SCC File No.: 38332

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

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

APPELLANTS
(Appellants/Plaintiffs)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, AND THE MINISTER OF EDUCATION OF BRITISH COLUMBIA

RESPONDENTS
(Respondents/Defendants)

(Style of cause continued on following page)

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(Pursuant to the Order of Martin J. dated 15 August 2019)

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STATEMENT OF ARGUMENT IN REPLY[1]

A. The section 23 analysis supports a proportional and temporal approach

1. The courts below used the concept of proportionality primarily to articulate the services and facilities to which a group of rightsholders was entitled by virtue of its location on the sliding scale.[2] As several interveners concede,[3] the "sliding scale" necessarily imports an element of proportionality because it links *entitlement* to the specific "numbers" at issue. Where rightsholders were entitled to "proportionate" facilities and services, the courts below measured their current facilities and services against that standard. It is in this manner, and not as a stand-alone yardstick,[4] that "proportionality" informs the final comparative stage of the s. 23 analysis.

2. Contrary to the CLO's submission, the courts below did not declare the *concept* of substantive equivalence itself to be rigid or impractical.[5] Rather, the Court of Appeal recognized that *applying* substantive equivalence to situations where the numbers do not warrant the highest level of services and facilities would lead to impractical results.[6] Further, just as substantive equivalence would not permit the government to provide the "worst" services and facilities to the minority,[7] there is no basis to suggest that the proportionality analysis would permit such a result.

3. Nor was it improper for the courts below to assess the pedagogical and cost-appropriateness of proposed minority-language services by considering what would be provided for majority-language students in the same area.[8] Provided majority-language comparators are not treated as determinative (and they were not here),[9] they can provide a useful frame of reference for assessing whether the "numbers" warrant the facilities and services requested by a minority-language community. Absent this frame of reference, a court would have little choice but to accept the

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[1] The Province relies on the shortforms and citations for cases cited in its main factum.
[2] See e.g. TJ at paras 2491, 2697, 5064.
[3] Factum of l'Association des juristes d'expression française du Nouveau-Brunswick and l'Association des enseignantes et enseignants francophones du Nouveau-Brunswick ("AJEFNB") at paras 22-23; Factum of Commission nationale des parents francophones ("CNPF") at para 18.
[4] See Factum of the Commissaire aux Langues Officielles du Canada ("CLO") at para 17.
[5] Factum of the CLO at para 18.
[6] BCCA at para 149.
[7] Factum of the CNPF at para 39.
[8] Factum of AJEFNB at paras 23-24; Factum of the Canadian Association for Progress in Justice ("CAPIJ") at para 26.
[9] TJ at paras 856, 2203, 2488-2489.

request at face value, giving rightsholders a blank cheque to dictate entitlement. Section 23 does not guarantee that outcome.

4. Further, in determining entitlement, the trial judge *did* consider evidence of majority-language schools elsewhere in the province. Where she distinguished the majority-language situation, her reasons were based in the evidence and included, but were not limited to, geographic proximity.[10] In contrast, there was no evidence about how the specific "small schools" invoked by the appellants and certain interveners operate (given that many are below capacity) or whether they do so "efficiently".[11]

5. A careful reading of the decisions below, rather than a selective parsing, confirms that the lower courts did not allow "practicality", and in particular, concerns over cost-effectiveness, to supersede all other considerations in the s. 23 analysis.[12] The trial judge recognized the need to be alive to the factors that influence parental choice, and her community-specific assessments reflect that.[13] Further, the trial judge's attention to pedagogical considerations is evident, for example, in her concern that the small number of students in Chilliwack might be deprived of the benefits of interacting with larger populations as a result of the CSF's choice to continue operating a homogeneous school.[14] This express recognition of student welfare stands in contrast to the proposals to establish classes at the bare minimum size,[15] or to fix the number of students who "warrant" a homogeneous school at 40 without reference to any grade composition.[16]

6. Finally, the temporal approach to s. 23 adopted by the courts below in the five communities where there was either no existing CSF program, or where the CSF sought to subdivide an existing catchment area, reflected the variable reliability of the evidence about anticipated demand. The

