

**SUPREME COURT OF CANADA**

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| **Citation:** Association des parents de l’école Rose-des-vents *v.* British Columbia (Education), 2015 SCC 21, [2015] 2 S.C.R. 139 | **Date:** 20150424**Docket:** 35619 |

Between:

Association des parents de l’école Rose-des-vents, 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, and Conseil scolaire francophone de la Colombie-Britannique

Appellants

and

Minister of Education of British Columbia and Attorney General of British Columbia

Respondents

- and -

Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of the Northwest Territories, Attorney General of the Yukon Territory, Commissioner of Official Languages of Canada, Commission scolaire francophone, Territoires du Nord-Ouest, Fédération nationale des conseils scolaires francophones, Conseil des écoles fransaskoises and Commission scolaire francophone du Yukon

Interveners

**Coram:** McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

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| **Reasons for Judgment:**(paras 1 to 90) | Karakatsanis J. (McLachlin C.J. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring) |

Association des parents de l’école Rose-des-vents *v.* British Columbia (Education), 2015 SCC 21, [2015] 2 S.C.R. 139

Association des parents de l’école Rose-des-vents,

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, and

Conseil scolaire francophone de la Colombie-Britannique Appellants

v.

Minister of Education of British Columbia and

Attorney General of British Columbia Respondents

and

Attorney General for Saskatchewan,

Attorney General of Alberta,

Attorney General of the Northwest Territories,

Attorney General of the Yukon Territory,

Commissioner of Official Languages of Canada,

Commission scolaire francophone, Territoires du Nord-Ouest,

Fédération nationale des conseils scolaires francophones,

Conseil des écoles fransaskoises and

Commission scolaire francophone du Yukon Interveners

**Indexed as:** Association des parents de l’école Rose-des-vents ***v.* British Columbia (**Education)

2015 SCC 21

File No.: 35619.

2014: December 2; 2015: April 24.

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

on appeal from the court of appeal for british columbia

 *Constitutional law — Charter of Rights — Minority language educational rights — Substantive equality — Manner in which court should assess whether children of rights holders are provided with educational experience equivalent to that provided in schools of linguistic majority of province or territory — Are issues of costs and practicalities relevant to equivalence analysis? — Whether a finding of lack of equivalence amounts to Charter breach — Whether it is necessary to determine responsibility as between province or territory and school board prior to finding prima facie breach of s. 23 of Canadian Charter of Rights and Freedoms.*

 *Constitutional law — Charter of Rights — Procedure — Hearing — Procedural fairness — Phasing of proceedings — Relevance of pleadings — Petition judge phasing proceedings, leaving determination of responsibility for Charter breach to later phase — Petition judge striking portions of province’s pleadings as irrelevant to first phase — Whether procedures adopted by petition judge procedurally unfair.*

 L’école élémentaire Rose-des-vents (“RDV”) is the only publicly-funded French-language elementary school for children living west of Main Street in the city of Vancouver. The school is overcrowded and enrollment is growing. RDV is small and the classrooms are significantly smaller than those in other schools. Some have no windows and only three classrooms meet the recommended size for classrooms. The library is very small, the washrooms are inadequate and there is no available flexible space in the school. Roughly 85 percent of students attending RDV are transported to school by bus and over two-thirds of those have bus trips of more than 30 minutes per trip. By contrast, the English-language schools in RDV’s catchment area are larger, with larger classrooms, larger and better playing fields, and more spacious libraries. Most students attending English-language schools in the area live within one kilometre of their schools.

 In 2010, parents of children attending RDV challenged their school board and the provincial government, seeking a declaration that the educational services made available to their children were not equivalent to those of the English-language schools in the area and that their minority language education rights under s. 23 of the *Charter* had been breached. They requested that the legal proceedings be phased so that they could obtain a declaration while leaving the question of responsibility for the alleged inadequacies to a later phase, if necessary. Their hope was that obtaining a declaration would be sufficient to obtain a favourable government response.

 The petition judge accepted the request to phase the proceedings, deciding to first assess only whether the children of rights holders were being provided with instruction and facilities equivalent to majority language schools, as guaranteed under s. 23 of the *Charter*. Prior to undertaking this initial phase of the proceedings, the judge struck certain parts of the province’s pleadings on the grounds that they were not relevant to that phase. At the conclusion of the first phase of the proceedings, the judge issued a declaration that the parents are not being provided the minority language educational facilities guaranteed to them by s. 23 of the *Charter*. He did not assign responsibility for the failure to meet the constitutional standard. The Court of Appeal allowed the appeal brought by the province. It set aside both the order striking some of the province’s pleadings, and the declaration.

 Held: The appeal should be allowed and the petition judge’s declaration reinstated. The award of special costs issued by the petition judge is restored. The matter should be remitted to the Supreme Court of British Columbia for the next phase of the petition, if necessary. Special costs are awarded to the appellants for the appeal proceedings.

 Section 23 of the *Charter* guarantees a “sliding scale” of minority language education rights. At the upper limit 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. The focus in giving effect to s. 23 rights should be on substantive equivalence, not on *per capita* costs and other markers of formal equivalence. What is paramount is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students.

 When assessing substantive equivalence, a purposive approach requires a court to consider the educational choices available from the perspective of s. 23 rights holders. The comparator group that will generally be appropriate for that assessment will be the neighbouring majority language schools that represent a realistic alternative for rights holders. The question to be examined is whether reasonable rights-holder parents would be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school. If so, the remedial purpose of s. 23 is threatened. If the educational experience, viewed globally, is sufficiently superior in the majority language schools, that fact could undermine the parents’ desire to have their children educated in the minority language, and thus could lead to assimilation.

 The comparative exercise must be alive to the varied factors that reasonable parents use to assess equivalence. The exercise is contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times, amongst other factors. Such an approach is similar to the way parents make decisions regarding their children’s education. The extent to which any given factor will represent a live issue in assessing equivalence will be dictated by the circumstances of each case. The relevant factors are considered together in assessing whether the overall educational experience is inferior in a way that could discourage rights holders from enrolling their children in a minority language school. If, on balance, the experience is equivalent, the requirements of s. 23 will be met.

