

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)

AND:

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

RESPONDENTS
(Respondents)

AND:

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal provides this Court with an opportunity to further define what constitutes a s. 23¹ breach and how, if at all, costs can be considered in justifying a *Charter* breach under s. 1.² It also provides an opportunity for further clarity on whether substantive equivalence applies across the sliding scale or whether proportionality can be considered.

B. Facts and Situation in Prince Edward Island

2. The Intervener, the Attorney General of Prince Edward Island (“AGPEI”), agrees with the facts as set out by the Respondent, Her Majesty the Queen in Right of British Columbia (“British Columbia”) and is intervening in this appeal in support of British Columbia’s position.

3. Prince Edward Island (“PEI”), by virtue of its size, brings a unique perspective with regard to provincial requirements to provide minority language education in a small jurisdiction with a low number of local comparator schools.

4. The AGPEI submits that this Court cannot overlook what ultimately would be required in terms of additional facilities, services, and programming for minority language schools should the Appellant be successful and, in particular, the significant financial impact that it may have on a small jurisdiction.³

5. There are two education authorities in PEI, one for each official language. La Commission Scolaire de Langue Française (“CSLF”), was continued as the minority language education authority under section 11 of the *Education Act*, RSPEI 1988 c. E-0.1.⁴ Similar to British Columbia, PEI has legislation and policies with respect to prioritization of capital

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

² *Charter*.

³ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 SCR 839 at 848-849, 851 [*Manitoba Reference*].

⁴ *Education Act*, RSPEI 1988, c E-0.1 at s. 11 [*Act*].

projects. Section 93 of the *Education Act* and sections 14 and 27 of the *Education Act Authority Regulations* lay out the process for capital funding requests.⁵

6. The Minister of Education and Lifelong Learning (“Minister”) consults with the education authorities, including the CSLF, on the construction of new schools, additions to existing schools, or any repairs or maintenance in excess of \$10,000. The CSLF evaluates the effectiveness of schools and, prior to September 15 of each year, submit a request to the Minister for any capital construction projects. The Minister must then submit the request to the Minister of Transportation, Infrastructure and Energy. Once that process is complete, it goes through the Treasury Board capital budget process.⁶

7. PEI has a total of six minority language schools (five K-12 and one K-6). These schools are spread across the Island and service all s. 23 rights holders, and other students as well. In the 2018-2019 school year, there were 983 students enrolled in minority language schools, approximately 5% of the total public student population in PEI.

8. The operating budget for the minority language schools represents approximately 7.5% of the total operating budget for both minority and majority language schools.

PART II – ISSUES ON APPEAL

9. The AGPEI will address the grounds of appeal which are most pressing to PEI. The three grounds of appeal addressed in this factum as outlined by British Columbia in their Memorandum of Arguments are:

- a. Can the Province require the CSF to prioritize capital projects that address breaches of s. 23?;
- b. How should the number of students in a French-language school be situated on the sliding scale when the number is less than the number of students in the neighboring English-language school?; and
- c. Did the courts below take into account irrelevant factors in the s.1 analysis?;

⁵ *Education Act Education Authorities Regulations*, PEI Reg EC524/16 at ss. 14 and 27 [Regulations].

⁶ *Financial Administration Act*, RSPEI 1988, c F-9 [FAA].

10. The AGPEI agrees with the position taken by British Columbia with respect to all three grounds of appeal.

11. The AGPEI submits that provinces may require their education authorities to prioritize capital project requests, including those which are meant to address s. 23 breaches. In addition to prioritization, there must be a degree of proportionality in determining the level of facilities, services and programming required in a minority language school. To impose substantive equivalence across the sliding scale is neither appropriate nor practical. There must be room for a proportional analysis at all levels of the sliding scale, except where a “fully equivalent homogenous school”⁷ is warranted. Finally, while cost savings will not normally justify a breach of the Charter under s.1, a fair and rational allocation of public funds is a pressing and substantial issue and can be considered at all stages of the *Oakes* test.⁸

PART III – STATEMENT OF ARGUMENT

A. Provincial governments can require minority language education authorities to prioritize capital projects, including those required to remedy s. 23 breaches.

