500-09-029539-210, 500-09-029549-219, 500-09-029550-217

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on April 20, 2021 by the Honourable Justice Marc-André Blanchard

N^os^ **500-09-029550-217 C.A.M.**
500-17-109983-190 S.C.M. – 500-17-109731-193 S.C.M.
500-17-108353-197 S.C.M. – 500-17-107204-193 S.C.M.

ATTORNEY GENERAL OF QUÉBEC
JEAN-FRANÇOIS ROBERGE, in his capacity as Minister of Education
SIMON JOLIN-BARRETTE, in his capacity as Minister of Immigration, Diversity and Inclusion

APPELLANTS / INCIDENTAL RESPONDENTS
(Defendants)

v.

ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
COMITÉ JURIDIQUE DE LA COALITION INCLUSION QUÉBEC

RESPONDENTS
(Plaintiffs)

(Style of cause continues on the next page)

BRIEF OF THE INTERVENER QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
Dated February 18, 2022

- and –

ENGLISH MONTREAL SCHOOL BOARD
MUBEENAH MUGHAL
PIETRO MERCURI

RESPONDENTS /
INCIDENTAL APPELLANTS
(Plaintiffs)

- and –

QUEBEC COMMUNITY GROUPS NETWORK

IMPLEADED PARTIES /
INCIDENTAL APPELLANT
(Intervener)

- and –

CANADIAN HUMAN RIGHTS COMMISSION
MOUVEMENT LAÏQUE QUÉBÉCOIS
LORD READING SOCIETY
POUR LES DROITS DES FEMMES DU QUÉBEC – PDF QUÉBEC
LIBRES PENSEURS ATHÉES
PUBLIC SERVICE ALLIANCE OF CANADA (PSAC)
WORLD SIKH ORGANIZATION OF CANADA
AMRIT KAUR
AMNESTY INTERNATIONAL, FRENCH CANADIAN SECTION

IMPLEADED PARTIES
(Interveners)

- and –

FRANÇOIS PARADIS, in his capacity as President of the National Assembly of Québec
QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
FÉDÉRATION DES FEMMES DU QUÉBEC
WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENERS

(Style of cause continues on the next page)

N^os **500-09-029549-219 C.A.M.**

500-17-109983-190 S.C.M. – 500-17-109731-193 S.C.M.
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POUR LES DROITS DES FEMMES DU QUÉBEC – PDF QUÉBEC

APPELLANT /
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ENGLISH MONTREAL SCHOOL BOARD
MUBEENAH MUGHAL
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FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
ICHRAK NOUREL HAK
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)

IMPLEADED PARTIES
(Plaintiffs)

(Style of cause continued on the next page)

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LORD READING SOCIETY
QUEBEC COMMUNITY GROUPS NETWORK
WORLD SIKH ORGANIZATION OF CANADA
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FÉDÉRATION DES FEMMES DU QUÉBEC
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TABLE OF CONTENTS

INTRODUCTION

1. The *Canadian Charter of Rights and Freedoms*[1] protects the autonomy of minority official-language communities in every province and territory. This protection is robust. By design, it is beyond the reach of the notwithstanding clause in every way.

2. The Quebec English School Boards Association ("the QESBA") intervenes to support the trial judge's conclusion that Bill 21 violates s. 23 of the *Charter* (ground of appeal 9.1), and that this violation is not justified in a free and democratic society (ground of appeal 9.3).

3. Section 23 should receive a broad interpretation, consistent with decades of Supreme Court guidance. This includes the recognized right of the minority-language community to exclusive management and control of all aspects of education pertaining to both language and culture. Community management and control is integral to the purpose of s. 23, which is to ensure the vitality of minority official-language communities. Government regulation of any matter listed in the Supreme Court's decision in *Mahé* should be presumed to be a matter of language and culture.

4. A breach of s. 23 cannot be justified if the state offers no arguments to justify the breach. If the government wholly refuses to engage in the justification process, as is the case here, it is not for other parties or the courts to fill in the arguments that the government could or should have made. If the state does not attempt to justify a *Charter* breach arising from legislation, then a court ought to find, as a matter of law, that the *Charter* breach is not justified.

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[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*].

5. If this Court decides to undertake a s. 1 analysis, a higher threshold applies for breaches of s. 23. Because a "particularly stringent standard"[2] of justification applies, no deference is due at any step in the s. 1 analysis.