 Issues of costs and practicalities are considered in the determination of the level of educational services a group of rights holders is entitled to on the sliding scale. It would undermine that analysis to consider costs and practicalities again, after the appropriate level of educational services has already been determined. Accordingly, it is not appropriate for provincial or territorial governments to invoke issues of practicality or cost as part of the inquiry into equivalence. Costs and practicalities may, however, be relevant in attempts to justify a breach of s. 23, and in attempts to fashion an appropriate and just remedy for a breach.

 In the present case, the petition judge applied the correct test to assess equivalence. He comprehensively and holistically assessed the relevant factors and compared RDV to the English-language schools in the relevant catchment area in Vancouver. In the determination of overall substantive equivalence, he concluded that the programs offered at RDV were not so superior as to offset its inadequate facilities, overcrowding and long travel times. In his opinion, the disparity between the minority and majority language schools was such as to limit enrollment and contribute to assimilation. There is no error in principle in the petition judge’s analysis.

 The declaration issued by the petition judge 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. Where the children of s. 23 rights holders are entitled to an educational experience equivalent to that of majority language children, there is no difference between a finding of a lack of equivalence and a finding that the rights holders have not received the services to which they are entitled under s. 23. However, since responsibility for the breach has not yet been assigned ― and leaving open the possibility that the responsible party or parties may seek to justify the breach ― it cannot be said that the judge’s declaration constitutes a complete finding of a *Charter* violation.

 Where a proceeding has been formally phased to separate the question of substantive equivalence from other elements of the s. 23 analysis, evidence that does not assist in answering that question would normally not be relevant. Considered from this perspective, the petition judge was entitled to strike the portions of the province’s pleadings as they were not relevant to the inquiry into substantive equivalence.

**Cases Cited**

 **Applied:** *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; **discussed:** *Mahe v. Alberta*, [1990] 1 S.C.R. 342; **referred to:** *Assn. des Parents Francophones (Colombie-Britannique) v. British Columbia* (1996), 27 B.C.L.R. (3d) 83; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,2003 SCC 62, [2003] 3 S.C.R. 3; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28; *Arsenault-Cameron v. Prince Edward Island* (1997), 149 Nfld. & P.E.I.R. 96; *Marchand v. Simcoe County Board of Education* (1986), 12 C.P.C. (2d) 140.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 23, 24(1).

**Authors Cited**

Bastarache, Michel. “Education Rights of Provincial Official Language Minorities (Section 23)”, in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswell, 1989, 687.

Canada. Royal Commission on Bilingualism and Biculturalism. *Report of the Royal Commission on Bilingualism and Biculturalism*, Book II, *Education*. Ottawa: Queen’s Printer, 1968.

Doucet, Michel. “L’article 23 de la *Charte canadienne des droits et libertés*” (2013), 62 *S.C.L.R.* (2d) 421.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Thomson/Carswell, 2007 (updated 2014, release 1).

Landry, Rodrigue, and Réal Allard. “L’exogamie et le maintien de deux langues et de deux cultures: le rôle de la francité familioscolaire” (1997), 23 *Revue des sciences de l’éducation* 561.

Power, Mark, and Pierre Foucher. “Language Rights and Education”, in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. Markham, Ont.: LexisNexis Canada, 2005, 1095.

 APPEAL from judgments of the British Columbia Court of Appeal (Saunders, Bennett and Hinkson JJ.A.), 2013 BCCA 407, 49 B.C.L.R. (5th) 246, 342 B.C.A.C. 251, 585 W.A.C. 251, 367 D.L.R. (4th) 387, 291 C.R.R. (2d) 106, 44 C.P.C. (7th) 122, [2014] 1 W.W.R. 1, [2013] B.C.J. No. 2057 (QL), 2013 CarswellBC 2799 (WL Can.); and 2014 BCCA 40, 54 B.C.L.R. (5th) 79, 350 B.C.A.C. 142, [2014] 4 W.W.R. 528, 58 C.P.C. (7th) 230, [2014] B.C.J. No. 155 (QL), 2014 CarswellBC 225 (WL Can.), setting aside decisions of Willcock J., 2011 BCSC 1495, 21 C.P.C. (7th) 111, [2011] B.C.J. No. 2096 (QL), 2011 CarswellBC 3303 (WL Can.); 2012 BCSC 1614, 39 B.C.L.R. (5th) 144, 270 C.R.R. (2d) 220, [2013] 2 W.W.R. 528, [2012] B.C.J. No. 2247 (QL), 2012 CarswellBC 3373 (WL Can.); and 2013 BCSC 1111, 49 B.C.L.R. (5th) 189, [2013] 10 W.W.R. 602, 40 C.P.C. (7th) 274, 61 Admin. L.R. (5th) 310, [2013] B.C.J. No. 1352 (QL), 2013 CarswellBC 1871 (WL Can.). Appeal allowed.

 Nicolas M. Rouleau and *Joseph Pagé*, for the appellants Association des parents de l’école Rose-des-vents et al.

 Robert W. Grant, Q.C., Jean-Pierre Hachey, Mark C. Power and David P. Taylor, for the appellant Conseil scolaire francophone de la Colombie-Britannique.

 Leonard T. Doust, Q.C., Karrie Wolfe and Warren B. Milman, for the respondents.

 Alan F. Jacobson and Barbara C. Mysko, for the intervener the Attorney General for Saskatchewan.

 Randy Steele, for the intervener the Attorney General of Alberta.

 François Baril, for the intervener the Attorney General of the Northwest Territories.

 Maxime Faille, Guy Régimbald and Pippa Lawson, for the intervener the Attorney General of the Yukon Territory.

 Christine Ruest Norrena and Isabelle Bousquet, for the intervener the Commissioner of Official Languages of Canada.

 Roger J. F. Lepage and Francis P. Poulin, for the interveners Commission scolaire francophone, Territoires du Nord-Ouest, Fédération nationale des conseils scolaires francophones, Conseil des écoles fransaskoises and Commission scolaire francophone du Yukon.

