs.

[6685] The only strategic overview to mention the CSF and its capital needs is the October 1999 strategic overview submitted to Treasury Board in support of the 2000/01 Consolidated Capital Plan. That year, the Minister requested 18 Expansion Projects, 12 Building Condition Projects, a list of maintenance projects, funds for the purchase of school buses and self-insurance, and funds to acquire "assets for the Francophone Education Authority". Mr. Miller advised that it was unusual to include a specific, separate reference to the need to acquire assets for the CSF, as the CSF's needs were being considered as part of the Ministry's expansion programme. I note, however, that this was around the same time the CSF was acquiring its first capital assets, and the Minister moved forward with a number of capital projects for majority boards that would not have otherwise been approved to secure those transfers.

[6686] By the November 2001 Strategic Overview for 2002/03, mention of the CSF's needs diminished significantly. The only reference to the CSF was a comment that the public school system is composed of 59 districts as well as the CSF. Mr. Miller confirmed this was the Minister's first submission to the Treasury Board for a new government.

[6687] That year, the Province began to shift away from funding Expansion Projects. In the strategic overview, the Minister explained that as of September 2001, BC's schools were under-enrolled by about 50,000 students. Enrolment was expected to decline in 50 districts through 2005/06, and increase in 10 growing districts by 7,700 students. Based on that trend, the Minister advised Treasury Board that Expansion Projects would be a low priority in non-growing districts, and school consolidation and closure would increase in importance. Mr. Miller explained that the deprioritization of Expansion Projects marked a major shift in the education's capital programme.

[6688] Mr. Miller advised that many in the Capital Branch believed the shift toward school closures and consolidations would create opportunities for the CSF to acquire closed assets. The Minister did not convey that information to Treasury Board.

[6689] Although the Ministry foresaw an overall decline in enrolment, the Minister highlighted that 10 growing districts were likely to grow by about 1,500 to 2,000 students each year over four years. The Minister sought \$15,000 per new student, or a total of \$30 million per year, for Expansion Projects in high-growth districts in each of the next four years. The Minister did not convey to Treasury Board that the CSF was one of the 10 growing school districts that were likely to operate at or near their total capacity although Mr. Miller conceded Ministry staff were aware the CSF had growing enrolment. The Minister also did not explain to Treasury Board how the enrolment projections for the CSF differed from and would impact enrolment in other school districts.

[6690] The plaintiffs also emphasize more recent evidence of recommendations made to Cabinet, which are protected from publication by the Confidentiality Order because they are cabinet documents subject to public interest immunity. Having reviewed all the evidence, I conclude that since 2005, the Minister did not communicate to Treasury Board the CSF's need for Expansion Projects, or the need for funding to acquire surplus schools from majority school boards for the CSF.

ii. Discussion

[6691] The plaintiffs argue that the Minister never adequately communicated the CSF's needs to Treasury Board. They place particular emphasis on the November 2001 Treasury Board submission for 2002/03, noting that it included no statement advising the new government that the CSF is different from other school districts, and no mention of the Province's *Charter* obligations. In their submission the Minister and Treasury Board failed to plan for the CSF's enrolment growth.

[6692] On my review of the evidence, I am satisfied that the Minister did not use its strategic overviews to communicate to Treasury Board the type of funding it needed

to meet its obligations under s. 23. Beginning in about 2002, when the B.C. Liberal government was first elected, the Minister communicated to Treasury Board that enrolment was largely in decline, and that Expansion Projects would be a low priority. Although the Minister foresaw that declining enrolment would present opportunities for the CSF to acquire sites from majority boards, it took no steps to communicate to Treasury Board that it would need funding to pay for those transfers. Rather, the Minister promoted a move away from Expansion Projects. Treasury Board acted on that advice and did not fund Expansion Projects for about six years, to the detriment of the CSF and its need for space to accommodate minority language programmes.

b) Other Funding Priorities

[6693] As I introduced in Chapter III, Introduction to the Capital Planning Process, while the Province has treated Expansion Projects as a lower priority since 2001 or 2002, the Province created Capital Envelopes to respond to other priorities. They were described by Mr. Miller, Mr. Stewart and Mr. Palmer, and include reducing portables, responding to building envelope issues, seismic mitigation, and implementing early learning programmes. Additionally, the plaintiffs point to the operating funds the defendants spend on independent schools.

i. Portable Reduction Programme

[6694] In the late 1990s and early 2000s, the Province undertook a capital programme focused on reducing the number of portables in the education system. Due to rapid enrolment growth in the 1990s, there were about 3,200 portables in the Province in 1997. In about 1997, Treasury Board directed the Ministry to reduce the number of portables, while acknowledging it would not be practical to eliminate all of them.

[6695] The portable reduction programme was an active capital programme until 2002/03. The Ministry included Expansion Projects in its Consolidated Capital Plans to build permanent space for students in portables. By November 2001, the

Province had spent about \$925 million on school expansion over a four-year period. This reduced the number of portables by about half.

ii. Building Envelope Programme

[6696] In about 2002, the Ministry developed a building envelope capital programme targeted to remediating water leakage into school building envelopes. This priority related to the “leaky condo” issue that arose in the Lower Mainland in the 1990s. The Ministry identified schools experiencing water leakage, implemented mitigation measures and pursued redress through litigation.

[6697] By 2002, the Ministry estimated that repairs would cost about \$100 million over three years. It is not clear how much of this was actually spent from the Province’s capital budget, or what the Province was able to achieve from its litigation strategy.

iii. Seismic Mitigation

[6698] Since 2004, seismic mitigation has been the most significant capital funding priority in the province. As I explained in Chapter III, Introduction to the Capital Planning Process, out of a recognition that many buildings in the province are vulnerable to earthquakes, the Province has made significant investments in retrofitting and replacing BC’s most vulnerable schools.

[6699] Mr. Miller explained that the Ministry assessed the seismic risk of school buildings beginning in 2004. That work identified 750 schools with high- or high-moderate seismic risk. Further work after 2005/06 led to the reassessment of about 600 schools based on new scientific research. On completing that reassessment, the Ministry was satisfied only 183 buildings presented a high or moderate risk for seismic issues. The remaining high priority projects were assessed as H1 through H3, with H1 indicating the highest-risk projects. The Ministry is working toward the retrofitting of all of the high seismic risk schools in the Province.

[6700] In 2004, based on the first round of seismic assessments, the Province announced its plans to spend about \$1.5 billion to retrofit 750 buildings over the

course 15 years. To start the programme, in February 2005 the Ministry received a three-year Capital Envelope to address 95 of the highest-priority projects. As construction costs escalated, progress on the 15-year plan slowed.

[6701] On May 11, 2012, the Ministry announced \$122 million in new funding for a second round of seismic projects. The Province supported a seismic project for École des Pionniers as part of that announcement. Mr. Miller testified that later, in the spring of 2013, the Province announced a third round of funding to support another 45 H1 seismic projects with funding of about \$585 to \$600 million.

[6702] By the time Mr. Palmer testified in the spring of 2015, the Ministry was proud of the number of seismic projects underway and completed. As of December 2014, 143 seismic projects had been completed: 123 in SD39-Vancouver, and 20 in other school districts. A further 10 were under construction: nine in SD39-Vancouver, and one in another district. Seven more projects were proceeding to construction, and 53 were in the planning phase. About 126 of 339 total projects were considered to be future priorities.

[6703] The CSF has several projects in the programme. The seismic renovation of École Élémentaire Rose-des-Vents (Vancouver (West)) was approved in 2005, and completed in 2009. The CSF reported to the Ministry that the project cost \$3 million. The École des Pionniers Replacement Project (Port Coquitlam) is proceeding to construction as a seismic project. A seismic renovation of École Élémentaire Côte-du-soleil (Powell River) has been supported and was in the pre-planning process. École Élémentaire Anne-Hébert (Vancouver (East)), the CSF's final H1 seismic project, has yet to be approved.

iv. Full-day Kindergarten

[6704] As I describe in Chapter III, Introduction to the Capital Planning Process, Introduction to the Capital Planning Process, in around 2008/09, but possibly as early as 2006, government developed an interest in full-day kindergarten and early learning programmes for three- to four-year-olds. As the early learning plans

progressed, the Ministry focused on full-day Kindergarten, which was introduced in 2011/12.

[6705] At the time, most students attended Kindergarten half time. As a result, the Ministry would need to double the Kindergarten spaces province-wide. The Ministry worked with school districts to identify surplus classrooms for Kindergarten students. That work led it to believe that it would require space for 650 additional students.

[6706] When the Province announced the full-day Kindergarten programme in June 2010, it was accompanied by a \$144 million capital investment and a plan for new classroom space. Mr. Miller revealed that 400 of those spaces were created by modifying existing buildings. The Ministry also built modular buildings to create about two-thirds of the spaces. Some schools used portables to accommodate the programme. If there was insufficient space to add modular structures to a school site, the Ministry funded renovations. One school was reopened. According to Mr. Miller, by September 2011, there were sufficient spaces for all Kindergarten students.

[6707] The CSF did not receive new Kindergarten spaces as part of this programme. Dr. Ardanaz explained that the CSF has offered a full-day Kindergarten programme since its inception. In January 2010, Mr. Cavelti emailed Mr. Allison to confirm the CSF was able to provide full-day Kindergarten throughout its schools and would therefore not need additional space. Mr. Allison agreed the CSF already offered full-day Kindergarten.

[6708] The CSF benefited indirectly from the full-day Kindergarten capital funding. As I explained in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), the Ministry provided the CSF with three modular classrooms to reduce the effects of overcrowding at École Élémentaire Rose-des-Vents. Mr. Stewart explained the Ministry had some unspent funds in its Capital Envelope when the programme was drawing to a close, so he bent the rules to address the enrolment pressures the CSF was facing.

v. Other Provincial Priorities

[6709] The evidence that is subject to a Confidentiality Order reveals that the Ministry takes two other Provincial priorities into account when deciding what projects to recommend to Treasury Board. On reviewing those priorities and the evidence Mr. Palmer gave in connection with them, they appear to be secondary to the primary needs for Expansion Projects, Building Condition Projects and Seismic Projects. They do not drive Capital Envelopes as do the need for those types of projects. Rather, they are considerations that the Ministry may take into account when deciding which projects to support with a given Capital Envelope.

[6710] The evidence suggests that some weight is given to these factors, although they are secondary to the criteria that drive the Capital Envelope. The evidence also suggests the Minister recommended one project because of one of the priorities. The Court does not have evidence the priorities influenced the decisions to approve, or not, any other capital projects.

vi. Independent Schools

[6711] Separate from the Capital Drivers, but similar in nature, the plaintiffs argue that the Province devoted considerable funds to independent schools, arguing that those funds could be spent on CSF projects.