12. At the highest end of the sliding scale, as established in *Mahe*,⁹ a minority language education authority is granted a measure of management and control over the minority language education system and facilities.¹⁰ The management and control provided to the minority language education authority is to minimize the linguistic and cultural assimilation of minority languages within a province and to foster the preservation of the minority language community.¹¹

13. However, there are temporal aspects to the degree of management and control granted to a minority language education authority, as they are not granted exclusive control.¹² The AGPEI submits that there is a degree of cooperation required between an education authority and government to establish a plan to address capital projects, especially where there are a number of

⁷ *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 at para 794 [TJ].

⁸ *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

⁹ *Mahe v Alberta*, [1990] 1 SCR 342 at 365-367 [*Mahe*].

¹⁰ *Mahe* at 371-372.

¹¹ *Arsenault-Cameron v PEI*, 2000 SCC 1 at para 8 [*Arsenault*].

¹² *Mahe* at 373-377.

projects required to remedy different asserted s. 23 breaches. It is unreasonable to expect the majority to fully understand the needs of a minority language education system.¹³ Prioritization of capital projects by the education authority, including projects intended to remedy possible s. 23 breaches, is necessary as provinces must fairly allocate limited resources among all departments and in accordance with government's oversight of capital expenditures.

1. A level of cooperation between minority language education authorities and government is necessary to ensure that breaches of s. 23 are not perpetuated.

14. Minority language education authorities are required to make tough decisions in many areas, including prioritizing capital construction projects, given that they are provided a right to a degree of management and control of their education system.¹⁴ In some jurisdictions, including PEI, minority language education authorities have the responsibility to oversee all the minority language schools within the province.¹⁵ Minority language education authorities have a responsibility to ensure appropriate levels of services are provided at each school in the province. Under their mandate they must reasonably ensure that there are no s. 23 breaches occurring and take the initiative to identify and address them when they do occur.¹⁶

15. In order to remedy a possible s. 23 breach, government must first be made aware that an alleged breach is occurring. The minority language education authority's measure of management and control includes identifying for government breaches of s. 23 and providing guidance and options on how to remedy any breaches.¹⁷

16. In addition to identifying potential breaches of s. 23, minority language education authorities may identify which breach is the most egregious and affects the most rights holders. Minority language education authorities are in a better position to understand which capital projects or improvements will have the biggest impact in terms of remedying a possible s. 23 breach.¹⁸

¹³ *Mahe* at 372-373.

¹⁴ *Mahe* at 371-372; *Arsenault* at paras 45-46.

¹⁵ *Act* at s. 11(1)

¹⁶ *Act* at ss. 20(2), 20(3); *Regulations* at s. 14.

¹⁷ *Regulations* at s. 14.

¹⁸ *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2018 BCCA 305 at para 176[BCCA].

17. It is more appropriate for a minority language education authority to prioritize capital projects to government as it assists in ensuring their cultural and linguistic heritage is maintained, than it would be for government to do so.¹⁹

It is therefore clear that minority language parents and their representatives are in the best position to identify local needs when it comes to defining the relevant areas.²⁰

18. In *Arsenault*, the minority language education authority acknowledged that it had the responsibility to request the new school.²¹ The AGPEI submits that it reasonably stems from that acknowledgement that the construction of the new school would have been prioritized over other capital projects as it was the one that affected the largest number of rights holders.

19. While it is necessary for minority language education authorities to identify possible s. 23 breaches, suggest remedies, and prioritize those remedies, it is government who has the corporate expertise and capacity to execute capital projects. Government has the ultimate oversight of capital expenditures across the province. The AGPEI submits that governments are better positioned than minority language education authorities to do things such as acquire land, hire contractors, oversee construction, manage budgets, etc.