 The judgment of the Court was delivered by

1. Karakatsanis J. — This appeal reflects a new generation of issues for minority language education rights. When is the quality of a minority language school education equivalent to that of the majority language schools? What factors go into determining equivalence?
2. These questions lie at the heart of this appeal. They engage s. 23 of the *Canadian Charter of Rights and Freedoms*, the minority language education provision that guarantees minority language rights holders the right to have their children receive primary and secondary school instruction in English or French. While this Court has considered this *Charter* right on several occasions over the past 30 years, the present appeal illustrates the evolution of minority language education disputes since the adoption of the *Charter*: rather than focusing on a group’s initial entitlement to a given level of minority language educational services, this appeal asks how a court may determine whether a group is, in fact, receiving its entitlement.
3. It is well established that where the number of children of minority language rights holders warrants the highest level of services envisioned by s. 23, those rights holders are entitled to instruction and educational facilities equivalent in quality to that provided to the official language majority of the province or territory. This Court’s past jurisprudence has recognized that, because of the remedial nature of s. 23 rights, equality may mean something different than formal equality. It requires substantive equality. In this appeal, we are called upon to give guidance on how to measure this equivalence. We are also asked to determine the significance of a finding of lack of equivalence, and whether it amounts to a breach of s. 23 of the *Charter*.
4. In this case, the parents of children attending a French-language elementary school challenged their school board and the provincial government, and sought a declaration that the educational services were not equivalent to those of the English-language schools in the area. In my view, they were entitled to that declaration. As a result, I would allow the appeal and restore the declaration of the petition judge.
5. Facts
6. L’école élémentaire Rose-des-vents (RDV) is the only publicly-funded French-language elementary school for students living west of Main Street in the city of Vancouver. It was established in 2001, five years after the Supreme Court of British Columbia ruled that the number of children of rights holders in the geographic area of Vancouver/Lower Mainland and Victoria warranted the highest measure of management and control contemplated under s. 23 (*Assn. des Parents Francophones (Colombie-Britannique) v. British Columbia* (1996), 27 B.C.L.R. (3d) 83). The court concluded that the B.C. legislature could no longer delay putting in place an appropriate minority language education scheme.
7. As the petition judge held, enrollment at RDV has increased since 2001 and the school, which currently shares facilities with a French-language secondary school, has become increasingly overcrowded. In 2012, RDV had a nominal capacity of 215 students and an operating capacity of 199 students. Enrollment in 2011 was 344 students, and enrollment is growing.
8. RDV is small, with narrow hallways and no coat hooks or lockers. There is a lack of storage space. This is said to have contributed to the spread of lice among students. There is no available flexible space in the school. The washrooms are inadequate. The library is very small, and the classrooms are significantly smaller than those in other schools. Only three classrooms meet the recommended size for classrooms. Two classrooms have no windows. The playground is divided into small sections. Due to the space sharing arrangement with the secondary school, the space made available to RDV will likely diminish in the coming years.
9. By contrast, the English-language schools in RDV’s catchment area are larger, with larger classrooms, larger and better playing fields, and more spacious libraries.
10. Of the 344 students attending RDV in 2012, 293 were transported to school by bus. None of those elementary school students live within the one kilometre “walk limit”. Over two thirds of these students spend more than 30 minutes per bus trip. By contrast, most students attending English-language schools in the area live within one kilometre of their schools.
11. The B.C. Minister of Education has acknowledged that RDV is operating “over capacity”. The construction of a new French-language school in Vancouver has been a “high priority” of the Ministry of Education at least since 2008 (A.R., vol. II, at p. 104). The Conseil scolaire francophone de la Colombie-Britannique (CSF), the French-language school board that oversees RDV, acknowledges the overcrowding, the substandard facilities, and the long bus rides.
12. In 2010, the Association des parents de l’école Rose-des-vents and Joseph Pagé, on his own behalf and as a representative of parents of children enrolled at RDV (“the Parents”), filed a petition naming as respondents the Minister of Education, the Attorney General of British Columbia (collectively, “the Province”), and the CSF.[[1]](#footnote-1) The petition sought a declaration that the Parents’ minority language education rights under s. 23 of the *Charter* had been breached. The Parents argued that the RDV school facilities were not equivalent to those of the English-language schools in the area. However, they sought to avoid the question of assigning responsibility for the alleged inadequacies during the first stage of the proceedings. They hoped that a declaration at the first stage would be sufficient to obtain a favourable government response.
13. The CSF agrees with the Parents that the facilities available to rights holders in the RDV catchment area are inadequate. However, it blames the inadequacies on insufficient funding from the Province, which funds capital expenditures separately from regular operating expenditures. The Province denies that the RDV facilities are deficient, but argues that if they are, the CSF, as the agency charged with exercising management and control of the minority language education system on behalf of rights holders, bears responsibility for any inadequacies.
14. In a separate action commenced later in 2010, the CSF, the Fédération des parents francophones de Colombie-Britannique,[[2]](#footnote-2) and 33 individual parents initiated proceedings against the Province, alleging province-wide breaches of s. 23 of the *Charter* and raising systemic challenges to the capital funding system put in place by the Ministry of Education as it applies to minority language education. While that action is not a subject of this appeal, it may resolve some of the outstanding issues raised in this petition.
15. Judicial History
	1. Supreme Court of British Columbia
16. The present matter constitutes the first phase of what may be a multi-phase proceeding. Justice Willcock, then of the Supreme Court of British Columbia, presided over the petition. He decided to phase the proceedings in light of the declaratory nature of the relief sought by the Parents, and the possibility that the outcome of the first phase might lead to a resolution of the dispute (2011 BCSC 1495, 21 C.P.C. (7th) 111). In doing so, he took into consideration the efficient use of judicial resources and the critical need for timely compliance in s. 23 cases to avoid the risks of assimilation caused by delay, relying on this Court’s decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 29.
17. This appeal concerns the first phase. The judge was to assess whether the Parents were being provided with instruction and facilities equivalent to majority language schools, as guaranteed under s. 23 of the *Charter*. Prior to undertaking this first phase, the judge struck certain parts of the Province’s pleadings on the grounds that they were not relevant to the first phase of proceedings (2011 BCSC 1495). As well, during the course of the hearing, the Province sought an adjournment in order to bring further evidence on various points, including responsibility for any breach of s. 23. The judge denied this adjournment request (2012 BCSC 1206).
18. In his reasons for judgment at the conclusion of the first phase of proceedings, the judge found a lack of equivalence between the school facilities afforded to the Parents and the facilities available to majority language students in the same area (2012 BCSC 1614, 39 B.C.L.R. (5th) 144). He found that, despite the good quality of instruction and academic outcomes, the RDV facilities are inadequate, and that the long travel times of many students are not offset by superior facilities or programs. He found that the disparity limited enrollment and contributed to assimilation. He concluded that the facilities are inadequate to meet the standard of equivalence required by s. 23 of the *Charter*. He did not assign responsibility for the failure to meet the constitutional standard.
19. The judge issued “a declaration in favour of the parents . . . 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*” (para. 160). He also retained jurisdiction over the litigation to hear further applications, should the outcome of the first phase of the proceedings be insufficient to facilitate the resolution of the issues between the parties.
20. The judge awarded special costs to the Parents throughout, and to the CSF in relation to all proceedings on or after November 4, 2011 (2013 BCSC 1111, 49 B.C.L.R. (5th) 189). Though he did not find the Province’s conduct worthy of reproof or rebuke, the judge concluded that the petitioners and the CSF were entitled to special costs as public interest litigants.
	1. Court of Appeal for British Columbia
21. The Court of Appeal for British Columbia allowed the appeal brought by the Province. Hinkson J.A. (Saunders and Bennett JJ.A. concurring) concluded that certain paragraphs struck by the judge should not have been struck, as they were not clearly irrelevant to the first phase of proceedings (2013 BCCA 407, 49 B.C.L.R. (5th) 246). The Court of Appeal was of the view that issues of costs and practicalities may be relevant to the equivalence analysis performed as part of the first phase. The Court of Appeal, relying on the judge’s March 2012 clarification of his 2011 phasing order, also concluded that the reasons for judgment went beyond what the judge said he intended to resolve as part of the first phase of the proceedings. This had the effect of unfairly precluding the Province from obtaining further evidence to support its defence that any disparity in the facilities did not amount to a breach of the Parents’ s. 23 rights.
22. The Court of Appeal set aside the order striking certain paragraphs of the Province’s pleadings. It also set aside Justice Willcock’s declaration dated October 31, 2012, and ordered that the petition be remitted to the Supreme Court of British Columbia. The Court of Appeal also set aside the award of special costs (2014 BCCA 40, 54 B.C.L.R. (5th) 79).
23. Issues
24. This appeal raises both substantive and procedural issues.
25. First, how should a court assess the substantive equivalence of a minority language school facility as compared to majority language school facilities, for the purpose of determining whether the minority language facility complies with s. 23 of the *Charter*? In particular, are issues of costs and practicalities relevant to the s. 23 equivalence analysis? Is it necessary to determine responsibility, as between a province or territory and a school board, prior to finding a *prima facie* breach of s. 23?
26. Second, were the procedures adopted by the petition judge in managing the proceedings procedurally unfair?
27. Analysis
	1. Equivalence Under Section 23 of the Charter
		1. Basic Principles and Interpretation of Section 23
28. Section 23 of the *Charter* guarantees minority language rights holders the right to have their children educated in English or French, as the case may be:

**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.

1. Section 23 is a remedial right that differs from many other *Charter* rights. The provision is an important marker of Canada’s commitment to bilingualism, and to the bicultural founding character of this country. It imposes a constitutional duty on the provinces and territories to provide minority language education to children of s. 23 rights holders where numbers warrant. This commitment sets Canada apart among nations, as Justice Vickers of the Supreme Court of British Columbia explained in *Assn. des Parents Francophones*:

From its genesis, Canada brings to the world a unique history and culture of cooperation and tolerance. It is rooted in the commitment of French and English people, who had earlier been separated by geography, a history of divisive disputes, language and culture, to live together, to work together and to share the resources of a new nation. Section 23 restates a fundamental part of that commitment relating to language and culture and acknowledges the vision and faith of our nation’s pioneers. Our distinct place in the world’s family of nations is dependent on governments honouring the commitment entered into more than two centuries ago which has been reaffirmed by this generation of Canadians through the enactment of particular provisions of the *Canadian Charter of Rights and Freedoms*. [para. 24]

1. Section 23 is concerned with the preservation of culture as well as language. As the Royal Commission on Bilingualism and Biculturalism noted, “[l]anguage and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture” (*Report of the Royal Commission on Bilingualism and Biculturalism*, Book II, *Education* (1968), at p. 8). As this Court noted in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362, “any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it”: see also M. Bastarache, “Education Rights of Provincial Official Language Minorities (Section 23)”, in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 687, at p. 695.
2. Section 23 was designed to correct and prevent the erosion of official language minority groups so as to give effect to the equal partnership of Canada’s two official language groups in the context of education: *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 26; *Mahe*, at p. 364. Minority language education is crucial to the maintenance of that partnership:

For a minority group, equal partnership means the possibility of preserving its linguistic and cultural identity. . . . The gradual loss of the mother tongue is inevitable without some institution to give formal instruction in the language and to enhance its prestige by according it some social recognition. At the same time, minority-language schools can adapt the curriculum to stress the cultural heritage of the minority group. [*Report of the Royal Commission*, at pp. 8-9]

Indeed, in minority language communities, schools are a primary instrument of linguistic, and thus cultural, transmission: *Mahe*, at pp. 362-63. In many such communities, demographic changes and the shifting role of religious establishments have turned local minority language schools into vital community centres (M. Power and P. Foucher, “Language Rights and Education”, in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 1095, at pp. 1100-1101).