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[10] See e.g. TJ at paras 2488-2489; 2205. See Factum of AJEFNB at paras 33, 38.
[11] Factum of CAPIJ at para 19.
[12] Factum of AJEFNB at paras 6, 13, 14, 16, 26; Factum of CAPIJ at para 24; Factum of CNPF at paras 22-24, 33.
[13] TJ at paras 837, 850-853, 860; see also e.g. paras 2235-2242 (Whistler); 4824-4843 (Chilliwack).
[14] TJ at paras 4765, 4815, 4843, 4877; see also para 791 (deference re: pedagogical needs).
[15] Factum of the Chaire de Recherche sur la Francophonie Canadienne en droits et enjeux linguistiques ("Chair") at para 13.
[16] Factum of the Federation nationale des conseils scolaires francophones ("FNCSF") at paras 2, 4-12. *Arsenault* does not support a right to homogeneous small schools. In *Arsenault PEISC*, the board sought a class, not a stand-alone school: see paras 5, 16 ($5,000 for capital), 111.

trial judge found that enrolment projections were "reasonably accurate" in the short term, and less so in the long term. Coupled with the uncertainty of whether students would move from an existing program, as well as evidence of incremental growth at other CSF programs, the trial judge made determinations about the numbers that could be *expected to* use minority-language education services in both the short and long term.[17] Her findings were based in the evidence she found reliable, and were not limited to assessments of "immediate demand". As the underlying findings are not challenged, the temporal approach should be upheld.

B. The courts below did not err in their approach to section 1

7. The argument of the CLO and the CAPIJ that the objective of the capital and operating funding systems is too general to be pressing and substantial under the *Oakes* test[18] must be rejected for two reasons. First, in *Sauvé*, although the majority considered the government's stated objectives to be "problematically vague", this Court nonetheless proceeded to the proportionality stage, where the effects of the measure were assessed and ultimately found unjustified.[19] In this case, despite having accepted the objective, the trial judge ultimately found eight of the 12 breaches for which the Province was at least partly responsible *not* to be justified. The articulation of an objective that touches on "costs" is not, therefore, determinative.

8. Second, while the "fair and rational allocation of limited public funds" may not be a sufficiently precise objective in relation to measures that infringe other *Charter* rights, it is necessarily engaged in the unique context of s. 23. Any measure that inadequately fulfils government's obligation under s. 23 to expend funds will reflect choices about how to allocate limited public resources. In this case, the appellants challenged the entirety of the capital and, to a lesser extent, operating funding systems for public education in BC. The objective of a funding system is unavoidably to fairly allocate limited funds.

9. To the extent others interveners[20] rely on fact that s. 23 is not subject to the override provision in s. 33 of the *Charter*, this Court's decisions in *Sauvé* and *Frank* confirm it is still open

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[17] Factum of CAPIJ at para 13; Factum of the Conseil scolaire francophone provincial de Terre-Neuve-et-Labrador ("CSFNFL") at paras 7, 9. See also e.g. TJ at paras 473, 1980, 3795.
[18] Factum of CAPIJ at para 35; Factum of CLO at paras 2, 26.
[19] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 19, 26 [*Sauvé*].
[20] Factum of Société de l'Acadie du Nouveau-Brunswick et la Fédération des conseils d'éducation du Nouveau-Brunswick ("SANB") SANB at paras 26-28; Factum of Chair at paras 19-25.

to governments to justify infringements of such rights.[21] The Chair and SANB have not specified what the heightened burden they propose means in practice, nor its impact in this case.