20. The trial judge found that government has the institutional capacity to manage capital projects.²² However, government cannot be expected to fully understand the diverse ways in which capital projects may impact the language and culture of the minority. Government is not in a position to wholly appreciate the ramifications and consequences of capital projects required to remedy potential s. 23 breaches.²³

21. The AGPEI submits that not every s. 23 breach can be remedied instantly and therefore the parties must work together to develop a plan to ensure the proper allocation of limited public funds to remedy s. 23 breaches.

22. As noted in *Arsenault*, government has the responsibility to promote educational

¹⁹ *Arsenault* at para 43.

²⁰ *Arsenault* at para 57.

²¹ *Arsenault* at para 36.

²² *BCCA* at paras 92,176

²³ *Arsenault* at para 54; *Mahe* at 372-373.

services available to the minority language in order to aid in determining the potential demand in an area²⁴. Government are only able to accomplish this after it has been identified by the minority that potential demand may exist in an area. Government also must consult the minority on how best to promote the linguistic and cultural aspects of the minority language in a specific region. This is just one area where the minority language education authority and the government must work together.

23. The minority cannot rely on the majority to account for their linguistic and cultural concerns. What makes sense to the majority may not make sense to the minority and vice versa.²⁵ The two groups must work together to ensure that the needs of any potential rights holders are maintained and furthered in a practical and fiscally responsible way.

24. In PEI, the Minister must submit recommendations for capital projects to the Minister of Transportation, Infrastructure and Energy.²⁶ The Minister is only able to submit these recommendations after consultation with the education authorities.²⁷ The education authorities continually evaluate and monitor the effectiveness of schools and must bring to the Minister's attention any deficiencies in order to discuss possible remedies.²⁸ It is the education authorities, not the Minister, who may first be aware of any shortcomings in a school, including where s. 23 may be being breached.

2. Requiring all breaches of s. 23 to be remedied immediately is not practical.

25. Government is required to use limited public funds to ensure the needs of all citizens are met. Requiring a government to remedy every possible s. 23 breach immediately is impractical and would create an unreasonable burden on the public purse. It is also not supported by the jurisprudence.

There is a perpetual tension in balancing competing priorities; between the availability of financial resources and the demands on the public purse. In

²⁴ *Arsenault* at para 34.

²⁵ *Mahe* at 372-373; *Arsenault* at para 49.

²⁶ *Act* at s. 93(1).

²⁷ *Act* at s. 93(3)

²⁸ *Regulations* at s. 14.

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.²⁹

26. While the AGPEI agrees that government must make reasonable efforts to remedy possible s. 23 breaches, those reasonable efforts must correlate with legitimate expenditures across government and cannot create an impractical and unreasonable financial burden on government.

27. Throughout the s. 23 analysis, there must be a degree of practicality considered.³⁰ Ultimately, it is government’s responsibility to ensure that they do what is “practically possible”³¹ to ensure that s. 23 is not breached and to remedy any breaches that do occur. Section 23 guarantees that a practical approach is taken with respect to remedying breaches, it does not include placing an overwhelming financial burden on government in order to remedy all possible s. 23 breaches at once.³²

28. Prioritization of capital projects is necessary to identify which potential breaches affects the most rights holders, as defined in s.23 of the *Charter*.³³ Practical solutions must be offered by the minority language education authority to remedy those breaches without usurping government’s fiscal responsibility to the entire province.

29. Impractical, and financially irresponsible, results are not what is intended by s. 23.³⁴ Section 23 “grants a right which must be subject to financial constraints.”³⁵ Prioritization, rather than immediate action, on all capital projects is one of those areas of financial constraint.

²⁹ *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 49 [RDV].

³⁰ *Mahe* at 366-368, 378, 384-385.

³¹ *Arsenault* at para 26.

³² *Mahe* at 376-377, 385; *Arsenault* at paras 27, 52.

³³ *Charter* at ss. 23(1) and 23(2).

³⁴ *Mahe* at 367, 376; *Arsenault* at para 26; *RDV* at paras 47, 49.