1. One distinctive feature of s. 23 is that it is particularly vulnerable to government inaction or delay. Delay in implementing this entitlement or in addressing s. 23 violations can result in assimilation and can undermine access to the right itself. As this Court has noted before, for every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation and cultural erosion (*Doucet-Boudreau*, at para. 29). Left 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.
	* 1. “Numbers Warrant” and the “Sliding Scale” of Section 23 Rights
2. The s. 23 right to equivalent educational facilities for minority language rights holders where numbers warrant provides a means to counteract the assimilation that occurs when the children of rights holders attend majority language schools. In *Mahe*, this Court explained that s. 23 guaranteed a “sliding scale” of minority language education rights (p. 366). At the upper limit of the sliding scale, numbers will warrant the provision of the highest level of services to the minority language community. In such cases, rights holders are entitled to full educational facilities that are distinct from, and equivalent to, those found in the schools of the majority language group (*Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 854-55; *Mahe*, at p. 378). These facilities must be accessible and, where possible, located in the community where the children reside (*Arsenault-Cameron*,at para. 56). The upper threshold of the sliding scale can include separate minority language school boards (*Mahe*, at p. 374).
3. In *Mahe*, this Court held thatcosts and practicalities are relevant to the determination of where, on the sliding scale of s. 23 rights, a given minority language community falls, although pedagogical concerns will generally assume more weight (pp. 384-85). Once it is determined that the number of children mandates the highest level of services, s. 23 requires that the quality of services be substantively equivalent to that offered to the majority language students. It is also imperative that minority language parents possess a measure of management and control over the educational facilities in which their children are taught (pp. 371-72). This management and control is vital to ensuring that the minority language and culture flourish in the educational setting.
4. As this Court noted in *Mahe*, “it should be self-evident that in situations where the [highest] degree of management and control is warranted the quality of education provided to the minority should in principle be on a basis of equality with the majority” (p. 378). That being said, the education provided need not be identical. Section 23 is not meant to adopt a formal vision of equality that would focus on treating the majority and minority official language groups alike. In *Arsenault-Cameron*, this Court cautioned against applying to a s. 23 analysis the accessibility and pedagogy standards that apply to the majority language group, given the importance of s. 23 rights to the flourishing and preservation of the minority language and culture (paras. 39-40 and 49-51).
	* 1. What Is the Test for Equivalence?
5. As noted above, a central aim of s. 23 is “to correct, on a national scale, the historically progressive erosion of official language groups”: *Arsenault-Cameron*, at para. 26; see also *Mahe*,at p. 364. Because of the remedial nature of s. 23, and the specific challenges relating to the protection of minority language and culture and the prevention of assimilation, equivalence in the context of s. 23 may mean something other than formal equivalence.
6. The focus in giving effect to s. 23 rights, then, should be on substantive equivalence, not on *per capita* costs and other markers of formal equivalence. In the present case, there is evidence that the CSF receives a 15% premium in its operational funding from the Province, as compared to other school boards in the province. Given economies of scale, higher *per capita* costs for a minority language board or school are not unexpected (*Mahe*, at p. 378). However, there is no particular *per capita* number that will satisfy the requirements of s. 23 in any given instance. Rather, what is paramount is that the educational experience of the children of s. 23 rights holders at the upper end of the sliding scale be of meaningfully similar quality to the educational experience of majority language students. As this Court noted in *Arsenault-Cameron*, “[s]ection 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority” (para. 31).
	* + 1. What Analytical Perspective Is Relevant in Assessing Equivalence?
7. The first step in any s. 23 analysis is to determine the entitlement of the parents, who are the holders ofthe right. This requires assessing what level of service the number of rights holders in a given community warrants. In the present case, a court has previously determined, and the parties accept, that numbers warrant the highest level of French-language educational instruction and facilities, which necessarily includes an element of management and control for the rights holders. This being established, the issue in this case is how to determine whether the Parents have, in fact, been provided the substantive equivalence to which they are entitled.
8. When assessing equivalence, a purposive approach requires a court to consider the educational choices available from the perspective of s. 23 rights holders. Would 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? If so, the purpose of this remedial provision is threatened. If the educational experience, viewed globally, is sufficiently superior in the majority language schools, that fact could undermine the parents’ desire to have their children educated in the minority language, and thus could lead to assimilation. The inquiry into equivalence should thus focus on comparisons that would adversely affect the realization of the rights under s. 23 of the *Charter*.
	* + 1. What Geographic Scope Is Relevant for the Assessment of Equivalence?
9. As this Court has noted, both the statutory language and the purpose of s. 23 in preventing the erosion of official language minority groups require considering “wherever in the province” numbers will warrant the application of s. 23 rights (*Mahe*, at p. 386; *Arsenault-Cameron*,at paras. 56-57). For that reason, it is necessary to think locally, as the linguistic and cultural benefits of minority language education accrue to the local community.
10. 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 of 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).
	* + 1. What Factors Are to Be Compared in Assessing Equivalence?
11. As the Province has argued, no school is likely to be considered by all parents to be equal or better than its neighbours in every respect. The comparative exercise must be alive to the varied factors that reasonable parents use to assess equivalence. The fact that a given school is deficient in one area does not mean that it lacks equivalence in an overall sense. In particular, both quality of instruction and facilities can represent important elements of comparison. Indeed, in *Mahe*, Dickson C.J. rejected an approach that would treat instruction and facilities as “separate rights” under s. 23 of the *Charter*, rights to be associated with different numerical thresholds. He preferred instead to consider instruction and facilities together when determining the scope of the s. 23 right (p. 366). Such an approach is consistent with the purpose of s. 23. It stands to reason that the same considerations apply when comparing equivalence between minority and majority language schools. The quality of instruction and the quality of facilities may both be strong indicators of equivalence, and are properly considered together.