[6712] While he was under cross-examination, Mr. Stewart confirmed that the Province allocates some operating funding to independent schools. Based on a formula, independent schools receive either 35%, 50% or 0% of the basic per pupil operating amount that public schools receive. In his discovery evidence, Mr. Miller suggested independent schools receive either 50% or 35% of public school operating allocations, which leads the plaintiffs to argue that few independent schools receive no provincial funding. The Province only provides independent schools with operating funding; those schools do not receive any capital funding.

[6713] Mr. Stewart could not speak to how much funding is actually devoted to independent schools. The plaintiffs tried to craft an argument that the amount must

be significant based on the Ministry's overall operating grants. The plaintiffs point to the evidence of the number of students enrolled in independent schools in each year between 2008/09 and 2012/13. They also note the basic per pupil amounts included in the operating grant manuals in those years. From there, they multiply the number of students enrolled by 35% and 50% of the per-pupil operating allocation to generate a range of funding the Ministry must have spent on independent schools in those years. Using those numbers, the plaintiffs suggest the Province invested somewhere between \$796,687,037 and \$1,138,124,340 in independent schools in the five years between 2008/09 and 2012/13.

[6714] In doing this, the plaintiffs assume that very few, if any, independent schools receive no operating funding from the Province. The problem, of course, is that the Court has no knowledge of how many independent schools fall in that category.

[6715] In his discovery evidence, Mr. Miller stated that independent schools "typically get 35 or 50 percent of the per-pupil funding that's provided to a public board, depending on what area of the province they're in." However, the context of that statement was a response to a question about whether Central Okanagan Academy, an independent school in Kelowna acquired by the CSF, would have been built subject to Area Standards. Mr. Miller was explaining that the Ministry does not fund capital projects for independent schools. It was in that context that he made a passing reference to the operating funding for independent schools. I do not take his omission of an explanation that some independent schools do not receive operating funding as evidence that very few independent schools receive no Ministry funding. The plaintiffs did not ask Mr. Miller about operating funding for independent schools.

[6716] The plaintiffs also point to a 2003/04 briefing note to prepare the Minister for a budget estimates debate. That briefing note indicated the Ministry planned to allocate about \$28.4 million of a planned \$312.9 million budget increase to independent schools. The plaintiffs argue that "just that increase... would be enough to fully fund the construction of a new [CSF] school facility."

vii. Discussion

[6717] The plaintiffs argue that the Province does not face financial constraints. They note that the Province set numerous additional capital spending priorities, and made significant capital investments based on them.

[6718] The plaintiffs urge that the CSF did not benefit from the portable reduction programme. In their view, the CSF's first new school approval was for École Gabrielle-Roy (Surrey) in about 2000, which was not an Expansion Project. Of course, this omits the fact that the Province funded the acquisition of a number of surplus schools for the CSF during this period. They also suggest that since then, the Ministry has taken policy decisions to devote considerable funds to other priorities- like full-day Kindergarten, seismic mitigation and independent schools- while the Province chose not to address the CSF's needs.

[6719] The plaintiffs note that implementing s. 23 of the *Charter* was not among the Province's priorities. In their view, the Province has never prioritized its positive obligations pursuant to s. 23 of the *Charter*. They say that is particularly troubling because the Ministry has deprioritized Expansion and Building Condition Projects since 2005. The plaintiffs suggest that when the Province shifted away from Expansion and Building Condition Projects to targeted capital funding in the early 2000s, the Province ignored the CSF's needs.

[6720] In my view, the evidence establishes that since the CSF was created, the Province has applied considerable funding to priorities other than the CSF's needs. The defendants do not dispute this. The CSF benefited from some of those funding priorities. It has received funding for seismic projects, and benefited slightly from the full-day Kindergarten Capital Envelope. However, the CSF always benefited in the same manner as other districts. The Ministry has never sought a Capital Envelope to explicitly prioritize meeting its constitutional obligations.

[6721] As a result of the fact that the Ministry has never requested or received a distinct Capital Envelope to respond to the CSF's needs, the CSF competes for

capital projects against other school districts. Given the size of its schools, its requests are often for small schools. Its needs are therefore treated as less important than those of the majority. Moreover, the CSF has had to compete with schools that have a greater ability to see their projects approved because they can contribute Local and Reserve Capital to their capital projects. This led to the CSF's capital requests being passed over in Sechelt and Penticton in 2005, which materially contributed to rights breaches in those communities. It is also easy to envision how the "other provincial priorities" the Ministry considers (which are subject to the Confidentiality Order) could politicize capital approvals and make them less focused on absolute need, to the detriment of the CSF. As a result, it is important for the CSF's capital needs be afforded their own source of capital funding until the CSF is in the same position relative to other school boards.

2. Efforts toward a Capital Envelope for the CSF

[6722] While the Ministry did not explicitly prioritize the CSF's capital funding needs, it did take some steps to take account of the CSF's unique capital planning needs. Despite those efforts, the CSF has taken the position in negotiations with the Ministry that its unique needs have not been adequately taken into account. Mr. Bonnefoy raised these issues with Minister Bond in 2008 and 2009, and Minister Bond instructed Ministry staff to work with the CSF to address those concerns. Those discussions almost led to a request for a distinct Capital Envelope to address the CSF's needs. Subsequently, those plans fell away. The plaintiffs' position is that the Ministry did not proactively work with the CSF. The defendants' view is that the Ministry adequately accounts for the CSF's unique needs.

a) Efforts to Account for the CSF's Unique Needs

[6723] Mr. Miller gave evidence about the many ways in which the Ministry has attempted to take into account the CSF's unique capital planning needs. He advised that when he worked at the Ministry, he spent more time working on the CSF's capital issues than those of any other district. This was the case even though his

portfolio included the capital concerns of rapidly-growing SD36-Surrey, and the considerable seismic programme in SD39-Vancouver.

[6724] Mr. Miller advised that the Ministry took into account the CSF's unique needs when the CSF was first created and was trying to build an asset base. The Ministry put aside its usual needs assessments and acquired schools for the CSF based solely on the CSF's priorities, school availability and the amount of funds in the capital budget. The Ministry also built new schools to the CSF's long-range projections, six to eight years in the future, giving their projections the benefit of the doubt.

[6725] Mr. Miller also suggested that some Ministry policy changes that affect all districts helped the CSF. He gave the example of changes to the calculation of the AFG, which gave the CSF a greater ability to maintain its buildings. He also pointed to the NLC programme, which he advised could help the CSF to provide cultural and community facilities in CSF schools.

[6726] On the operating side, Mr. Miller pointed to the operating funding system, and indicated that the CSF benefits from unique geographic factors more than any other district. He also averted to the 15% Francophone Supplement that the CSF receives in recognition of the unique challenges it faces delivering Francophone education.

[6727] Mr. Miller commented on the lack of funding for Expansion and Building Condition Projects since about 2005. He suggested the lack of funding was challenging for all districts, including the CSF. He acknowledged the lack of funds posed a particular challenge for districts with growing enrolment, like the CSF.

b) 2008: Provincial Acknowledgment of the CSF's Unique Needs

[6728] In the summer of 2008, Mr. Bonnefoy explained, the CSF was facing serious overcrowding in some of its facilities, but did not believe it was making progress with respect to its needs for Expansion Projects. Further, by June 2009, after the CSF

acquired École Élémentaire Anne-Hébert (Vancouver (East)), CSF staff were frustrated that CSF schools were not being renovated or rebuilt immediately following their acquisition.

[6729] The CSF had other concerns, too. Mr. Bonnefoy explained that CSF staff were concerned the CSF's capital projects were being passed over because the CSF had little Local or Capital Reserve to contribute to them. The CSF's requests for Building Condition Projects were not progressing. The CSF was also frustrated at the prioritization requirements.

[6730] The CSF resolved to pursue its concerns with the Minister. On June 9, 2008, Ms. Bourgeois, the President of the CSF, wrote to Minister Bond about the CSF's capital requirements. She explained that the CSF was struggling to acquire adequate permanent facilities, particularly in Vancouver, Sechelt, Kelowna and North Vancouver Island. Ms. Bourgeois sought a "fundamental shift in the way in which the CSF acquires permanent education facilities". She requested a meeting with Premier Gordon Campbell, Minister Bond and the Deputy Premier.

[6731] In her response, Minister Bond explained that she understood the CSF's unique requirements and the challenges it faced due to its provincial responsibilities, increasing enrolment, and its small schools. She acknowledged that in many cases, the CSF's projects were driven by opportunity and related to the activities of majority school boards. She also stated that she recognized the overlap of minority and majority education responsibilities in the same communities.

[6732] On November 12, 2008, CSF officials met with Minister Bond to discuss the CSF's concerns. Mr. Miller was also likely present at that meeting. The attendees discussed the CSF's most recent Capital Plan Submission, including ongoing issues at École Élémentaire Rose-des-Vents (Vancouver (West)) and the need for a secondary school in the Fraser Valley. The CSF explained its desire to plan its capital projects by ward.

[6733] The CSF urged that the Capital Planning Cycle did not respond to its needs. It was proposed that a five-year Capital Envelope be developed for the CSF that recognized its unique character, while giving it some flexibility to take advantage of opportunities. Mr. Bonnefoy left with the impression that the CSF's position had been well received.

[6734] The CSF subsequently received a letter from Minister Bond dated December 30, 2008. The Minister advised that she had asked Ministry staff to work with the CSF to develop a longer-term capital funding envelope to address the CSF's unique facility needs. She also suggested Ministry staff would work with majority school boards and other levels of government toward the acquisition of CSF school sites.

[6735] Mr. Miller conceded that as of 2009, Ministry staff thought that a new approach to capital planning for the CSF would have had some benefit. He recalled that Minister Bond spoke to him about the development of a long-range Capital Envelope for the CSF. Based on his conversation, he believed Ministry staff would work with the CSF to identify its needs for school and site acquisitions and building condition work, then evaluate those needs against the needs in other districts. That work would allow the Ministry to go to Treasury Board to request a three- to five-year envelope for the CSF. He and other Ministry staff hoped the envelope would give the CSF some flexibility to move forward with projects as opportunities arose. Savings in the envelope could likewise be applied to additional CSF projects.

[6736] In Mr. Miller's view, Ministry staff consulted with majority boards and other levels of government as Minister Bond suggested. In December 2008, Mr. Miller wrote to Mr. Butler (then the CSF's Regional Manager), Mr. Stewart and Mr. Cavelti, and outlined work to be completed, which included searching for sites in Vancouver and Abbotsford, assisting with transportation funding and working with majority boards to acquire existing schools for the CSF.

[6737] Mr. Miller advised that the Ministry had discussions with the Federal government around this time, as well as successful discussions with SD71-Comox

Valley and SD20-Kootenay Columbia that allowed the CSF to acquire surplus schools. Mr. Stewart reported that Ministry staff worked together to lobby the Federal Government for sites in Vancouver, as outlined in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)). Mr. Stewart made some telephone calls concerning the MSA Site in Abbotsford, as outlined in Chapter XXXI, Abbotsford French-Language Education. Mr. Stewart could not say who worked on transportation and other site acquisitions.