³⁵ *L’Association des parents de l’école Rose-des-vents v. British Columbia (Minister of Education)*, 2013 BCCA 407 at para 40 citing *Mahe* at 384-385.

3. Prioritization and collaboration does not constitute a s. 23 breach of a minority language education authorities’ “management and control”.

30. Governments have the responsibility to manage limited public funds in a fair and rational way. Requiring a minority language education authority to prioritize its capital projects is consistent with government’s ultimate role of creating a capital expenditures plan across all of government, without unreasonably hindering the minority language education authority’s management and control of their education system.³⁶

31. Minority language education authorities, even at the highest level of entitlement, are not given exclusive management and control of their education system.³⁷ They are entitled to manage and control the areas of the education of minority language students which affect their language and culture. The requirement to prioritize capital projects does not impact their ability to manage and control those areas.³⁸

32. Governments are entitled to select, with the assistance of the minority language education authority, which capital projects shall be funded in order to satisfy that all practical and reasonable steps have been taken to meet s. 23 obligations.³⁹ Governments have a legitimate interest in the provision of public education in both languages. Requiring education authorities to prioritize capital projects is a necessary role that education authorities must take in assisting government in providing quality education. This prioritization requirement does not breach section 23.

B. Substantive equivalence only applies to fully equivalent homogenous minority language schools and proportionality can be considered along the remainder of the sliding scale.

33. *Mahe* suggests that levels of entitlement be “worked out over time by examining the particular facts of each situation.”⁴⁰ The AGPEI submits that this allows this Court to determine that substantive equivalence is not required along the entire sliding scale. As there is no explicit

³⁶ *FAA at ss.2-3.*

³⁷ *Arsenault* at para 42.

³⁸ *Arsenault* at para 46.

³⁹ *Arsenault* at para 52.

⁴⁰ *Mahe* at 385.

standard across all jurisdictions, it is reasonable to determine that proportionality can play a part in the substantive equivalence analysis.⁴¹

34. The AGPEI submits that to require substantive equivalence along the entire sliding scale is not practical and may place an unreasonable burden on minority language education authorities and government to provide services which may not be justified. Only where the highest level of entitlement is present will substantive equivalence be considered necessary.⁴² The minority language educational system does not have to be identical to that of the majority.⁴³

35. There is room to “breathe life”⁴⁴ into where along the sliding scale substantive equivalence may be appropriate or whether a proportionality assessment is more suitable. Ultimately, the question that must be answered is whether a reasonable rights holder would be deterred from sending their child to a minority language school because it is meaningfully inferior to the majority language school in their area?⁴⁵

1. Substantive equivalence is not applicable across the entire sliding scale.

36. The AGPEI recognizes that where “fully equivalent homogenous schools”⁴⁶ are warranted, substantively equivalent facilities are required. However, s. 23 is not intended to “create an absolute right”.⁴⁷ It creates a right that is still subject to financial constraints and practicalities.⁴⁸ Governments are required to do what is “practically possible”⁴⁹ which would not be accomplished by substantive equivalence applying along the entire sliding scale.⁵⁰ There is no requirement that impractical solutions be necessary for relatively small numbers of students.⁵¹

37. Where the numbers warranted fall below the threshold for a fully equivalent homogeneous minority language school there is room for a proportionality analysis and sharing

⁴¹ *Mahe* at 376, 385-386.

⁴² *RDV* at para 30.

⁴³ *RDV* at para 31.

⁴⁴ *Mahe* at 364-365.

⁴⁵ *RDV* at paras 33,35; *BCCA* at para 77.

⁴⁶ *TJ* at para 794.

⁴⁷ *Mahe* at para 385.

⁴⁸ *RDV* at para 49.

⁴⁹ *Arsenault* at para 26.

⁵⁰ *Mahe* at 367; *Arsenault* at para 26.

⁵¹ *Mahe* at 385.

of facilities and services. *Mahe* specifically allows for this in finding that a separate school board for the minority language was not warranted and that proportional representation on the majority language school board was more appropriate.⁵²

38. A proportional analysis will not lead to an inferior education system as there are still limits and obligations on what level of minority language education services government must offer.