PART I. FACTS

6. The QESBA relies on the facts as found by the trial judge.

7. The trial judge found that Bill 21 violates s. 23 of the *Charter*, and that this violation could not be justified under s. 1 of the *Charter*. The trial judge declared certain provisions of Bill 21 inoperative with respect to "*toute personne, tant physique que morale, qui peut bénéficier des garanties prévues à l'article 23 de cette même Charte*".[3]

8. The QESBA's membership includes all nine English-language school boards in Québec. As such, the QESBA represents all the school boards and schools affected by the trial judge's order at paragraph 1140 of the trial judgment.

9. The QESBA is also the principal applicant in a constitutional challenge to *An Act to amend mainly the Education Act with regard to school organization and governance*,[4] currently before the Superior Court of Québec.[5]

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2 *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 147 [*Conseil scolaire*].

3 *Hak c. Procureur général du Québec*, 2021 QCCS 1466, paras. 1138-1140 [*Trial judgment*].

4 S.Q. 2020, c. 1

5 Superior Court file No. 500-17-112190-205. See also *Procureur général du Québec c. Quebec English School Board Association*, 2020 QCCA 1171 [*Quebec English School Board*], this Court's decision in the stay application.

PART II. ISSUES IN DISPUTE

10. The QESBA intervenes to make the following submissions:

- Ground of appeal 9.1: The QESBA submits that the trial judge correctly interpreted the scope of s. 23 of the *Charter*.

  Submission A: The s. 23 guarantee of minority-language community management and control over matters of language and culture should be understood broadly, in accordance with principles articulated by the Supreme Court.

- Ground of appeal 9.3: The QESBA submits that the breach of s. 23 of the *Charter* is not justified under s. 1 of the *Charter*.

  Submission B: As a matter of law, the infringement of s. 23 is not justified under s. 1 of the *Charter* because the Attorney General has not pleaded or argued any justification.

  Submission C: Should this Court decide to make findings on s. 1, a "particularly stringent standard" applies for infringements of s. 23.

PART III. SUBMISSIONS

A. The section 23 guarantee of minority-language community management and control over matters of language and culture should be understood broadly, in accordance with principles articulated by the Supreme Court

11. This submission includes four points. First, s. 23 of the *Charter* ought to be interpreted broadly, in light of the consistent and established jurisprudence of the Supreme Court. Second, s. 23 provides robust protections for both language and culture. Third, community management and control over matters of language and culture is integral — and not merely instrumental — to the purpose of s. 23. Fourth, a matter should be presumed to be one of language and culture if it falls within the enumerated list set out in *Mahé*.

1. Section 23 should be interpreted broadly

12. Section 23 of the *Charter* is a novel kind of right, "quite peculiar to Canada".[6] It confers a right "upon a group", and places positive obligations on the government.[7] The Supreme Court has urged courts to "breathe life into the expressed purpose" of s. 23.[8]

13. Section 23 has given rise to a distinct jurisprudence. The Supreme Court has articulated a clear purpose of the right. The Supreme Court has also consistently interpreted this right broadly, in accordance with that purpose.

14. As a starting point, the Supreme Court has emphasized that language rights "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" [emphasis in original].[9] This principle applies fully and unqualifiedly to s. 23.[10]

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6 *Mahé v. Alberta*, [1990] 1 S.C.R. 342 p. 363 [*Mahé*].
7 *Ibid.*, cited in *Quebec English School Board*, *supra*, note 5, para. 18.
8 *Ibid.*
9 *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 25 [*Beaulac*].
10 Applied to s. 23, see *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 27 [*Arsenault-Cameron*]; and *Conseil scolaire* *supra*, note 2, paras. 18-19.

15. The purpose of s. 23 is to "preserve and promote minority language and culture throughout Canada."[11] This provision protects French-speaking minorities outside Québec, and the English-speaking minority within Québec. The Supreme Court has recognized a threefold purpose in s. 23: preventative, remedial and unifying. Most recently, Wagner C.J.C., writing for the majority in *Conseil scolaire*, affirmed that s. 23 "is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities."[12]

16. In the *Secession Reference*, the Supreme Court recognized that the *Charter*'s minority language rights reflect a broader constitutional principle, namely the protection of minorities.[13]

17. Indeed, protection for minority education formed part of the constitutional bargain at Confederation. While s. 93 of the *Constitution Act, 1867* confers to the provinces jurisdiction over education, it also contained protections for minority denominational schools. In the case of Québec, this preserved the rights of the Protestant, mainly English-speaking minority, to manage and control its school boards.[14] When the constitutional protections for denominational schools in Québec were repealed in 1997, it was fully expected that s. 23 of the *Charter* would continue to protect the rights of English-language school boards to manage and control their affairs.[15]