[6738] From the CSF's perspective, though, very little changed. Indeed, Mr. Miller referred to the Ministry's work as a continuation of the work Ministry staff had already been doing.

c) 2009: Move Away from Capital Envelope for the CSF

[6739] Seeing little progress, the CSF began a new approach to capital planning that prioritized projects in each of seven wards of the Province. Ministry staff were generally receptive to the idea. It was on that basis that the CSF submitted its May 2009 Capital Plan Submission for 2009/10.

[6740] By the time the Ministry received and was considering the CSF's May 2009 Capital Plan Submission for 2009/10, staff were aware the Ministry was likely to see limited capital funding. Shortly thereafter, there was an election and Minister Bond was replaced as Minister of Education by Minister MacDiarmid.

[6741] Mr. Miller advised despite the Cabinet shuffle, staff remained interested in pursuing a Capital Envelope for the CSF. However, the Capital Branch's circumstances were changing "drastically" due to an ongoing world financial crisis, and an election. Due to a new focus on balancing the provincial budget, there was little hope for a Capital Envelope for the CSF, and little opportunity to move forward with the previous agenda.

[6742] CSF staff met with Minister MacDiarmid and other Ministry staff shortly after Minister MacDiarmid was appointed in the summer of 2009. At that meeting, the CSF stressed that it had begun attracting a larger share of students in each district

than had originally been anticipated. CSF staff informed the new Minister of some of the CSF's challenges: the CSF's difficulties with enrolment projections, the size of its catchment areas, security of tenure and the CSF's grade configurations and the suitability of schools for those configurations. The CSF shared that it had moved to a ward-based method of prioritizing its capital project requests, and stated that it required additional capital funding to achieve parity with majority school boards.

[6743] Discussions continued at a November 5, 2009, meeting where Mr. Bonnefoy, Mr. Allison, Mr. Cyr and two CSF trustees met with Deputy Minister Gorman, Mr. Miller and Mr. Owen at the CSF's Board Office in Richmond. CSF staff drew attention to the various ways majority-language districts had acquired school sites and their ability to address overcrowding by redrawing catchment areas: advantages they maintained the CSF lacks. CSF staff also pointed to some of the problems the CSF faced acquiring capital assets and its need for Ministry assistance.

[6744] By the time of trial, the CSF had not received a Capital Envelope specific to it. Mr. Stewart confirmed this was the case as of his retirement. While Mr. Stewart maintained the Capital Envelope for the CSF was always on the table, Mr. Palmer advised that he was not involved in further discussions concerning that idea.

d) Discussion

[6745] The defendants admit the following allegation from the plaintiffs' pleading:

At times, the defendants and the [Ministry] have recognized that the [CSF] has distinctive capital planning needs. For instance, the Minister has committed to developing a capital planning process that responds to the specific capital needs of the [CSF]. In particular, at a meeting held on November 12, 2008 attended by, *inter alia*, the President of the [CSF], the Minister and Assistant Deputy Ministers of the [Ministry], the Minister confirmed the distinctive planning needs of the [CSF].

[6746] In the plaintiffs' submission, despite this, the Province has never put in place a capital planning process that responds to the specific capital needs of the CSF.

The plaintiffs suggest that little changed after Minister Bond committed to finding new ways of working with the CSF.

[6747] The defendants acknowledge that following the meeting with Minister Bond, Ministry staff were enthusiastic about finding new ways to work with the CSF. They suggest that Mr. Miller and Mr. Stewart made efforts to do so. The defendants also admit the enthusiasm waned and was not regained with the world financial crisis.

[6748] In the defendants' submission, however, the Ministry went out of its way to find different ways of working with the CSF throughout the CSF's existence. In their view, the system does take into account the CSF's unique needs.

[6749] As I see it, in late 2008 and early 2009, Minister Bond was in favour of creating a longer-term Capital Envelope for the CSF. Minister Bond and Ministry staff envisioned that the CSF and the Ministry would work together to identify the CSF's needs and the Minister would approach Treasury Board to attempt to justify a request for a long-term Capital Envelope for the CSF. The envelope would allow the CSF some flexibility to pursue emerging opportunities.

[6750] The Minister never went to Treasury Board to request that longer-term Capital Envelope. Ministry staff thought it was unlikely any capital funding would be forthcoming due to global economic conditions and their impact on the Province's revenues. When Minister Bond was replaced by Minister MacDiarmid in the summer of 2009, the idea fell away and has not been actively pursued since. I conclude that by the time of trial, the idea was no longer within the Ministry's contemplation.

[6751] Based on the evidence that was put before the Court, it appears as though the primary change the Minister contemplated was a long-term Capital Envelope for the CSF. Minister Bond and her staff were focused on finding ways for the CSF to respond to opportunities to acquire sites as those opportunities arose. Since 2009, a number of opportunities have arisen, and no funding was available for the CSF to pursue them. As a result, the CSF continues to lack space in a number of communities where the numbers warrant them.

[6752] Some of those were ones that were contemplated and discussed in the meetings in 2008 and 2009: opportunities to acquire a school in Abbotsford, for example. While a full acquisition project is not currently justified, it will likely be justified within 10 or so years. There also appears to be an opportunity for the CSF to acquire Kilgour Elementary in Richmond. I find that all parties agree that Kilgour Elementary represents the best long-term solution to the CSF's needs in Richmond.

3. Conclusion

[6753] The plaintiffs draw a comparison between the situation in this case and the facts in *Dufferin Peel*. In *Dufferin Peel*, the government delayed funding admittedly needed minority language educational facilities to pursue a deficit elimination strategy. As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the court concluded that the delay was contrary to s. 23.

[6754] The plaintiffs say that, like the Ontario school construction moratorium at issue in *Dufferin Peel*, the Province's decision not to fund the CSF by way of a long-term envelope was a case of the Province deferring its constitutional obligations in favour of cost-cutting measures. They urge that in this case, as in *Dufferin-Peel*, it is not open to the Province to decide cost savings should take precedence over s. 23.

[6755] I agree. Since 2005, the Ministry has not funded few new Expansion Projects. It has chosen to devote funding to matters other than its constitutional obligations. It has never gone forward to request a Capital Envelope prioritizing the CSF's needs. Further, when funding was available in 2005, CSF projects were passed over in favour of projects where majority school boards could contribute Local or Reserve Capital-- something the CSF has less ability to do. This has stalled the CSF's progress expanding minority language education where it is warranted. It has remained stalled even though the Ministry has recognized since 2008 that there would be some benefit to funding the CSF's capital needs independently from the majority for at least some period of time.

B. A Capital Envelope for the CSF

[6756] I take it that since 2008, all parties have agreed that there would be some benefit to developing a long-term Capital Envelope for the CSF. Creating that type of an envelope would give the CSF some flexibility to acquire sites when opportunities arise. It would ensure that the CSF does not compete against majority school boards for capital projects. It would also allow an avenue for the Ministry to continue to exercise its legitimate role ensuring that projects are justified.

[6757] As I explain in Chapter X, Remedies, s. 24(1) of the *Charter* allows courts a wide, unfettered scope for crafting remedies to respond to *Charter* breaches: *Ward* at paras. 18-19. The remedy must be appropriate and just. First, it must meaningfully vindicate the rights and freedoms of the claimants, and address the circumstances in which the right was infringed or denied. Second, it must apply means that are legitimate within the framework of our constitutional democracy, respecting the separation of functions between the legislature, executive and the judiciary. Third, the remedy should invoke the functions and powers of a court; the remedy should be a judicial one. Fourth, the remedy should be fair as against the party that it is made. Finally, it should be allowed to develop novel and creative features to be flexible and responsive to the needs of a given case: *Doucet-Boudreau* at paras. 54-59.

[6758] It is my view that ordering the Province to craft an envelope to respond to the CSF's needs meets the requirements set out in *Doucet-Boudreau*.

[6759] Ordering the Province to establish such an envelope provides a way of ensuring that the declarations I issue in connection with the Community Claims are meaningfully vindicated. The primary impediment to the CSF expanding its programmes to realize the objectives of s. 23 is a lack of funding, and the fact that the CSF must compete for capital projects. The Ministry has failed to devote sufficient funding to the CSF's capital needs for many years. Ordering the Province to craft a Capital Envelope will ensure that there is a source of funding available to respond to the CSF's capital needs.

[6760] It also respects the role of the executive and the legislature, as well as the proper role of the CSF and the Court. With a long-term Capital Envelope, the Ministry's usual capital planning requirements like the requirements for prioritization, PIRs, and proper enrolment projections would still be adhered to. The CSF would not be given a "blank cheque" as it would with a trust remedy. It would also leave it in the hands of the CSF to decide which of its projects are most important, and which rights breaches should be addressed most urgently, thus respecting the CSF's important role with respect to management and control of matters going to the minority's language and culture. It is a remedy that leaves it to Province and the CSF to work out the detailed arrangements concerning how capital projects should progress. As the Court observed in *Association des Parents- SCC*, it falls outside the court's expertise to participate deeply in operational questions; those issues are better resolved between the Ministry and the CSF (at para. 67).

[6761] I also consider this to be a judicial remedy. It is a way to provide the CSF with compensation, similar to the types of awards courts make in civil cases. Further, courts are not strangers to issuing orders in the nature of *mandamus* requiring government actors to exercise certain powers. As I see it, I am requiring the Province to exercise its legal powers in a way that courts frequently do following a judicial review.

[6762] I acknowledge that this is an exceptional remedy, and extends slightly beyond what is typically contemplated with an order in the nature of *mandamus*. However, in light of the special circumstances and the need to creatively respond to the CSF's needs, I find that this is an appropriate circumstance to exercise some creativity and flexibility in crafting a remedy.

[6763] As a result, I order as follows:

- a) The Province must exercise its legal powers to create a long-term, rolling Capital Envelope to provide the CSF with secure funding to address its need for capital projects across the Province.

[6764] The CSF must comply with the administrative requirements for accessing funds from its Capital Envelope: it must prioritize its projects, support them with feasibility work and proper projections, and build schools that adhere to the Area Standards except to the extent that the Ministry and the CSF agree that allowances should be made to account for the CSF's unique needs.

[6765] I will not go further to delineate how much funding should be devoted to the CSF's projects or what projects must be funded using the Capital Envelope. The CSF's needs are malleable. It has the jurisdiction to create many new programmes, and it is impossible to know at this point where the need will be greatest and where opportunities will arise. It is within the CSF's jurisdiction to make those decisions. The evidence falls short of proving how expensive sites and new schools will be. The Ministry and the CSF will need to work together to ensure that the Capital Envelope addresses as many of the CSF's needs as possible.