The province has an interest both in the content and qualitative standards of educational programs. Such programs can be imposed without infringing s. 23, insofar as they do not interfere with the linguistic and cultural concerns of the majority.⁵³

39. The AGPEI submits that unfortunately, not every local area can be entitled to the identical education system without imposing an unintended and impractical financial burden on government.

2. Proportionality and practicalities can be considered even when a homogenous minority language school is warranted.

40. Even when a homogenous minority language school may be warranted, the AGPEI submits that it does not necessarily mean that rights holders are also automatically entitled to identical facilities, services, and programs as the appropriate comparator majority school. As a whole, the reasonable rights holder is entitled to a substantively equivalent education system that is provided to the majority comparator school and this can include a degree of proportionality.

41. That AGPEI submits that even at the upper end of the scale, one must consider proportionality in determining whether a reasonable rights holder would send their child to the majority language school over the minority language school. A reasonable rights holder's entitlement does not grant them the right to identical facilities, services, and programming as the local majority comparator school but rather proportional services to the extent that they would not deter a reasonable rights holder from sending their child to the minority language school.

⁵² *Mahe* at 389.

⁵³ *Mahe* at 380.

This is to be viewed contextually and holistically by taking into account a wide range of factors.⁵⁴ So long as the educational systems are meaningfully similar then there can be a degree of proportionality applied.⁵⁵ Only when the numbers warrant reaches the level of “fully equivalent homogeneous schools”⁵⁶ will proportionality not be applicable in a substantive equivalence analysis.

42. Section 23 does not require that government provide “programs and facilities which are inappropriate for the number of students involved.”⁵⁷ To not consider what proportional facilities, programs, and services would meet the needs of the reasonable rights holder creates an unreasonable and impractical burden on government in providing minority language education.

43. The AGPEI believes it worth noting that *Arsenault* found that there were 151 children projected to attend the sought after primary school (1-6) within the next 5 years in that area.⁵⁸ In the 2018-2019 school year, there were a total of 180 students across 13 grade levels (K-12) at École sur Mer which was constructed as a result of that decision. The Minister continues to work with the CSLF to determine what facilities, services and programs the rights holders in that area are entitled to. A homogeneous school was warranted, but the AGPEI submits that proportional facilities, services and programming as compared to the local comparator schools, or sharing of facilities, is appropriate when the numbers warranted fall under entitlement to a “fully equivalent homogenous school.”⁵⁹

44. Even though the numbers warrant place the rights holders at the upper end of the sliding scale and requires that a homogeneous school be constructed there still must be consideration for costs and practicalities in what services are available in that school.⁶⁰ The AGPEI submits that a practical analysis can be undertaken to understand the different ways in which educational systems can deliver services and programs to their students. This needs to be a flexible analysis taking into account differing geographical areas and may be tailored to the specific demographics of an area. It is neither a mathematical calculation nor a right to an

⁵⁴ *RDV* at paras 33, 57.

⁵⁵ *RDV* at para 33.

⁵⁶ *TJ* at paras 749, 835.

⁵⁷ *Mahe* at 385.

⁵⁸ *Arsenault* at paras 10, 33.

⁵⁹ *TJ* at para 794.

⁶⁰ *RDV* at para 39.

identical education system.

45. It is reasonable and practical to add in a proportionality component to the substantive equivalence analysis when looking at local comparator schools with significantly different numbers of students. While the threshold may require a homogenous school it does not mean that the minority language school must be identical to the majority language school with substantially more students. Rather, the AGPEI submits that while undergoing a substantive equivalence analysis there must also be a proportionality component.

46. Consider a situation where the majority language comparator school has 400 students and the minority language school has 100 students. In the majority language school there may be separate labs and educators for chemistry, biology, physics, and home economics while in the minority language school there may be one lab which hosts all four subjects and one educator for all four. The programming and services available at the minority language school are substantively equivalent to the majority school but the space and number of educators required are proportional to the number of students.