10. The submissions that the Province simply preferred to spend money on other projects, but failed to identify competing legitimate claims,[22] are inconsistent with the trial judge's findings. For example, in the context of Pemberton, the trial judge found that by foregoing the specific request to build a school in that community, the Province was able to commit those funds to projects in areas of greater need, such as the CSF's overcrowding in Vancouver (West) and the 7,500 majority-language students housed in portables in Surrey.[23]

11. The trial judge found the purpose of s. 23 to be broader than simply combatting assimilation,[24] but she did not discount the importance of assimilation. Her focus on the transmission of French as a mother tongue was not an error of law;[25] it was based on the expert evidence of both parties, which she accepted.[26] Similarly, her conclusions on the effect of minority language schools on rates of assimilation were also based on the expert evidence.[27] Those factual findings are not challenged. They cannot be extrapolated to other cases, where parties may lead different evidence, including evidence of intergenerational or individual impacts.[28] That possibility could lead a court to different conclusions, including different weighting of effects at the s. 1 stage,[29] but it does not invalidate the s. 1 analysis in this case.

C. The *Mackin* immunity does not deny access to remedies

12. The Asper Centre contends that application of the *Mackin* liability threshold impedes "access to justice and access to remedies."[30] This argument must fail for two reasons.

13. First, it is based on the faulty premise that the availability of *Charter* damages is unlimited and the view that claimants should not have to prove state misconduct to overcome the *Mackin*

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[21] *Sauvé* at paras 6, 11, 62; *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 4.
[22] Factum of Chair at para 22; Factum of CSFNFL at para 20.
[23] See TJ at para 2434. See also *N.A.P.E.* at paras 94-95. See Factum of CAPIJ at paras 27, 41; Factum of SANB at paras 23-24.
[24] Factum of Quebec Community Groups Network ("QCGN") at paras 18-19, 22; TJ at para 123.
[25] Factum of CSFNFL at paras 22-28.
[26] See TJ at paras 319, 325, 332. See also TJ at paras 271-272, 324, 329.
[27] Factum of CSFNFL at para 12. See TJ at paras 257-372.
[28] TJ at para 1183; see Factum of CNPF at paras 4, 42.
[29] Factum of QCGN at para 32; Factum of CNPF at para 43.
[30] Factum of the David Asper Centre for Constitutional Rights ("Asper Centre") at paras 4-5.

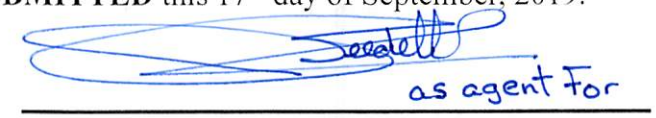
immunity. *Charter* damages are not available as a matter of right, and this Court recently cautioned that "courts must be careful not to extend their availability too far."[31] This Court has also accepted that, where an elevated liability threshold applies, claimants seeking *Charter* damages must establish that the state conduct meets the requisite level of gravity.[32]

14. Second, the qualified immunity does not deny "access to remedies" for *Charter* breaches. The Asper Centre overlooks the fact that other remedies, like a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*,[33] remain available. Nor does it preclude *Charter* damages altogether: where the liability threshold is met, the immunity is vitiated. The qualified immunity strikes a balance between the goals of remedying *Charter* violations and ensuring effective governance.[34] As the majority of this Court observed in *Hislop*:

> Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs.[35]

15. The APRDV and APC attempt to characterize the transportation funding breach as one of delay, in order to justify a lower liability threshold.[36] This must be rejected. Not only did the trial judge find that there was no inaction on the part of the Province, but she held that the Province remedied the transportation funding breach of its own initiative.[37]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2019.



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[31] *Henry* at para 91. See also *ibid* at para 36; *Ernst* at paras 27, 121.
[32] *Henry* at para 43.
[33] This is the appropriate remedy for an unconstitutional policy: *GVTA* at paras 84-89.
[34] *Mackin* at para 79; *Ward* at para 40. This Court also struck such a balance in *Henry* by establishing a "high" liability threshold for claims of wrongful non-disclosure: see paras 31, 89.
[35] *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 117. These comments also capture the policy-making role of government: see *Ward* at para 40.
[36] Factum of l'Association des parents de l'école Rose-des-Vents ("APRDV") and l'Association des parents de l'école des Colibris ("APC") at paras 30-31.
[37] See TJ at paras 1193, 1694, 1702, 1713-1715, 1784, 1787.

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