XLIII. DUTY TO ASSIST THE CSF AND THE *EDUCATION MEDIATION REGULATION*

[6766] The third and final issue at the source of many of the CSF's claims is the Ministry's policies requiring the CSF to identify and negotiate with respect to sites for sale and lease without Ministry assistance. That problem raises the question whether the Province met its duty to assist the CSF by enacting the *Education Mediation Regulation*. Indeed, the defendants plead the *Education Mediation Regulation* as a defence to the entirety of the plaintiffs' claim. If the enactment of the *Education Mediation Regulation* did not meet that duty, then the question becomes what more the government should be required to do to assist the CSF, and what remedy is appropriate to achieve that objective.

[6767] Below, I outline the history of the *Education Mediation Regulation*, which has its roots in *Vickers #1* and *Vickers #2*. Then, I turn to the plaintiffs' argument that the *Education Mediation Regulation* is ineffective and therefore falls short of meeting the defendants' obligations, before addressing what more the defendants should be required to do to assist the CSF.

A. Background and History to the *Education Mediation Regulation*

1. Circumstances Leading to the Adoption of the *Education Mediation Regulation*

[6768] As explained in Chapter V, The Remedial Purpose of s. 23 and Assimilation in British Columbia, as well as Chapter XXXV, Leases, in the 1990s the FPFCB challenged the *Francophone Education Regulation* for being *ultra vires* the *Former School Act*. In the alternative, the FPFCB argued the regulation was unconstitutional on several bases. Among them, the FPFCB argued the regulation unconstitutionally limited the FEA to leasing property and did not provide a dispute resolution mechanism to ensure the FEA would be able to obtain facilities and equipment. In *Vickers #1*, Mr. Justice Vickers held that without some dispute resolution mechanism, the limitation to the FEA's form of tenure placed it at the mercy of majority school boards. Thus, he concluded that the arrangement did not afford the FEA sufficient management and control to satisfy s. 23 of the *Charter* (at paras. 38, 40).

[6769] In September 1998, Mr. Justice Vickers heard a second challenge brought by the FPFCB, which focused on 1997 amendments to the *School Act*. In *Vickers #2*, Mr. Justice Vickers again considered whether the legislation should provide a dispute resolution mechanism to resolve any impasse that might arise between the majority and minority boards concerning ownership, management and control of schools and other assets.

[6770] Although Vickers J. found the legislative scheme was compatible with the *Charter*, he was concerned about the lack of a process to ensure the CSF had management and control of its programmes without constant reference to majority school boards. In particular, he noted that the CSF's ability to carry out its mandate was hampered by the need to bargain for space on a continuing basis (at para. 48). He also observed that the CSF was left to deal directly with majority school boards, which effectively relieved the Province of its responsibility for the active promotion of the linguistic and cultural rights for the Francophone minority (at para. 54). He noted that the CSF was left "in the unenviable position of operating in a vacuum, not

knowing what the future holds other than a series of negotiations with majority boards and an offer by the Province to 'call us if you need us.'" (at para. 55).

[6771] Accordingly, Vickers J. concluded that the *Charter* required some provision requiring the parties to a dispute (the CSF, the majority board and Ministry officials) to engage in a dispute resolution process. He ventured that such a process was important to ensure the Ministry not be allowed to sit back and decline to become involved unless invited (at para. 57). The process, he advised, ought to involve negotiation between the parties concerned, and might involve third-party assistance. He expressed hope that a well-considered dispute resolution process would avoid any further referrals to the courts, noting the benefit to the parties from resolving their differences by agreement rather than litigation (at para. 58).

[6772] Mr. Justice Vickers concluded by declaring (at para. 59):

... that the Province of British Columbia must enact provisions, by legislation or regulation, creating a dispute resolution process to include representatives of the Ministry of Education. The process or mechanism is to be designed to address any dispute that may arise in:

- i. implementation and operation of the transfer of assets;
- ii. the co-management of shared assets;
- iii. lease negotiations of any facilities that are not transferred; and
- iv. any other dispute that may arise between the C.S.F and a majority school board.

[6773] Following *Vickers #2*, the Province consulted with both the CSF and the FPFGB about a draft version of the *Education Mediation Regulation*. According to Mr. Gignac, the FPFGB was concerned at the time that the process would be costly and did not provide for a binding resolution. Dr. Ardanaz testified that the CSF was likewise concerned the process was not mandatory, would be costly and lengthy, and did not guarantee results.

[6774] Both the FPFGB and the CSF expressed their concerns to the Ministry. In November 1999, Ms. Hennessey, then the President of the CSF, wrote to Minister Gordon Wilson and expressed the CSF's view that to comply with the order in

Vickers #2 the dispute resolution mechanism must be designed to resolve four types of disputes: those related to the transfer of assets; the co-management of shared assets; lease negotiations for assets that are not transferred; and any other dispute that might arise between the CSF and a majority school board. Later, she wrote again and expressed concern that the proposed process would be too lengthy and did not guarantee a final resolution.

[6775] The Minister declined to amend the draft to respond to those concerns, as the Ministry believed the draft regulation complied with *Vickers #2*. The evidence confirms that the *Education Mediation Regulation* was implemented with few substantive changes. It was not amended to create a binding or shorter process as requested by the FPCFB and the CSF.

2. The *Education Mediation Regulation*

[6776] The *Education Mediation Regulation*, B.C. Reg. 250/2000, came into force on July 7, 2000. Since then, it has been subject to only two non-substantive amendments to its language.

[6777] The *Education Mediation Regulation* creates a process for the resolution of “disputes” between “disputants”. Disputants are defined in s. 1 to mean a Francophone education authority (the CSF) and a board of education. The Minister is not a disputant. Rather, he, like the disputants, is a “participant”.

[6778] Section 1 of the *Education Mediation Regulation* defines a dispute as:

a dispute between one or more boards of education and one or more francophone education authorities in relation to any one or more of the following:

- (a) any matter arising under section 166.29 of the *School Act*;
- (b) the co-management of shared assets;
- (c) the negotiation, implementation or interpretation of any lease of assets or facilities that are not transferred under section 166.29 of the *School Act*;
- (d) any other dispute that may arise between one or more boards of education and one or more francophone education authorities;

[6779] The balance of the regulation focuses on the mediation process. Prior to mediation, the disputants must have made their best efforts to resolve the dispute through informal negotiation, or one of the disputants must have refused to engage in negotiations (s. 2). The process begins when any disputant or the Minister delivers a Notice to Mediate to the other participants (s. 2). Then, the participants jointly appoint a mutually acceptable mediator within 14 days (s. 3). If the parties cannot agree, a participant may apply to a roster organization for an appointment of a mediator (s. 4). Each disputant delivers to the mediator a Statement of Facts and Issues, which is then exchanged with all the other participants (s. 7).

[6780] The first mediation session must occur within 21 days of the appointment of the mediator (s. 6). Each participant, including the Minister, is required to appoint a representative to attend the mediation, who must have authority to settle on behalf of that party. The parties also have a right to counsel and the right to withdraw from the mediation with consent of the other parties (s. 5). All persons are required to adhere to confidentiality requirements in connection with the information exchanged at the mediation (s. 10).

[6781] The mediation concludes when all issues are resolved and a written settlement agreement has been signed by all participants; the mediator determines that the process will not be productive; or all participants agree to terminate the mediation process (s. 11). If the parties have not reached agreement on all issues in dispute, the mediator may, on request, prepare a written non-binding recommendation for settlement. Even on request, the mediator is not required to make a non-binding recommendation (s. 12).

[6782] There are few formal requirements for the conduct of the mediation. The mediator has the ability to conduct the mediation in any manner he or she believes appropriate to assist the participants to reach a timely, fair and cost-effective resolution (s. 9).

3. History of Use of the *Education Mediation Regulation*

[6783] To date, no mediations have proceeded to completion pursuant to the *Education Mediation Regulation*.

[6784] None of the witnesses gave evidence about any majority school boards invoking or threatening to invoke the *Education Mediation Regulation*. Mr. Bonnefoy and Mr. Allison both invoked the *Education Mediation Regulation* on several occasions, and decided not to use the process in others. The Ministry has never invoked the *Education Mediation Regulation*, but appointed a facilitator to assist the CSF and SD39-Vancouver in connection with the CSF's acquisition of the Oakridge Site in 2000. I explain those examples below.

a) The CSF's invocation of the EMR

[6785] The Court heard evidence about three instances where the CSF invoked or threatened to invoke the *Education Mediation Regulation*, but the mediations did not proceed. Those circumstances arose in relation to disputes with SD43-Coquitlam, SD71-Comox Valley, and SD39-Vancouver.

[6786] As I explain in more detail in Chapter XXXII, Burnaby French-Language Education and École des Pionniers (Port Coquitlam), the CSF threatened to invoke the *Education Mediation Regulation* in 2008 in connection with the transfer of Terry Fox Secondary to the CSF from SD43-Coquitlam. In 2004 or 2005, Mr. Bonnefoy discovered that title to Terry Fox Secondary had not been properly transferred to the CSF and raised the issue with SD43-Coquitlam. When the matter was not resolved after a series of discussions in 2008, he gave notice that the CSF planned to issue a Notice to Mediate. According to Mr. Bonnefoy, SD43-Coquitlam transferred title of Terry Fox Secondary to the CSF within one month of the CSF's notice. According to Mr. Bonnefoy, he felt comfortable using the *Education Mediation Regulation* in connection with the transfer of Terry Fox Secondary because he was confident the CSF had a right to the property.

[6787] As I explain in more detail in Chapter XXXVIII, Site and School Acquisition Projects, in 2007, the CSF engaged in a lengthy negotiation process with SD71-Comox Valley to acquire a school in Comox. The Ministry was involved in all those meetings, and assured SD71-Comox Valley of the funding available for the sale. After years of negotiation, it appeared that the CSF's acquisition of Cape Lazo Middle would not proceed. In 2009, the CSF initiated the *Education Mediation Regulation*. Officials from SD71-Comox Valley expressed interest in meeting outside the formal mediation. Mr. Bonnefoy terminated the formal mediation, and the parties were able to quickly negotiate the acquisition of Village Park Elementary by the CSF.

[6788] As I concluded in Chapter XXIV, École Élémentaire Rose-des-Vents (Vancouver (West)), the CSF began a serious search for space to accommodate École Élémentaire Rose-des-Vents in about 2011. With no schools identified and École Élémentaire Rose-des-Vents experiencing serious overcrowding, in about 2013 the CSF developed an interest in SD39-Vancouver's Sexsmith Elementary. SD39-Vancouver refused a proposal that would have seen the Old Sexsmith School used by the CSF temporarily. Notably, since about 1998 some have been of the mind that the site is not large enough to support two schools. The Ministry would have supported the idea if SD39-Vancouver had agreed, but it was not willing to force SD39-Vancouver to accept the proposal out of respect for school board autonomy and the problems that would arise from unhappy neighbours sharing the same site.