47. Even when a homogeneous school is warranted by s. 23, government should be able to justify a sense of proportionality. The AGPEI submits that reasonable rights holders may not rely on proportionality as the sole reason for sending their child to a majority language school over a minority language school. Not all schools will be considered by all parents to be equal or better than their local comparator.⁶¹

48. This proportional analysis is especially necessary in a jurisdiction like PEI where there is only one majority language K-12 comparator school for the five minority language K-12 schools. Of the five minority language K-12 schools, four of them have less than half the number of students as the comparator majority school. It is neither practical nor reasonable to offer the identical level of services, programming, or facility in a school of 71 students compared to a school with 523 students.

49. Where a homogenous school is warranted, that school can offer proportionally the same services as the majority local comparator school so long as reasonable rights-holders are not deterred from sending their children to the school because the proportional services offered are “meaningfully inferior.”⁶²

⁶¹ *RDV* at para 38.

⁶² *RDV* at paras 35, 38.

50. The AGPEI submits that governments and minority language education authorities can work together to come up with creative and innovative solutions to serve the reasonable rights holder in situations where a fully equivalent school is not warranted.

51. *Rose-des-Vents* noted a few areas to consider in doing the comparative analysis of substantive equivalence.⁶³ This was not meant to be an exhaustive list and the AGPEI submits that where services are proportional at the minority language school compared to the majority language school the test for substantive equivalence may still be met as it is the entire “educational experience” that must be considered. Section 23 does not guarantee the absolute best in terms of every facility, service, program, etc... available to minority language rights holders in an area.⁶⁴

C. Cost savings were appropriately considered by the courts below in their s.1 analysis

52. The AGPEI agrees with, and adopts, the submissions of British Columbia with respect to costs being considered throughout the *Oakes* analysis.

53. In addition, the AGPEI submits that there is a distinction between “cost savings” and a “rational and fair allocation of public funds”. This differentiation is significant as there are public policy considerations taken into account in fairly distributing limited public funds across all government departments and also between the majority and minority language education authorities.⁶⁵

54. Except in rare circumstances, when a government’s sole purpose for justifying a breach of the *Charter* is financial, it will not be accepted as a reasonable justification.⁶⁶ However, the rational and fair allocation of public funds encompasses more than just financial considerations.

55. To put it practically, costs savings involves a reduction in the overall amount of money spent, whereas a fair and rational allocation of public funds is a distribution of the same pot of money without an overall reduction in funds.

⁶³ *RDV* at para 39.

⁶⁴ *RDV* at para 40.

⁶⁵ *FAA* at ss.2-3.

⁶⁶ *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at para 63 citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 384. [*N.A.P.E.*]

56. The fair and rational allocation of public funds includes making public policy decisions to ensure that even the most basic public needs are met and social values are maintained while not resulting in a financial deficit. It may also include reducing any outstanding debt that may burden a province.⁶⁷

57. When there are financial considerations which are intertwined with public policy decisions, the fair and rational allocation of public funds can be considered a pressing and substantial objective in justifying a breach.⁶⁸

58. The Court of Appeal in this matter agreed with the findings in *Rose-des-Vents* where Justice Karakatsanis found that costs may be considered in the s. 1 analysis after the breach of s. 23 has been made out.⁶⁹

59. As the parties agreed that the allocation of fair and rational allocation of public funds is a pressing and substantial issue, a court is required to consider that throughout the s. 1 analysis, including at all three steps of the proportionality determination.⁷⁰

D. Conclusion

60. The AGPEI submits that this Court must recognize that a degree of proportionality is applicable along the sliding scale, as not doing so would create an impractical financial burden on provinces.

61. The AGPEI also submits that the requirement for minority language education authorities to prioritize capital projects, even those which may be necessary to remedy s. 23 breaches, does not limit their management and control of their education system to the point of it being a s. 23 breach.