18. Section 23 must be interpreted in light of its particular historical and social context.[16] Based on this context, it has been interpreted broadly, not narrowly.[17] As Wagner C.J.C. stated in the Supreme Court's latest pronouncement on s. 23:

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11 *Mahé*, *supra*, note 6, p. 371; see also *Conseil scolaire*, *supra*, note 2, para. 13.
12 *Conseil scolaire*, *supra*, note 2, para. 15.
13 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*], paras. 79-80. Applied to s. 23, see *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, paras. 2, 7.
14 *Conseil scolaire*, *supra*, note 2, para. 7; *Quebec English School Board*, *supra*, note 5, para. 25; *Mahé*, *supra*, note 6, p. 373. *Secession Reference*, *supra*, note 13, paras. 79-80.
15 See *Quebec English School Board*, *supra*, note 5, para. 26.
16 See e.g., *Conseil scolaire*, *supra*, note 2, paras. 5-20; *Arsenault-Cameron*, *supra*, note 10, para. 27; *Quebec English School Board*, *supra*, note 5, para. 24.
17 See *Conseil scolaire*, *supra*, note 2, paras. 18-19.

> Many rights that have been granted to Canada's minorities were dearly won over many years, and it is up to the courts to give full effect to them, and to do so clearly and transparently.[18]

19. Thus, the Supreme Court affirmed that s. 23 is one of several constitutional rights that seek to "ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[19]

20. Finally, as this Court recently observed, the exclusion of s. 23 from the scope of s. 33 of the *Charter* reflects the importance of the right in Canada's constitutional structure:

> [27] Moreover, s. 23 is not subject to the notwithstanding clause in s. 33 of the *Canadian Charter*, which reflects the importance attached to the rights set forth therein and the intention that intrusions on it be strictly circumscribed: *Conseil scolaire francophone de C.-B.*, para. 148. Section 23 protects an official language minority, including Quebec's English-speaking minority, from the effects of decisions of the majority in the area of education by granting the minority certain control in that regard. By excluding s. 23 from the scope of the notwithstanding clause, the *Canadian Charter* prevents the government of a province from being able to circumvent its constitutional obligations: *Conseil scolaire francophone de C.-B.*, para. 149.[20]
>
> [Emphasis added]

21. The exclusion of s. 23 from the ambit of s. 33 means that the scope of s. 23 is totally independent from the effects of s. 33. The pre-emptive invocation of s. 33 in legislation has no effect whatsoever on the scope of the protection provided by s. 23.

22. Thus, s. 23 should be given "a generous and expansive interpretation" consistent with its purpose.[21]

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18 *Conseil scolaire*, *supra*, note 2, para. 19.
19 *Conseil scolaire*, *supra*, note 2, para. 11, citing *Secession Reference*, *supra*, note 13, para. 74.
20 *Quebec English School Board*, *supra*, note 5, para. 27, citing *Conseil scolaire*, *supra*, note 2, paras. 148, 149.
21 *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, para. 26.

2. Section 23 provides robust protections for both language and culture

23. Although s. 23 is an individual right, it has a "unique collective aspect"[22] because it protects collective interests: the language and culture of minority communities.

24. Section 23 is concerned not only with the protection and promotion of minority languages, but also with minority language communities. The Supreme Court consistently emphasizes that the purpose of s. 23 is directed at minority communities. For example, in *Gosselin*, the Supreme Court articulated the purpose of s. 23 as follows:

> The purpose of s. 23 is the protection and promotion of the minority language community in each province. […] Section 23 achieves its purpose by ensuring that the English community in Quebec and the French communities of the other provinces can flourish.[23]
>
> [Emphasis added]

25. Further, each time the Supreme Court has pronounced on s. 23, it has recognized that s. 23 protects both language and culture.[24] For example, in *Mahé*, the Supreme Court recognized the "vital role" that minority language education plays in "encouraging linguistic and cultural vitality" of minority communities [emphasis added].[25]

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22 *Quebec English School Board*, *supra*, note 5, para. 19, citing *Mahé*, *supra*, note 6, p. 365, 389, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 28; *Conseil scolaire*, *supra*, note 2, para. 17. See also Érik Labelle Eastaugh, "The Concept of a Linguistic Community" (2019) 69:1 U Toronto LJ 117.