[6789] The CSF acted swiftly to invoke the *Education Mediation Regulation* to resolve the dispute concerning the Sexsmith Elementary Site dispute. SD39-Vancouver refused to participate in the mediation because the parties had not met the negotiation prerequisite, and therefore no dispute had arisen. When the CSF resorted to the *Education Mediation Regulation*, the parties had only just begun discussing the idea of the CSF using the space, and the CSF waited only six days following its formal request. It had not received a response from SD39-Vancouver. Mr. Allison suggested he moved quickly because he thought the mediation could take some time. However, by moving forward in the manner he did and resorting to

mediation without engaging in dialogue or negotiation, Mr. Allison ensured the mediation's failure and harmed the CSF's relationship with SD39-Vancouver.

[6790] In my view, the situation with the Sexsmith Elementary Site had a direct impact on the opportunity for the CSF at the Wesbrook Site. There was a possibility in 2012 or 2013 that the CSF would be able to construct and use a school at the Wesbrook Site pending need for the site by SD39-Vancouver. When Mr. Allison prematurely invoked the *Education Mediation Regulation*, it poisoned the negotiations concerning that opportunity. Moreover, UBC senior staff were not interested in the proposal.

b) Decision NOT to invoke the EMR

[6791] Both Mr. Allison and Mr. Bonnefoy also gave evidence about instances where they took a decision not to invoke the *Education Mediation Regulation* despite challenging issues arising that might be considered "disputes" under the *Education Mediation Regulation*.

[6792] Mr. Bonnefoy gave evidence about his decisions not to invoke the *Education Mediation Regulation* in negotiations with SD38-Richmond and SD39-Vancouver.

[6793] As I found in Chapter XXIII, École Élémentaire des Navigateurs (Richmond), when the Ministry implemented the Lease Funding Suspension in about 2008, SD38-Richmond officials attempted to hold the CSF to the terms of its lease of the former Kilgour Elementary. This was around the same time Mr. Bonnefoy invoked the *Education Mediation Regulation* in connection with its dispute with SD71-Comox Valley. Mr. Bonnefoy did not invoke the *Education Mediation Regulation* in connection with its dispute with SD38-Richmond because he wanted to work collaboratively and did not want to "add fuel to the fire". He also thought mediation would be "counterproductive", as he did not believe the *Education Mediation Regulation* could help in a situation where SD38-Richmond was trying to enforce the terms of a lease that had been signed in good faith. Unlike in SD71-Comox Valley, the CSF did not have a Ministry-supported capital project, so the CSF was

concerned about maintaining its relationship with SD38-Richmond to negotiate further leases.

[6794] Mr. Bonnefoy also did not invoke the *Education Mediation Regulation* when the CSF was seeking a long-term lease of École Élémentaire Anne-Hébert (Vancouver (East)) between 2004 and 2006. Again, Mr. Bonnefoy pointed to the CSF's need to maintain a positive relationship with SD39-Vancouver as its landlord, and suggested that invoking the *Education Mediation Regulation* would create confrontation and more problems than solutions.

[6795] The CSF likewise did not invoke the *Education Mediation Regulation* against SD39-Vancouver to secure more space to accommodate École Élémentaire Rose-des-Vents students in about 2008/09. Instead, the CSF suggested the appointment of a facilitator to meet with all parties, including the City of Vancouver, to make non-binding recommendations. Mr. Bonnefoy did not use the *Education Mediation Regulation* because third parties (the City of Vancouver and the Vancouver Board of Parks and Recreation) were involved in the discussions.

[6796] Mr. Allison testified about his decision not to invoke the *Education Mediation Regulation* against SD48-Sea-to-Sky with connection to the administrative fees charged in the lease agreements, which I discuss in Chapter XXXV, Leases. He said that he based his decision on his desire to preserve an often troubled relationship. Instead of using that process, Mr. Allison chose to withhold payment of the administrative fees. While he was under cross-examination, Mr. Allison became evasive and refused to say whether his approach might have been more detrimental to the relationship. He maintained that he thought he had sufficiently explained his views to SD48-Sea-to-Sky.

[6797] Mr. Allison likewise did not invoke the *Education Mediation Regulation* when École Élémentaire Les Aiglons faced eviction from Garibaldi Highlands Elementary, as described in Chapter XIX, École Élémentaire Les Aiglons (Squamish). Mr. Allison knew the *Education Mediation Regulation* was an option, but did not use it because

he thought that approach was confrontational and could result in the CSF losing space.

[6798] As a “Participant”, the Ministry is also entitled to invoke the *Education Mediation Regulation*. The plaintiffs questioned Mr. Miller about the Ministry’s failure to do so, and decision to use an independent facilitator to negotiate the transfer of the Oakridge Site to the CSF in about 2000. I discussed this process in Chapter XXV, École Élémentaire Anne-Hébert (Vancouver (East)). Mr. Miller agreed it was “unique” for the Ministry to appoint a facilitator. He could not say why the Ministry chose to appoint a facilitator and not use the *Education Mediation Regulation*.

[6799] I note, however, that negotiation involved the need to accommodate a third party, the Vancouver Hebrew Academy, which was being evicted from the Oakridge Site by the CSF. Mr. Miller testified that the involvement of the Vancouver Hebrew Academy made negotiations difficult. Notably, the dispute also arose in 2000, around the same time as the Province established the *Education Mediation Regulation*. I infer that the Ministry likely appointed the facilitator as a means of using a process similar to the *Education Mediation Regulation*, but one that was better suited to accommodating the interests of a third party. While the *Education Mediation Regulation* allows participation by third parties, the process was new and had not been tested. Notably, that process was productive and led to the CSF acquiring the Oakridge Site from SD39-Vancouver. The CSF and SD39-Vancouver have maintained a relationship since that time, with the CSF continuing to lease École Élémentaire Anne-Hébert from SD39-Vancouver until about 2009. I acknowledge that relationship was not always a perfect one.

[6800] Thus, I find that the use of a process similar to that envisioned in the *Education Mediation Regulation* did not harm the CSF’s relationship with its majority school board lessor, and also led to a positive result for the CSF.

B. The Effectiveness of the *Education Mediation Regulation*

[6801] In its pleadings, as a response to the whole of the claim, the Province objects that the CSF has not delivered a Notice to Mediate pursuant to the *Education Mediation Regulation*.

[6802] In response, the plaintiffs argue that its claim does not fall within the scope of the *Education Mediation Regulation*. In the alternative, the plaintiffs submit that the *Education Mediation Regulation's* jurisdiction is not exclusive, and that the Court ought to exercise its discretion to continue exercising jurisdiction over the plaintiffs' claim. Finally, the plaintiffs argue in the further alternative that if the *Education Mediation Regulation* impedes the present claim, it unjustifiably violates s. 23 of the *Charter* and is of no force and effect.

[6803] When the plaintiffs began arguing this issue in its oral submissions, Mr. Milman, counsel for the Province, interjected and clarified the Province's position. He confirmed the defendants do not take the position that the *Education Mediation Regulation* is an answer to the entire claim. The defendants also do not assert that the Court does not have or should not exercise jurisdiction over the claim because of the operation of the *Education Mediation Regulation*. Rather, they take the position that to the extent that the CSF complains, it has a valuable tool available that it has not used.

[6804] In light of the defendants' position, I do not find it necessary to consider the plaintiffs' detailed arguments concerning the overlapping jurisdiction of this Court and a mediator pursuant to the *Education Mediation Regulation*. I am satisfied this Court has jurisdiction, and should exercise its discretion, to consider this claim even though the CSF might have pursued some of its complaints using the *Education Mediation Regulation*.

[6805] The real issues with respect to the *Education Mediation Regulation* are twofold. First, there is the question whether the *Education Mediation Regulation* is,

in fact, a functional, valuable tool that the CSF could have used to resolve some of the disputes in the claim.

[6806] The second relates to my conclusion that the Ministry unjustifiably requires the CSF to identify and negotiate for school sites without Ministry assistance. If the *Education Mediation Regulation* is effective, then the question arises whether the Province fulfills its obligation because it has provided the CSF with a means of self-help, as Mr. Justice Vickers required in *Vickers #2*.

[6807] The plaintiffs argue that the *Education Mediation Regulation* has not remedied “the unconstitutional situation, recognized in both *Vickers #1* and *Vickers #2*, where s. 23 rights depended upon negotiations between the Conseil and [majority boards] in a context of a systemic imbalance in bargaining power.” In their view, the *Education Mediation Regulation* resulted in no change to the CSF’s ability to negotiate leases and property transfers from majority boards. They suggest the CSF remains in a weak bargaining position. Since the *Education Mediation Regulation* does not lead to binding decisions, they take the position that it does not correct the imbalance in bargaining power between the CSF and majority boards.

[6808] In support of their contention that the *Education Mediation Regulation* is ineffective, the plaintiffs argue that the evidence concerning the few instances where the CSF has threatened or invoked the *Education Mediation Regulation* show that the process could alienate majority boards because it is too confrontational, creates delay, and offers nothing more than an informal negotiation process.

[6809] The plaintiffs also point to the Ministry’s review of CSF leases and decision not to add “teeth” to the *Education Mediation Regulation* as evidence that the Ministry, too, sees the *Education Mediation Regulation* as ineffective. In addition, they note that the Ministry never elected to invoke the *Education Mediation Regulation*, even in connection with the transfer of the Oakridge Site.

[6810] The defendants take the position that the *Education Mediation Regulation* satisfies Mr. Justice Vickers’ requirement that there be a dispute resolution

mechanism available to the CSF. They point to what Mr. Justice Vickers stated was required at paras. 57-58 of *Vickers #2*: a process requiring parties to engage in a dispute resolution process, involving negotiation between the parties concerned, possibly including third party assistance, but where the Minister need not abdicate its role in approving or rejecting a lease to a third party tribunal. The defendants argue that the *Education Mediation Regulation* satisfies those requirements, and is what Mr. Justice Vickers had in mind. Thus, the defendants say the CSF can seek a remedy for any imbalanced bargaining power between it and majority boards.

[6811] The defendants also submit the *Education Mediation Regulation* is a road that has not been travelled. They note that the CSF has never followed a mediation through to its conclusion. The defendants suggest the unsuccessful mediation concerning Sexsmith Elementary was not a *bona fide* test of the effectiveness of the *Education Mediation Regulation*. Rather, the defendants say that Mr. Allison was “going through the motions” so the CSF could say it tried to use the *Education Mediation Regulation* before this trial.

[6812] The defendants argue that strengthening the *Education Mediation Regulation* by providing for binding arbitration would exacerbate the problems with confrontation that the CSF complains about. This, the defendants say, is particularly problematic because Mr. Bonnefoy and Mr. Allison were reluctant to use the *Education Mediation Regulation* because it was already too confrontational.