62. Governments must be able to fairly and rationally distribute the public purse across all government departments; prioritization of capital projects by the minority language education authority assists government in doing this. Governments and minority language education authorities must work together to ensure that government does what is practically possible to remedy s. 23 breaches.

⁶⁷ *N.A.P.E.* at paras 52, 61, 72.

⁶⁸ *N.A.P.E.* at para 69.

⁶⁹ *RDV* at para 49; *BCCA* at para 219.

⁷⁰ *TJ* at para 1065; *BCCA* at para 218.

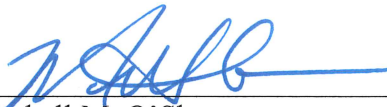
PART IV - SUBMISSIONS REGARDING COSTS

63. There ought to be no award of costs for or against the AGPEI.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11 day of September, 2019.



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PART V - TABLE OF AUTHORITIES

Case Law	Paragraphs
<u><i>Arsenault-Cameron v Prince Edward Island</i>, [2000] 1 SCR 3</u>	12, 17, 18, 20, 22, 23, 27, 29, 31, 32, 36, 43
<u><i>Association des parents de l'école Rose-des-vents v. British Columbia (Education)</i>, [2015] 2 SCR 139</u>	25, 29, 34, 35, 36, 41, 44, 47, 49, 51, 58
<u><i>Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)</i>, 2016 BCSC 1764</u>	11, 36, 41, 43, 59
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<u><i>Mahe v Alberta</i>, [1990] 1 SCR 342</u>	12, 13, 14, 20, 23, 27, 29, 33, 35, 36, 37, 38, 42
<u><i>Newfoundland (Treasury Board) v. N.A.P.E.</i>, [2004] 3 SCR 38</u>	54, 56, 57
<u><i>R. Oakes</i>, [1986] 1 SCR 103</u>	11
<u><i>Reference re Public Schools Act (Man)</i>, [1993] 1 SCR 839</u>	4

Legislation	Sections
<u>Education Act, RSPEI 1988, c E-0.1</u>	5, 14, 24
<u>Education Act Education Authorities Regulations, PEI Reg EC524/16</u>	5, 14, 15, 24
<u>Financial Administration Act, RSPEI 1988, c F-9</u>	6, 30, 53
<u>The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11</u>	1, 28

APPENDIX A- Education Act, ss. 11, 20(2), 20(3), 93(1), 93(3)**EDUCATION ACT**

RSPEI 1988, c E-0.1

PART III-EDUCATION AUTHORITIES**11.**

(1)The school board known as La Commission scolaire de langue française, or the French Language School Board, established pursuant to the former Act, is continued as a body corporate to administer the French school system with jurisdiction over the entire province.

(2)The school board known as the English Language School Board, established pursuant to the former Act, is continued as a body corporate under the name “Public Schools Branch” to administer the English school system with jurisdiction over the entire province.

(3)Subject to the limitations contained in this Act and the regulations, an education authority is a body corporate with the powers granted to a body corporate by the Companies Act R.S.P.E.I. 1988, Cap. C-14. 2016,c.6,s.11.

Powers, duties of education authority**20.**

(1)An education authority has the powers and duties conferred on it by this Act and the regulations.

(2)An education authority has the following responsibilities:

(a)to deliver the courses of study and education programs prescribed, approved or authorized pursuant to this Act to meet the needs of all students enrolled in a school operated by the education authority and to enable their success;

(b)to be accountable and provide assurances to students, parents, the community and the Minister for performance of duties and responsibilities conferred on the education authority by this Act and the regulations;

(c)ensure that each student enrolled at a school operated by the education authority and each staff member employed by the education authority is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and a sense of belonging;

(d)to provide a continuum of specialized supports and services to students that is consistent with the principles of inclusive education;

- (e)to collaborate with municipalities, the other education authority and community-based service agencies in order to effectively address the needs of all students and manage the use of public resources;
- (f)to collaborate with post-secondary institutions and the community to enable smooth transitions for students from secondary to post-secondary education;
- (g)to establish and maintain governance and organizational structures that promote student well-being and success;
- (h)to ensure effective management of the education authority's resources;
- (i)to recruit the Director and entrust the day-to-day management of the education authority to the staff through the Director;
- (j)to comply with all applicable Acts and regulations;
- (k)to establish appropriate dispute resolution processes;
- (l)to carry out any other responsibility that is prescribed by regulation.