12. Thus, the comparative exercise is contextual and holistic, accounting for not only physical facilities, but also quality of instruction, educational outcomes, extracurricular activities, and travel times, to name a few factors. Such an approach is similar to the way parents make decisions regarding their children’s education. Of course, the extent to which any given factor will represent a live issue in assessing equivalence will be dictated by the circumstances of each case. The relevant factors are considered together in assessing whether the overall educational experience is inferior in a way that could discourage rights holders from enrolling their children in a minority language school.
13. As a result, the fact that a minority language school is older than nearby majority language schools is not, when viewed in isolation, enough to ground a finding of lack of equivalence. Schools can last for a long time, and older schools may have facilities that are inferior to those of newer schools. The fact that a minority language school is in the older range would not normally drive a reasonable rights-holder parent to withdraw her child from the school, particularly where other aspects of the educational experience are strong. Fundamentally, the age of a school and the quality of its physical facilities are but two factors among many. There are several other compelling considerations that form part of a reasonable parent’s comparison: the quality of the teachers, the curriculum, and the cultural opportunities offered by a minority language school are all relevant. The expectation is not, and cannot reasonably be, to have the “very best” of every aspect of the educational experience. As noted above, the comparative exercise is holistic.
14. Ultimately, the focus of the assessment is the *substantive equivalence* of the educational experience. If, on balance, the experience is equivalent, the requirements of s. 23 will be met.
15. For its part, the Province proposed a very different test for measuring equivalence under s. 23. This test would include four distinct elements. First, a court would consider the allegations of inferiority; second, it would weigh the deficiencies against the relative superiorities at the minority language school in order to determine how the two net out in their impact on assimilation; third, the court would consider the resource allocation decisions of the minority language school board and whether the deficiencies are attributable to inadequate funding; and lastly, it would weigh the extent of the assimilation attributable to the alleged inferiorities against the practicalities of the available alternatives.
16. In my view, such a test is unnecessarily complex and rigid. Not only would it introduce unnecessary elements into the equivalence analysis, it would also require unravelling the question of responsibility for a lack of equivalence, as between the Province and the local school board, even where such an exercise provides no insight into the question of whether a given minority language school is equivalent to its majority counterparts. Such a test would also require the court to jump forward to considering possible positive remedies, under the guise of assessing the practicalities of the alternatives available, even where the litigants do not seek a positive remedy. For all of these reasons, I reject this approach to assessing equivalence.
	* 1. Is There a Role for Costs and Practicalities Within the Equivalence Test?
17. The Court of Appeal concluded that costs and practicalities may, in some cases, play a role in the equivalence analysis. The Province takes the position that costs and practicalities are part of every entitlement-related decision under s. 23. Thus, where there is a question of upgrading facilities or constructing new facilities for a group of s. 23 rights holders, costs and practicalities will enter into the analysis of whether the existing facilities are equivalent.
18. By contrast, the Parents and the CSF say that costs and practicalities are only relevant in the assessment of where on the sliding scale a given group of rights holders belongs. Once such a group has been determined to be entitled to the highest level of educational services anticipated by s. 23, they are entitled to services of a quality equal to those of the majority, regardless of costs or practicalities.
19. 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.
20. As this Court noted in *Mahe*, costs will usually be subsumed within pedagogical needs in determining what level of services the numbers warrant (pp. 384-85). Funds allocated to minority language schools should be *at least* the same *per capita* as those allocated to majority language schools (p. 378). However, pedagogical needs will, in most cases, prevent the imposition of unrealistic financial demands on the state (p. 385). For example, it would not make sense, either from a pedagogical or a cost perspective, to establish a school for only 10 students in an urban centre. This would be true generally for educational services in either language.
21. However, 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 of a numbers decline puts into question whether the community still sits at the upper end of the sliding scale, entitlement to a previously established level of instruction and facilities is unlikely to be challenged. The more useful inquiry for upper threshold rights-holder groups may be into whether they are receiving the equivalence of the educational services guaranteed to them under s. 23. Costs and practicalities will be irrelevant when considering the minimum requirements for educational equivalence.
22. 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.
23. 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.
	1. Application to This Appeal
		1. Equivalence
24. In the present case, the petition judge made a number of factual findings regarding RDV and neighbouring English-language schools. He found a number of serious inadequacies at RDV compared to English-language schools in the area. Many of these are set out at the outset of these reasons. The inadequacies at RDV are striking.
25. The judge also determined the number of eligible students living in the catchment area to be at least 710, and found that the Francophone population in the relevant area warrants the provision of elementary school facilities capable of accommodating approximately 500 students. As of 2011, 344 students were enrolled at RDV, while the school has an operating capacity of only 199 students. There is both overcrowding and unmet demand at RDV.
26. As already mentioned, in 1996, the Supreme Court of British Columbia found that the number of children of rights holders in the geographic area of Vancouver/Lower Mainland and Victoria warranted the maximum level of management and control contemplated under s. 23 of the *Charter*: see *Assn. des Parents Francophones*. As of 1996, the minority language community in Vancouver and Victoria was of sufficient numbers to be entitled to the highest threshold of educational services anticipated by the sliding scale: there were 8,725 eligible children in 1991 (paras. 44 and 53). There was no suggestion in this appeal that today’s numbers are any less compelling. It remains clear that the number of rights holders living west of Main Street in Vancouver warrants the highest level of services, and thus educational equivalence with nearby English-language schools.
27. The petition judge applied the correct test to assess equivalence. In his reasons, he described the test to be applied as follows:

I am of the opinion that in measuring equivalence I should look primarily to factors that influence parental enrollment decisions. I should look to evidence of the aesthetic qualities of the facilities and their structural integrity as well as evidence of academic outcomes. The principal objective of avoiding linguistic assimilation should be borne in mind. [2012 BCSC 1614, at para. 135]

It is clear that the judge understood that both facilities and academics are relevant. With respect to academics, he held that to the extent that academic results contribute to enrollment, they must be considered but do not constitute a substitute for a comprehensive measure of equivalence. In the present case, the judge noted: “[T]he parents and the CSF do not challenge the government’s position that academic results are reasonably good. Parents are satisfied with the quality of the instruction their children are receiving” (para. 138).

1. The judge compared RDV to the English-language schools in the relevant catchment area in Vancouver. In the circumstances, this represents an appropriate geographic scope for the assessment of equivalence.
2. After reviewing the evidence, the judge concluded that RDV was not equivalent to the majority language schools in the area, stating:

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. [para. 157]

1. The judge comprehensively and holistically assessed the relevant factors. He noted the high quality of instruction and good academic outcomes. However, in the determination of overall substantive equivalence, he concluded that the programs offered at RDV were not *so* superior as to offset its inadequate facilities, overcrowding and long travel times. In his opinion, the disparity between the minority and majority language schools was such as to limit enrolment and contribute to assimilation. I can see no error in principle in his analysis.
	* 1. The Declaration
2. At the end of the first phase of the proceedings, the petition judge issued a declaration that the rights holders in the designated area “are not being provided the minority language educational facilities guaranteed to them by s. 23” (2012 BCSC 1614, at para. 160).
3. The Province argues that a court cannot make a finding that a group of s. 23 rights holders is not receiving what they are entitled to without first determining responsibility. In its view, a finding that a minority language school lacks equivalence does not equal a finding of a s. 23 breach.
4. The Parents disagree. They characterize the judge’s conclusion as a finding of a s. 23 breach, albeit one that does not assign responsibility for that breach. The Parents are of the view that a declaration alone could be sufficient to facilitate a resolution to the situation. Section 1 has not been pleaded and has not been extensively argued up to this point in the proceedings.
5. In my view, the judge’s declaration in this case constitutes a limited, or *prima facie*, declaration of a breach of s. 23. In these circumstances, where the children of s. 23 rights holders are entitled to an educational experience equivalent to that of majority language children, there is no difference between a finding of a lack of equivalence and a finding that the rights holders have not received the services to which they are entitled under s. 23. In effect, unless the absence of equivalence can be justified under s. 1, it is a violation of the claimants’ *Charter* rights. Put differently, what else could save a breach, other than justification of the failure to provide equivalent services or to allocate sufficient resources? However, since responsibility for the breach has not yet been assigned ― and leaving open the possibility that the responsible party or parties may seek to justify the breach ― it cannot be said that the judge’s declaration constitutes a complete finding of a *Charter* violation. Indeed, the judge’s careful phrasing of his declaration indicates that he was alive to these complexities.
6. Establishing responsibility for the breach may be relevant to crafting an appropriate remedy, should one be necessary. Even if the CSF was found, at a later phase of the proceedings, to be the sole party responsible for the absence of equivalence, such a finding would not undermine the judge’s declaration at the conclusion of the first phase. The *Charter* binds both the Province and the CSF: see *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22. Provinces have mechanisms for overseeing good governance by school boards. Even if the CSF were found solely responsible for the breach, restoring and maintaining educational equivalence at RDV may require action and expenditure on the part of both the CSF and the Province.
7. In summary, 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.
	* 1. The Effect of the Declaration
8. As of this stage of the proceedings, any positive remedy remains outstanding. The petition judge gave no specific direction to the Province or to the CSF.
9. 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).
10. The Parents hope that as a result of this declaration, the main actors implicated ― the Province and the CSF ― will recognize the need to promptly address the inadequate facilities at RDV. They hope that there is no need to await the outcome of the province-wide litigation, or any subsequent phase of this litigation.
11. 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.
12. As this Court noted in *Doucet-Boudreau*, “[f]or every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation”, which undermines the remedial goals of s. 23 (para. 29). The situation is urgent.
	* 1. Organization of the Proceedings
			1. Justice Willcock’s Phasing Order
13. Properly structured, communicated, and understood, phasing can facilitate access to justice by ordering a proceeding in such a way as to resolve first those issues that can be dealt with more expeditiously, while leaving to later phases more time-consuming or complex issues, particularly where it may prove unnecessary to engage the later stages. This can be particularly important in litigation involving s. 23 of the *Charter*. For this reason, it is understandable that minority language education rights holders would seek a timely determination of whether or not they are receiving the services required by s. 23.
14. This interest in the timely determination of s. 23 rights does not mean that normal rules of procedural fairness cease to apply. However, it is relevant to the exercise of a judge’s discretion to use phasing or other types of creative structuring of proceedings.
15. In this case, the petition judge phased the proceedings in light of the limited nature of the Parents’ requested relief, taking into consideration the efficient use of judicial resources and the special nature of s. 23. Determining responsibility for the breach was left for a subsequent phase of proceedings, if necessary.
16. Additionally, the ongoing litigation between the CSF and the Province involves the apportionment of responsibility for alleged s. 23 breaches on a province-wide scale. The outcome of that litigation may impact the future course of the proceedings under appeal here. From the Parents’ perspective, the outcome of the province-wide litigation may obviate the need for a subsequent phase of these proceedings.
17. Responsibility for the breach at issue here cannot be determined until the next phase of proceedings. Division of responsibility will determine where the burden of justifying the s. 23 violation lies, if a s. 1 argument is raised. Similarly, the division of responsibility would most likely precede any substantive remedial orders.
	* + 1. Striking of Pleadings and Procedural Directions
18. Given the phasing of the petition, the portions of the Province’s pleadings struck by the judge were not relevant to the first-phase inquiry into equivalence. In the circumstances, it was open to the judge to strike those portions of the Province’s pleadings. Further, the judge was entitled to decline to hear evidence on the question of responsibility for any inadequacies at RDV. While the judge’s communication of the phasing of the petition was perhaps not as clear as it might have been, this did not result in any prejudice to the parties. It was clear throughout the proceedings that the judge would not assign responsibility for any s. 23 breach or fashion any remedy as part of the first phase.
19. The Province’s struck pleading that there are many school facilities in British Columbia that could benefit from upgrading, renovation or replacement is irrelevant to the question of whether the children of rights holders are receiving instruction and facilities equivalent to those received by similarly situated majority language students. Similarly, the Province’s struck pleading that there are many causes of assimilation apart from inadequate facilities does not assist the court in the evaluation of substantive equivalence between minority and majority language schools. Moreover, the Province’s pleading that there is a variety of reasons for which rights holders could choose not to send their children to RDV is similarly irrelevant to the question of equivalence. I agree that there could be circumstances where a parent may take her child out of RDV for a reason other than a lack of equivalence. However, this does not negate the evidence that *other* students were not enrolled or were withdrawn from the school due to long transportation times or inadequate facilities. Thus, the struck pleading is not relevant to the question of equivalence.
20. The Province’s struck pleading that most of the students at RDV are children of exogamous couples, and that a decrease in the use of French at home is related to the incidence of exogamous couples, is also irrelevant. By the express terms of s. 23, a member of an exogamous couple can be a rights holder. The children of couples that include one rights holder are entitled to attend minority language schools. As this Court has underlined, s. 23(2) applies “without regard to the fact that qualified parents or children may not be French or English, or may not speak those languages at home” (*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 31). Indeed, a French-language school may play a crucial role in the transfer of the French language and culture where it is more difficult for one of the parents to transmit the language and culture in a minority context: see R. Landry and R. Allard, “L’exogamie et le maintien de deux langues et de deux cultures: le rôle de la francité familioscolaire” (1997), 23 *Revue des sciences de l’éducation* 561.
21. Relevance is assessed against the facts in issue. Here, the question that guides the inquiry into substantive equivalence between minority and majority language facilities is the following: would reasonable rights holders be deterred from sending their children to a minority language school because it is meaningfully inferior to an available majority language school? Where a proceeding has been formally phased to separate this question from other elements of the s. 23 analysis, evidence that does not assist in answering this question would normally not be relevant. Considered from this perspective, it is clear that the petition judge was entitled to strike the portions of the Province’s pleadings.
22. Far from being unfair to the parties, limiting the evidence that may be adduced according to the phasing of proceedings heeds this Court’s guidance in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Judges must actively manage the legal process in line with the principle of proportionality, taking into account fair access to the affordable, timely and just adjudication of claims: *Hryniak*, at paras. 32 and 5. Such considerations apply with equal force to s. 23 litigation.
23. Some or all of the Province’s struck pleadings may be relevant to a subsequent phase of the litigation. However, based on the judge’s organization of the proceedings, they do not assist in the first phase at issue in this appeal. Of course, his decision is without prejudice to any motions on the part of one or more of the parties to amend their pleadings at subsequent phases of the litigation.
24. For the same reasons, it was not inappropriate for the judge to deny the Province’s adjournment request to adduce new evidence during the first phase of proceedings. The additional evidence that the Province sought to adduce was largely irrelevant to the questions at issue in the first phase, and the judge concluded that the prejudice likely to be created by the delay outweighed the marginal relevance of the evidence.
25. Given the lack of relevance of the pleadings struck, the Court of Appeal erred in setting aside the order striking the pleadings, and in setting aside the judge’s declaration.
26. Disposition
27. The appeal is allowed and the petition judge’s declaration is reinstated. The matter will be remitted to the Supreme Court of British Columbia for the next phase of the petition, if necessary.
28. Costs
29. The judge awarded special costs to the Parents throughout the proceedings and to the CSF for all proceedings on or after November 4, 2011. He made this award on the basis that the Parents and the CSF were successful public interest litigants. The Court of Appeal set aside the award of special costs on the basis that the Parents and the CSF were no longer the successful litigants. As this Court is restoring the judge’s declaration, absent an error in principle or a plainly wrong award, his award of special costs should also be restored: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.
30. As this Court recently emphasized in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the standard for awarding special costs is a high one; only exceptional cases will warrant such treatment (para. 139). This Court described the test for special costs as a modification of the test for advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. The test for special costs described in *Carter* sets out two requirements:

First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that [the plaintiffs] have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the [plaintiffs] must show that it would not have been possible to effectively pursue the litigation in question with private funding. . . .

Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs. [paras. 140-41]

This Court further noted that only those costs that are shown to be “reasonable and prudent” will be covered (para. 142).

1. Although the judge in the present case did not have the benefit of this Court’s decision in *Carter*, his reasons with respect to costs show that he was alive to the considerations outlined in that case. Moreover, he was clearly alive to the exceptional nature of such an award, as evidenced by his frequent use of the words “exceptional” and “exception” throughout his reasons.
2. He found that the matter before him was one of significant and widespread societal impact:

The questions were of public importance as they involved constitutional principles and the sufficiency of measures taken to protect the minority language culture which is regarded as an important objective for all Canadians, given its place in the *Charter*. The case therefore implicates fundamental social values and policies. [2013 BCSC 1111, at para. 72]

As required by *Carter*, these findings go beyond the basic requirements set out in *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28.

1. Furthermore, the petition judge concluded that the interest of the Parents and the CSF was not such as would justify the proceedings on economic grounds given their means and the high cost of litigation. Regarding the ability of the Parents to bear the costs of the litigation, the judge referred to LeBel J.’s majority reasons in *Okanagan* on the importance of access to *Charter* justice for litigants of limited means:

In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole. [para. 27]

The judge turned his mind to the limited ability of the Parents to bear the costs of the proceedings. Further, he noted the Province’s superior capacity to bear these expenses, and the inability of the CSF to bear such costs without impacting students, thus risking further s. 23 violations. While, according to *Carter*, the fact that the unsuccessful party has a superior capacity to bear the cost of the proceedings cannot, in itself, justify an award of special costs, it remains a relevant consideration: *Carter*, at para. 137.

1. The type of litigation at issue in this appeal is unusual. The Parents already had a right to minority language education recognized under s. 23, and their petition was initiated largely as a means to compel the Province and the CSF to live up to existing obligations. This process raised novel legal questions regarding the analysis of equivalence under s. 23. By seeking a simple declaration of a lack of equivalence under s. 23, without seeking a positive remedy at the outset, the Parents evidently hoped to resolve some of their issues outside of the courtroom, by way of negotiation with the Province and the CSF.
2. Even with such a focused approach, litigation of this nature is nonetheless an onerous burden for a small group of parents to bear. It is for this reason that courts have, in the past, awarded special costs in cases involving s. 23 violations where the rights holders made sustained efforts to alert government to the s. 23 issues prior to launching legal proceedings: see *Doucet-Boudreau*, at para. 90; *Arsenault-Cameron*, at para. 63; *Arsenault-Cameron v. Prince Edward Island* (1997), 149 Nfld. & P.E.I.R. 96 (P.E.I.S.C.T.D.), at paras. 12-14; *Marchand v. Simcoe County Board of Education* (1986), 12 C.P.C. (2d) 140 (Ont. H.C.), at pp. 142-43.
3. In these circumstances, the cost award of the judge will be restored. I would also order special costs to the Parents and the CSF for the appeal proceedings.

 *Appeal allowed with costs.*

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 Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

 Solicitors for the intervener the Attorney General of the Northwest Territories: Gowling Lafleur Henderson, Ottawa.

 Solicitors for the intervener the Attorney General of the Yukon Territory: Attorney General of the Yukon, Whitehorse; Gowling Lafleur Henderson, Ottawa.

 Solicitor for the intervener the Commissioner of Official Languages of Canada: Office of the Commissioner of Official Languages, Gatineau.

 Solicitors for the interveners Commission scolaire francophone, Territoires du Nord-Ouest, Fédération nationale des conseils scolaires francophones, Conseil des écoles fransaskoises and Commission scolaire francophone du Yukon: Miller Thomson, Regina.

1. Despite being named as a respondent in the petition, the CSF has supported the position of the Parents, and is an appellant in the appeal before this Court. [↑](#footnote-ref-1)
2. The Fédération is a non-profit organization representing 28 parent associations from the CSF’s schools and 13 parent associations from French-language pre-schools. [↑](#footnote-ref-2)