[6813] It is my view that the *Education Mediation Regulation* responds to the requirements in *Vickers #2*. Mr. Justice Vickers required a mediation process that involved negotiation between the parties concerned, and might involve third-party assistance. The *Education Mediation Regulation* requires the parties to engage in informal negotiation. If that negotiation fails, a third party mediator is appointed. Mr. Justice Vickers also mandated that the process resolve disputes concerning the implementation and operation of the transfer of assets, the co-management of shared assets, lease negotiations, and any other disputes between the CSF and

majority boards. The *Education Mediation Regulation* defines disputes in just that way.

[6814] I do not find that the *Education Mediation Regulation* is unresponsive because it does not result in a binding decision. Indeed, a recurrent theme in the CSF witnesses' evidence about deciding not to use the *Education Mediation Regulation* is that they worry the *Education Mediation Regulation* is too confrontational. Of course, while Mr. Bonnefoy routinely expressed concern the *Education Mediation Regulation* could prove to be too confrontational, he agreed that the mediation process was not designed to be so. He also conceded that binding arbitration would be more confrontational than mediation.

[6815] Mr. Allison was unresponsive and evasive when he was asked whether he thought a binding arbitration would prove more useful than mediation. He eventually admitted that he believed an arbitration process would be preferable to mediation, but also conceded that could prove more damaging.

[6816] Moreover, as I explain in Chapter VI, The Respective Roles of the Province and the CSF, the Ministry has the residual discretion under s. 93 of the *Constitution Act, 1867* to craft an education system that navigates the unique blend of linguistic and educational circumstances in the Province: *Arsenault-Cameron, Mahe*. It is within the Province's jurisdiction to create a dispute resolution system so long as it does not infringe upon the CSF's right to management and control or prevent the realization of minority language education facilities in British Columbia. Creating a system that responds to the CSF's needs without binding resolution does not trench on s. 23. Instead, it is designed to ensure the CSF has access to space while preserving the relationship between the CSF and majority boards.

[6817] Unfortunately, as the defendants suggest, the *Education Mediation Regulation* is largely untested. However, when the *Education Mediation Regulation* has been used, it has typically had positive effects for the CSF.

[6818] In most instances where a dispute has arisen, the CSF has chosen not to invoke the *Education Mediation Regulation*. The CSF chose not to invoke the *Education Mediation Regulation* in connection with disputes with SD38-Richmond and SD39-Vancouver, largely because the CSF was afraid that mediation would harm its relationship with majority boards and its ability to secure educational space.

[6819] The CSF invoked - but did not proceed with - formal mediation on three occasions. With respect to disputes in Comox and Port Coquitlam, merely threatening to invoke the *Education Mediation Regulation* was the impetus for disputes being resolved.

[6820] With respect to SD39-Vancouver and the Sexsmith Elementary Site, though, the CSF invoked the *Education Mediation Regulation* prematurely when the parties were engaging in productive negotiations. The premature reference to the *Education Mediation Regulation* stalled the ongoing negotiations and hurt the CSF's chances of securing a different SD39-Vancouver site to relieve overcrowding at École Élémentaire Rose-des-Vents. However, I find that this is not something that arose out of the *Education Mediation Regulation* process; it arose out of Mr. Allison's antagonistic approach and decision not to engage in negotiation. I do not find that situation shows that mediation harms the relationship between the CSF and majority board lessors.

[6821] On the contrary, I find it persuasive that the closest process to that envisioned by the *Education Mediation Regulation* was a fruitful one. When the Ministry appointed an independent facilitator to negotiate the CSF's acquisition of the Oakridge Site from SD39-Vancouver, the facilitator used a process very similar to the one that had just been created with the *Education Mediation Regulation*. That process led to the CSF acquiring the Oakridge Site without harm to the CSF's ongoing relationship with SD39-Vancouver.

[6822] I find that all signs point to the *Education Mediation Regulation* being an effective means of resolving disputes, albeit one that has gone unused and untested by both the CSF and the Ministry.

[6823] That raises the question of whether the promulgation of the *Education Mediation Regulation* relieves the Ministry of its duty to further assist the CSF to identify sites and negotiate leases and acquisitions. In my view, it does not.

[6824] The fact that the Ministry has not resorted to the *Education Mediation Regulation* itself is problematic. In *Vickers #2*, it was made clear that the purpose of the *Education Mediation Regulation* was to ensure that the Ministry could not be allowed to sit back and decline to become involved unless invited (at para. 57). While the Ministry is permitted to invoke the *Education Mediation Regulation*, it has never done so; rather, it created the *Education Mediation Regulation* and then chose to look at it as a self-help mechanism for the CSF. Thus, the Ministry has declined to become involved in the *Education Mediation Regulation* process unless invited to do so. In more recent years, the Ministry has even declined to become involved after it was requested to do so. This falls far short of its obligations pursuant to s. 23.

[6825] By taking that approach, the Ministry has failed to take action to preserve and promote minority language education, and has left the CSF to the whims of the majority boards in connection with leasing arrangements and site acquisitions. It is not enough that the Ministry has created the *Education Mediation Regulation*. It must also use the process, or otherwise assist the CSF in its negotiations with majority boards as it did with the appointment of a facilitator to assist with the Oakridge acquisition.

C. A Policy Solution to Assist the CSF

[6826] In Chapter XXXV, Leases, I find that the Ministry's policies concerning lease negotiations inappropriately require the CSF to negotiate leases on its own without Ministry assistance. In recent years, the Ministry has tried to maintain neutrality between school boards, and failed to advocate for the CSF's interests. Since the Ministry adopted that practice, the policy has disadvantaged the CSF. The policy, when coupled with the lack of advocacy, falls short of meeting the Province's duty to preserve and promote minority language education by ensuring minority language

facilities are provided where the numbers so warrant. The policy is not minimally impairing of rightsholders' rights, and therefore is not a reasonable limit in a free and democratic society.

[6827] Similarly, in Chapter XXXVIII, Site and School Acquisition Projects, I find that the Ministry's policies require the CSF to take the lead identifying school sites, and that the Ministry has failed to sufficiently advocate for the CSF's needs with the minority and missed opportunities to identify sites for the CSF. That policy disadvantages the CSF, and is contrary to the Ministry's duty to preserve and promote minority language education by ensuring minority language educational facilities are provided where the numbers so warrant. The policy is not minimally impairing of rightsholders' rights, and therefore is not a reasonable limit in a free and democratic society.

[6828] At present, the CSF remains in a similar position to the position it was in at the time Mr. Justice Vickers decided *Vickers #2*. While the CSF may have recourse to the *Education Mediation Regulation*, it understandably does not wish to invoke it in those circumstances where it needs to preserve a relationship with a majority school board. The CSF is left to fend for itself to negotiate to acquire new sites, and is beholden to majority school boards and the willingness of Ministry actors to intervene to assist the CSF. Lately, Ministry actors have not been as willing to help as they should be, which is understandable given the way that the CSF has tried to manipulate events to further their position in this litigation.

[6829] At the same time, the CSF is clearly the party that ought to have primary responsibility for identifying and negotiating for school sites. The CSF's right to management and control includes the right to identify where school programs should be located. Many CSF witnesses testified that it is not appropriate for the Ministry to intervene unless the CSF asks for assistance. Intervening without such a request could do further damage to the CSF's relationship with majority school boards. Moreover, the Ministry has a legitimate interest in maintaining some semblance of neutrality between the majority and minority while still meeting its duty to preserve

and promote minority language education by ensuring that minority language educational facilities are provided where the numbers so warrant.

[6830] The CSF needs some certainty that it will have assistance from the Ministry when it asks for it. The Ministry must craft some sort of law or policy that will provide the CSF with that assurance. That policy should provide some mechanism to assist the CSF when it has made reasonable efforts to conclude negotiations and acquire a school site, but has encountered difficulty doing so.

[6831] Requiring the Ministry to take some sort of positive step by implementing a law or policy is appropriate and just in the circumstances. When the Province first created the FEA, it considered that it might be necessary to create some sort of law or policy to persuade majority school boards to assist the CSF. While the Ministry advocated for the CSF and helped it to identify sites and negotiate with the majority on request in the CSF's early years, it has recently failed to take the positive steps to protect the CSF when the CSF asked for help.

[6832] I do not want to go forward to stipulate what type of law or policy the Ministry must craft. There are a myriad of options available to the Province. As I described in Chapter XXXVIII, Site and School Acquisition Projects, the Ministry could implement a policy like a right of first refusal. It could craft a policy setting out prerequisites following which it will invoke the *Education Mediation Regulation* or exercise influence to persuade majority school boards to act. The Province could legislate a directive power to the Minister. This list is by no means exhaustive. At a minimum, the CSF must have some certainty that the Ministry will assist it after it has made reasonable efforts on its own.

[6833] I therefore make the following order:

- a) The Province and/or the Ministry must craft a policy or enact legislation to either resolve or ensure the Ministry's active participation in the resolution of issues concerning the CSF's need for space and the types of disputes that arise between the CSF and majority school boards: site identification;

implementation and operation of the transfer of assets; the co-management of shared assets; lease negotiations of any facilities that are not transferred; and any other dispute that may arise between the CSF and a majority school boards.

XLIV. CONCLUSION

[6834] To summarize, I order the following relief. With respect to the Community Claims, I declare as follows:

- a) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme (for children age 14-17) in Whistler with heterogeneous instructional space for about 30 students (or such other numbers and facilities as the parties agree to).
- b) Rightsholders under s. 23 of the *Charter* living in Squamish are entitled to have their elementary-age children (age 5-13) receive minority language education in homogeneous facilities with space for 135 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the experience at comparator elementary schools.
- c) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary school programme in Squamish (for children age 5-13) with homogeneous instructional space offering a global educational experience proportionate to the experience at comparator elementary schools for about 135 students (or such other numbers and facilities as the parties agree to).
- d) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish a secondary school programme in Squamish (for children age 14-17) with heterogeneous instructional space for about 35 secondary students (or such other numbers and facilities as the parties agree to).

- e) Rightsholders under s. 23 of the *Charter* living in the catchment area of École Élémentaire du Pacifique are entitled to have their elementary-age children (age 5-13) receive minority language education in homogeneous facilities with space for 90 children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.
- f) The school facility presently housing École Élémentaire du Pacifique does not allow the CSF to offer a global educational experience that is equivalent to that in smaller elementary schools in SD46-Sunshine Coast, and proportionate to the facilities in larger comparator schools.
- g) Rightsholders under s. 23 of the *Charter* living in the catchment area of École Élémentaire Entre-lacs are entitled to have their elementary/middle school age children (age 5-14) receive minority language education in homogeneous facilities with space for 175 students (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools in Penticton, Summerland and Okanagan Falls, and proportionate to the educational experience in comparator middle schools.
- h) The school facility presently housing École Élémentaire Entre-lacs does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools and proportionate to the experience in comparator middle schools.
- i) Rightsholders under s. 23 of the *Charter* living in Vancouver (West) are entitled to have their elementary-age children (age 5-12) receive minority language education in homogeneous facilities with space for 500 elementary-age children (or such other numbers as the parties agree to) that provide them with a global educational experience that is equivalent to that in comparator elementary schools.