(3)In addition to the responsibilities specified in subsection(2), the French Language School Board may

- (a)promote and distribute information about French first language instruction in the province; and
- (b)promote French language and culture in connection with its responsibility to deliver the courses of study and education programs approved or authorized pursuant to this Act. 2016,c.6,s.20.

Construction and capital additions to schools

93

- (1)The Minister, after consultation with the education authority concerned and in accordance with the regulations, may recommend to the Minister of Transportation, Infrastructure and Energy
 - (a)the purchase, rental or acceptance of gifts of land or buildings for school purposes;
 - (b)the construction and furnishing of school buildings; and
 - (c)capital additions to school buildings.
- (2)An education authority, with the Minister's approval, shall determine the location of school buildings.
- (3)The Minister shall consult with the education authorities respecting capital construction projects.

APPENDIX B- Education Act Education Authority Regulations, ss. 14, 27**EDUCATION ACT EDUCATION AUTHORITIES REGULATIONS**PEI Reg EC524/16

Responsibilities of French Language School Board**14**

In addition to the responsibilities of an education authority described in subsections 20(2) and (3) of the Act and any other regulations made pursuant to the Act, the French Language School Board has the following responsibilities:

- (a) to provide for the recruitment, employment, management and evaluation of the staff of the education authority and identification of staff development needs;
- (b) to provide for the transportation of students to and from school;
- (c) to ensure the development of and approve school effectiveness plans;
- (d) to monitor and evaluate the effectiveness of schools.

Capital construction project defined**27.**

(1) For the purposes of subsection 93(3) of the Act and these regulations, “capital construction project” means

- (a) the construction of a school building;
- (b) the construction of an addition to a school building; or
- (c) any major repairs or maintenance projects for school premises that have a projected cost exceeding \$10,000.

APPENDIX C- *Financial Administration Act, ss. 2, 3***FINANCIAL ADMINISTRATION ACT**RSPEI 1988, c F-9

Functions**2.**

The Board shall act for the Executive Council in relation to

- (a) general policy on the administration of the public service of Prince Edward Island;
- (b) the organization of the public service or any portion thereof, the control of the establishments therein and the determination of terms and conditions of employment of persons employed therein;
- (c) the preparation of the Estimates of Capital and Operating Revenue and Expenditure and the review of expenditure plans and programs and the recommendation of priorities in respect thereof;
- (d) financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licenses, leases, revenues from the disposition of property, and procedures by which departments or reporting entities manage, record and account for revenues received or receivable from any source; and
- (e) such other matters as may be referred to it by the Lieutenant Governor in Council.

1980,c.21,s.2; 1996,c.15,s.2; 2008,c.14,s.3.

Duties and Powers**3.**

(1) The Board shall

- (a) prepare the
 - (i) Estimates of Operating Revenue and Expenditure, and
 - (ii) Estimates of Capital Revenue and Expenditure;
- (a.1) assign to the Secretary such functions as the Board considers appropriate;
- (b) direct the manner and form in which the appropriation accounts of the province are to be kept;
- (c) establish procedures for the processing and approval of the transfer of funds between appropriation accounts;
- (d) set rules and guidelines for the administration of departments; and
- (e) direct the coordination of administrative functions among and within departments and reporting entities.

(2)The Board may

(a)require from any public officer or any agent of the Government any account, return, statement, document, report or information that the Board considers necessary for the performance of its functions;

(b)establish or abolish positions within the civil service; and

(c)take such action as it considers necessary for the efficient administration of the public service.

1980,c.21,s.3; 1996,c.15,s.3; 2008,c.14,s.4; 2012,c.15,s.6; 2016,c.8,s.1(1)(a)