- j) The school facility presently housing École Élémentaire Rose-des-Vents does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools.
- k) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary programme (for children age 5-12) in Northeast Vancouver with heterogeneous instructional space for about 25 to 45 students in the short term and homogeneous facilities with space for up to 270 students in the long term (or such other numbers as the parties agree to).
- l) Rightsholders under s. 23 of the *Charter* living in the Central Fraser Valley (Abbotsford, Mission and Chilliwack) are entitled to have their secondary-age children (age 13-17) receive a minority language education in facilities that provide them with space for 29 to 40 students in the short term and up to 120 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language secondary schools in the Fraser Valley.
- m) Rightsholders under s. 23 of the *Charter* living in Abbotsford are entitled to have their elementary-age children (age 5-12) receive a minority language education in facilities with space for 10 to 30 students in the short term and 85 students in the long term (or such other numbers as the parties agree to) that provide them with a global educational experience that is proportionate to the educational experience offered at majority-language elementary schools in SD34-Abbotsford.
- n) The lack of minority language school facilities in Abbotsford prevents the CSF from offering a global educational experience that is proportionate to the educational experience offered at majority-language secondary schools in the Fraser Valley and at elementary schools in SD34-Abbotsford.

- o) The CSF has the jurisdiction pursuant to s. 23 of the *Charter* to establish an elementary programme in Burnaby with heterogeneous instructional space for about 15 to 40 students in the short term and homogeneous instructional space for up to 175 students in the long term (or such other numbers and facilities as the parties agree to).

[6835] With respect to the breaches concerning the Ministry's capital planning framework, I declare as follows:

- a) Section 166.25(9) of the *School Act* is a valid exercise of the Province's constitutional jurisdiction over education.
- b) The Ministry's policy freezing CSF lease funding at 2013/14 levels is contrary to s. 23 of the *Charter*, and therefore of no force and effect.
- c) The Ministry's policy requiring the CSF to negotiate leases without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.
- d) The Ministry's policies of not funding Expansion Projects and evaluating the CSF's requests for capital projects against those of Majority School Boards with greater capital resources than the CSF unjustifiably infringes s. 23 of the *Charter*.
- e) The Ministry's policy requiring the CSF to identify and negotiate for site acquisitions without Ministry assistance unjustifiably infringes s. 23 of the *Charter*.
- f) The Ministry's failure to collect information regarding the potential demand for minority language education in British Columbia, including the numbers of and geographical distribution of children who could enrol in a school of the CSF, constitutes an unjustifiable violation of s. 23 of the *Charter*.

[6836] To ensure that the various declarations I make are effective I also make the following orders:

- a) The Province must exercise its legal powers to create a long-term, rolling Capital Envelope to provide the CSF with secure funding to address its need for capital projects across the Province.
- b) The Province and/or the Ministry must craft a policy or enact legislation to either resolve or ensure the Ministry's active participation in the resolution of issues concerning the CSF's need for space and the types of disputes that arise between the CSF and majority school boards: site identification; implementation and operation of the transfer of assets; the co-management of shared assets; lease negotiations of any facilities that are not transferred; and any other dispute that may arise between the CSF and a majority school boards.

[6837] I additionally order the defendants to pay to the CSF \$6 million in *Charter* damages over 10 years to compensate it for the chronic underfunding of the CSF's transportation system between 2002/03 and 2011/12.

[6838] In conclusion, I want to add a comment about the manner in which this case was brought. It should be clear to the reader that the plaintiffs' claim was broad and far reaching. It explored the entire breadth and scope of the sliding scale of entitlement envisioned in s. 23 at a time when there was limited judicial consideration of that sliding scale except for its upper echelons. The Community Claims (including the claim for a new school board office) could have proceeded by way of 18 separate trials.

[6839] I understand why the plaintiffs chose to pursue all their claims at once. The plaintiffs believed they needed extensive evidence from across the Province to support their systemic claim.

[6840] Nevertheless, it is unfortunate the claim was brought in this way. Our understanding of *Charter* rights develops incrementally. There is great benefit to a myriad of legal minds working on the many facets of complicated legal questions like those considered in this case. Advancing a few claims independently would have

allowed our understanding of s. 23 to develop incrementally over the course of a number of considered opinions.

[6841] Moreover, in the context of s. 23, it is important to resolve questions of entitlement as quickly as possible to ensure that generations of rightsholders do not lose their rights. If a few of these claims had been advanced independently, greater judicial guidance might have settled some of the claims. And most importantly, British Columbia's rightsholders might well have seen much faster results.

[6842] Given the length and breadth of evidence in this case, I am indebted to counsel for their able assistance. Although counsel worked under challenging timelines -- particularly with respect to their written submissions -- they provided me with capable, helpful guidance navigating a complex record.

[6843] That leaves the question of costs. The plaintiffs seek special costs of the trial and of all pre-trial steps. Neither party made full submissions on costs before me. If it is necessary, the parties may make further submissions as to costs.

“Russell J.”

The Honourable Madam Justice Russell

XLV. GLOSSARY

15% Francophone Supplement: A 15% supplement applied to the CSF's Operating Block grant to recognize the additional operating costs associated with the CSF's unique needs, including transportation and the cost of linguistic and cultural programming.

2007 Disposal Order: A September 2007 ministerial order concerning the disposal of school district property. It implemented the Asset Matching Programme by requiring school districts to offer surplus property to other government agencies before they could be disposed of.

2008 Disposal Order: A ministerial order concerning disposal of school district property that terminated the Asset Matching Programme in the 2007 Disposal Order and implemented a requirement for ministerial approval to dispose of real property except when selling to the CSF or independent schools.

2009 Transportation Policy: The CSF's 2009 internal policy concerning transportation, which introduced the concept of transportation zones outside of which the CSF would not offer transportation, and aimed to ensure school bus ride times did not exceed 45 minutes whenever possible, all with a view to reducing the CSF's transportation costs.

2011 Expansion Programme: An October 2011 limited Capital Envelope to address the need for Expansion Projects in areas of the Province that were experiencing enrolment growth.

Additive Bilingualism: A phenomenon whereby members of minority linguistic communities do not experience decreased knowledge of the minority language when they learn the majority language.

AFG: Short-form for the Annual Facility Grant; an annual allocation of funds given by the Province to school districts to allow them to maintain buildings over the course of their economic lives.

AFG Rural Factor: A factor in the formula for calculating AFG allocations that provides school districts with credit for 50% of the students that could be accommodated in surplus capacity in a school that cannot be closed and consolidated because it is located in a rural area.

APÉ: Association des Parents d'Élèves, the French translation of Parent Advisory Council.

Area Standards: An appendix to the Capital Planning Instructions that specifies the size of building and amenities that can be built for a given capacity of students at a given grade level. The Area Standards are designed to create building equity across all school districts.

ARES: The Ministry of Labour and Citizens' Services, Accommodations and Real Estate Services division. It is the successor to BCBC and the predecessor to Shared Services BC.

Asset Matching Programme: A 2007 programme managed by ARES whereby surplus government properties were systematically matched with government agencies interested in acquiring them with a view to retaining public assets in the public sector for public use. It was implemented by the Ministry along with the Asset Inventory Programme by way of the 2007 Disposal Order.

Asset Inventory Programme: A 2007 programme managed by ARES whereby the Ministry of Labour and Citizen's Services created an inventory of surplus government properties that might be available for an alternative government use. It was implemented by the Ministry along with the Asset Matching Programme by way of the 2007 Disposal Order.

Baragar: A computer-based tool for school boards to adjust enrolment forecasts base on local knowledge.

BCASBO: Short-form for the BC Association of School Business Officials; the professional association of school business officials working in school districts, including Secretary-Treasurers.

BCBC: Short-form for the British Columbia Building Corporation; the Province's real estate division. It is the predecessor to ARES and Shared Services BC.

BCSTA: Short-form for the BC School Trustees Association; the professional association that serves and supports school trustees across all of BC's Boards of Education.

BC Stats: The Province's central statistical agency.

Building Condition Project: A capital project designed to address building condition needs at the end of a building's economic life, such as a renovation or a replacement.

Capital Branch: The Ministry division responsible for the management and allocation of capital funds.

Capital Drivers: The strategic priorities that drive the provincial capital funding system. The most important Capital Drivers are enrolment, building condition and seismic vulnerability.

Capital Envelope: An allocation of funding by Treasury Board to a ministry to finance capital projects; also a set of spending targets with associated strategies or priorities for the Ministry to focus on within those targets.

Capital Plan Instructions: A set of instructions published by the Ministry that establish the process for school districts to request capital project funding through that year's Capital Planning Cycle.

Capital Plan Submission: A document in prescribed form prepared by school boards to notify the Minister of the capital projects that the board wants to complete over the course of the next five years.

Capital Planning Cycle: A regular cycle that involves school boards notifying the Ministry of their capital requirements, the Ministry informing Treasury Board of the needs across the education sector, Treasury Board providing the Ministry with a Capital Envelope, and the Ministry and Treasury Board approving project funding.

Community Claims: The plaintiffs' claims for new or improved schools in 17 communities in British Columbia.

Competing Districts: Those regional school districts where the CSF operates a minority language schools with a catchment area that overlaps with the majority school district's territory. Specifically, SD8-Kootenay Lake, SD19-Revelstoke, SD20-Kootenay-Columbia, SD23-Central Okanagan, SD33-Chilliwack, SD35-Langley, SD36-Surrey, SD37-Delta, SD38-Richmond, SD39-Vancouver, SD43-Coquitlam, SD44-North Vancouver, SD46-Sunshine Coast, SD47-Powell River, SD48-Sea-to-Sky, SD57-Prince George, SD61-Greater Victoria, SD67-Okanagan Skaha, SD68-Nanaimo-Ladysmith, SD70-Alberni, SD71-Comox Valley, SD72-Campbell River, SD73-Kamloops/Thompson, SD75-Mission, and SD82-Coast Mountains.

Confidentiality Order: The order of this Court dated March 25, 2014, that certain evidence in this trial is subject to public interest immunity and is banned from publication to preserve the confidentiality of Cabinet and Treasury Board documents.

Consolidated Capital Plan: A document prepared by the Ministry that sequentially ranks high-priority projects against one another by order of relative need. The Ministry provides the Consolidated Capital Plan to Treasury Board in support of its request for a Capital Envelope.

CSF: The Conseil Scolaire Francophone de la Colombie-Britannique, the provincial school board responsible for offering French minority language education in British Columbia.

Descendant Clause: A clause in an admissions policy that allows a school board to admit the descendants of rightsholders where their parents are not Mother-Tongue, Education or Sibling Rightsholders.

District Data: School district facility-specific and district-wide data relied on by the Fact-Finding Team to complete the Joint Fact Finder's Report.

Echo Report: A document the Ministry sends to school boards confirming receipt of their Capital Plan Submissions and indicating the Ministry's preliminary threshold ranking of each project.

École Virtuel: The CSF's electronic correspondence course service.

Education Rightsholders: Rightsholders pursuant to s. 23(1)(b) of the *Charter*, who received their primary school education in French. This group includes parents who attended British Columbia's minority language programme that preceded the CSF, the Programme Cadre, as well as parents who attended primary school in French anywhere in Canada.

Endogamy or **Endogamous Couples:** A situation where two persons from the same language group form a relationship.

Enrolment-Based Funding Model: The funding formula for calculating the Operating Block grants to school districts that has been in place since about 2002. Districts receive a base amount per student and supplements based on unique student and geographic factors.

Exogamy or **Exogamous Couples:** A situation where two persons from different language groups form a relationship.

Expanded Admissions Policy: The CSF's April 2013 admissions policy, by which the CSF allowed itself to exercise discretion to admit non-rightsholders to its schools in certain circumstances.

Expansion Project: A capital project designed to build new spaces for students, including building additions, renovating closed schools or building new schools.

Fact-Finding Team: The team of facility and data specialists that prepared the Joint Fact Finder's Report.

FCI: Short-form for the facility condition index. A ratio of the value of a building's deficiencies against its replacement value. As the FCI score approaches 1, the building is reaching the end of its economic life. As it approaches zero, the building is fairly new.

FEA: The Francophone Education Authority established in July 1995 to govern minority language education in the Lower Mainland and Lower Vancouver Island. The CSF is the successor of the FEA.

Financial Review Briefing Note: A briefing note prepared by the CSF in advance of the work by the Review Team to detail the CSF's 1998/99 deficit.

FOLS: Short-form for first official language spoken.

PPFCB: Short-form for the Fédération des Parents Francophones de Colombie Britannique, the provincial organization representing parents whose children attend a Francophone school in British Columbia.

Francisation: French-as-a-second-language programming applied in CSF schools to improve students' proficiency in the French language.

FTE: Short-form for full-time equivalent; a phrase used to describe students and teachers and account for the fact that some students and teachers attend or work at a school only part-time.

Funding Requirements Request: A March 2006 report prepared by Trillium in support of the CSF's request for additional operating funding from the Province. It quantified the additional costs of providing Francophone education in British Columbia.

Heterogeneous: An adjective to describe a programme, school or facility where the minority shares space with the linguistic majority.

Homogeneous: An adjective to describe a programme, school or facility where the minority has access to its own space that it does not share with the linguistic majority.

HVAC: Short-form for heating, ventilation and air conditioning.

In-House PIRs: PIR prepared by the CSF in house with the assistance of consultants in 2013 and 2014.

Immigrant Rightsholders: Parents that would be rightsholders if they were Canadian citizens.

Joint Fact Finder's Report: The fact-finding report of Mr. David Milne and the Fact-Finding Team, which reports standardized information concerning majority and minority schools and school board offices throughout British Columbia.

K-12: Short-form for Kindergarten to Grade 12.

Knowledge Category: The category of children referred to by Dr. Landry who do not have Francophone parents, but who nevertheless have some knowledge of French.

Lease Funding Suspension: A decision taken by the Ministry in about 2009 not to fund the CSF's leases for the 2009/10 school year. Described in Chapter XXXV, Leases.

Local Capital or Local Capital Reserve: A school board account from which school boards can spend on capital projects without ministerial approval.

Long-Term Leases: Leases of longer than five years; proceeds from those leases are treated as capital, and flow into the district's Restricted Capital Reserve account.

Minister or Ministry: The Provincial Minister or Ministry of Education.

Ministry Data: Centrally available district and facility information from the Ministry relied on by the Fact-Finding Team to prepare the Joint Fact Finder's Report.

Mother-Tongue Rightsholders: Rightsholders pursuant to s. 23(1)(a) of the *Charter*, whose first language learned and still understood is French. This group includes any citizens that grew up speaking French that still understand the language, no matter where they grew up, and no matter whether French was the only or one of many languages spoken in the household.

NLC: Short-form for neighbourhoods of learning centre; a programme beginning in about 2010 that involves the Ministry increasing the space allotment for all new school and replacement projects by 15% to allow districts to construct space for community services.

NPIR: Short-form for "No PIR". A threshold ranking that the Ministry uses to indicate that a school board did not submit a PIR in support of a capital project request. In many instances, the Ministry will not support or evaluate a project that has a threshold ranking of NPIR.

OLEP: Short-form for the Official Languages and Education Protocol, a series of agreements between the Federal and Provincial Governments whereby the Federal Government provides the Province with funds for French-language education.

OLEP Agreements: the *Canada-British Columbia Agreement on Minority Language Education and Second Official Language Instruction* that structure the OLEP framework.

OLEP Complimentary Funding Provisions: Provisions in the OLEP Agreements that allow the Federal Government to make complementary capital contributions to CSF capital and infrastructure projects.

Operating Block: An envelope of funds allocated to the Ministry by Treasury Board to distribute to school districts to pay for their operating costs.

Operating Funding Report: a May 2005 report prepared by Trillium on behalf of the CSF outlining the unique cost pressures the CSF faces in support of the CSF's request for additional operating funding from the Province.

Operating Grants Manual: An annual publication by the Ministry that sets out how the Operating Block grants will be calculated for that year and the amounts that each school district will receive pursuant to each element of the operating funding model.

PDR: Short-form for project definition report. Detailed feasibility work that finalizes the scope, strategies and budget for a capital project after the Ministry announces support for a capital project. The PDR informs the Project Agreement.

Pedagogie 2010: A CSF initiative introduced with its 2010 strategic plan that is designed to enculturate children in CSF schools into the French language and culture.

Petition: The staged Petition proceedings that were decided by Mr. Justice Willcock in *Association des parents- BCSC* and affirmed in *Association des parents- SCC*, and returned to this Court for decisions concerning responsibility, section 1 justification.

PIR: Short-form for project information report. Preliminary feasibility work that must be submitted by a school board along with a capital project request for the Ministry to consider it for approval. The PIR is expected to explain the rationale, scope, costs and consider various solutions and options for a proposed capital project. The PIR informs the PDR.

Planning Officer: A Ministry official in the Capital Branch who is responsible for working with school boards on their capital projects.

Positioning Letter: A letter that the CSF sent to the Ministry after about 2011 to demand certain actions and funding outside of regular Capital Planning Cycles. Due to the many inaccuracies in them, they must be treated with extreme caution and not relied on for the truth of their contents.

Project Agreement: A contract between the Ministry and a school board for the completion of a capital project.

Province: The Queen in Right of British Columbia.

RAEG: Short-form for the release of assets for economic generation programme; A policy beginning in about 2012 whereby the Province encouraged disposal of surplus school and other Government facilities to reduce the provincial deficit.

Regional Manager: A Ministry official in the Capital Branch who is responsible for working with school boards on their capital projects, and oversees a Planning Officer.

Regular Home Use Category: That category of children counted by Dr. Landry who are born to non-Francophone parents but nevertheless use French at least regularly at home.

Resource-Cost Funding Model: The funding model for calculating the Operating Block grants to school districts that existed prior to 2002, whereby the Ministry specifically funded school programmes, and the operation of a school and building space whether leased or owned. School boards received an amount for each FTE

student, and additional funding for every elementary and secondary school, as well as amounts for district-level operations. Districts also received grants to reflect the varying costs of delivering specific programmes, the districts' geographic characteristics and educator salaries.

Restricted Capital or Restricted Capital Reserve: A school board account from which it can spend only with ministerial approval, and only on capital projects.

Review Team: The financial review team established in 1999 or 2000 to examine the CSF's financial operations in light of the deficit it incurred in 1999.

School Acquisition Project: A capital project to fund the acquisition of a surplus school.

Short-Term Leases: Leases of less than five years with no option or right to purchase; Proceeds from these leases can be designated as either operating or capital income at a school district's election.

Sibling Rightsholders: Individuals who became rightsholders pursuant to s. 23(2) of the *Charter*, by virtue of having a child receive his or her primary or secondary school instruction in French, whether in the past or at present. This group includes parents of children that received French-language education anywhere in Canada, so long as the programme was not a French immersion programme.

Site Acquisition Project: The acquisition of a piece of real property by a school board to build a new school or other amenity.

Space Rank Formula: A formula the Ministry uses to analyze and rank the relative need for Expansion Projects. It examines current and projected enrolment and compares that to the capacity in schools proximate to the proposed project. The Ministry's goal is to ensure that enrolment warrants the construction of more student spaces in the area.

Special Agreement: The March 2002 *Canada-British Columbia Auxiliary Agreement on Capital Projects*, by which the Federal government funded \$15 million in enhancements to CSF capital projects.

Start-Up Agreement: The March 1997 *Canada- British Columbia Special Agreement for the Implementation of Francophone Schools Governance* between the Provincial Government and the Minister of Canadian Heritage (on behalf of the Federal Government), which provided \$12 million in start-up funding for the creation of the CSF.

Strong Start: A Ministry programme of drop-in centres in public schools for caregivers and children aged 0 to school aged to participate in play-based activities to help them develop skills in preparation for their entry into the public school system.

Subtractive Bilingualism: A phenomenon whereby members of a linguistic minority community who live their lives in the majority language experience decreased knowledge of the minority language as they learn the majority language.

Task Force: The minority language education task force established in 1990 with a mandate to identify how to best accommodate the educational rights of Francophones in British Columbia.

Task Force Report: The May 1991 *Minority Language Education Task Force Report*, which reported on how to best accommodate the educational rights of Francophones in British Columbia.

Technical Review Committee: The Ministry committee responsible for reviewing and recommending changes to the Operating Block funding model on an annual basis. The Technical Review Committee has representation from the Ministry as well as representatives from school boards and trustees appointed by their professional organizations.

Tiens-moi la main, j'embarque: A French-language pre-Kindergarten programme that takes place outside of class hours in communities where the CSF has no dedicated space for early learning programmes.

Transportation Zone: A geographic boundary around a school outside of which the CSF will not offer transportation services.

Trillium: A short form for Trillium Business Strategies, a business and policy consultant company led by Mr. Doug Hibbins that has extensive experience consulting in BC's education sector.

UBC: Short-form for the University of British Columbia.

Unique District Factors: Supplements in the Enrolment-Based Funding Model whereby the Ministry allocates school districts certain amounts for district-specific factors. It includes the following supplements: a small community supplement; low enrolment supplement; rural factor; climate factor; sparseness factor; student location factor; and a salary differential.

Unique Student Factors: Supplements in the Enrolment-Based Funding Model whereby the Ministry allocates school districts certain amounts for each student with aboriginal ancestry, students with English or French as a second language and non-graduated adult students.

Vitality: Ethnolinguistic vitality. The force that makes a language group act as an active and distinct entity in an intergroup context.

WebCaps: The Ministry's computer programme through which school boards submit their Capital Plan Submissions to the Ministry.