23 *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, paras. 28-29. See also, e.g., *Arsenault-Cameron*, *supra*, note 10, para. 26: "official language groups" and para. 47, regarding "preservation and flourishing of the linguistic minority community"; *Beaulac*, *supra*, note 9, taken up in *Arsenault-Cameron*, *supra*, note 10, para. 27: "development of the official language community"; and *Conseil scolaire* *supra*, note 2, para. 11: "("vulnerable minority groups" […] "minority language communities"); see also *Conseil scolaire* *supra*, note 2, paras. 15, 149, 157 [all emphasis added].

24 See for e.g. *Mahé*, *supra*, note 6, p. 350: "vital role of education in preserving and encouraging linguistic and cultural vitality", and 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"; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 26: "Section 23 is concerned with the preservation of culture as well as language" [all emphasis added].

25 *Mahé*, *supra*, note 6, p. 350.

26. Most recently, in *Conseil scolaire*, the Supreme Court could not have been more explicit that culture and language are two distinct elements protected by s. 23:

> Section 23 is intended to preserve culture and language, two core elements of the notions of identity and well-being of individuals and communities.[26]
>
> [Emphasis added]

27. This Court also recently recognized that s. 23 is aimed at "preserving and encouraging the linguistic and cultural vitality of official language minorities" [emphasis added].[27]

28. Thus, the s. 23 right is not merely a right to receive instruction in the minority language or the right to minority language facilities; it is the right to participate in a minority community and to partake in that community's language and culture.

3. Management and control over matters of language and culture is integral to the purpose of section 23

29. In *Mahé*, the Supreme Court recognized that s. 23 requires a measure of minority community management and control over matters related to language and culture. Management and control is integral, and not merely instrumental, to the purpose of s. 23.

30. In *Mahé*, the Supreme Court linked management and control directly to the purpose of s. 23:

> That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns.[28]
>
> [Emphasis added]

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26 *Conseil scolaire*, *supra*, note 2, para. 13.
27 *Quebec English School Board*, *supra*, note 5, para. 17.
28 *Mahé*, *supra*, note 6, p. 371-372.

31. In *Mahé*, the Supreme Court emphasized that management and control is "vital" to ensuring the minority community can flourish.[29] The Court noted that "[a] variety of management issues in education e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns".[30] Although the majority's intentions may be benign, "the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority."[31]

32. Recently, the Supreme Court affirmed the importance of management and control in relation to the purpose of s. 23:

> [149] What s. 23 does is to protect an official language minority from the effects of decisions of the majority in the area of education by granting the minority a certain autonomy in relation to its education system. The history of the relationship between the majority and the minority in this area shows that the minority's interests are not well served if it does not have some control over the management and funding of its schools.[32]
>
> [Emphasis added]

33. Thus, management and control is not merely instrumental to securing or managing the minority language facilities; rather, management and control itself is integral to the purpose of s. 23. It provides the autonomy necessary for a minority-language community to develop and flourish, and protects the minority language and culture against unintentional interference. A robust protection of this right is essential to achieving the purpose of s. 23.

34. In *Mahé*, the Supreme Court held that the number of francophone rights-holders in Edmonton warranted a separate school and that the minority community was entitled to "exclusive authority" over the complete list of enumerated matters set out at paragraph 39

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29 *Mahé*, *supra*, note 6, p. 372.
30 *Ibid*.
31 *Ibid.*, cited in *Conseil scolaire*, *supra*, note 2, para. 86.
32 *Conseil scolaire*, *supra*, note 2, para. 149.

below.[33] In Québec, the numbers warrant the highest degree of management and control by the minority community throughout the province.

35. Of course, provincial laws and regulations apply to minority schools, but only to the extent that these do not "interfere 'with the linguistic and cultural concerns of the minority'."[34] Logically, any provincial law that interferes with the linguistic and cultural concerns of the minority infringes s. 23, and, unless such infringement is justified under s. 1, the law does not apply within the minority school system.

36. Thus, in Québec, s. 23 protects a sphere of autonomy over language and culture within English-language schools. It also protects the community's self-determined linguistic and cultural concerns.

37. As the trial judge pointed out, the assertion of the s. 23 right by the minority in no way requires cultural comparisons between the minority and majority schools.[35] It simply requires establishing that the matter falls within the scope of language and culture of the minority community, and thus benefits from the protection of s. 23.

4. A matter should be presumed to be one of language and culture if it falls within the enumerated list set out in *Mahé*

38. In *Mahé*, the Supreme Court held that the minority community is entitled to exclusive management and control over "those aspects of minority language education which pertain to or have an effect upon minority language and culture."[36] Whether or not a full separate school board is warranted, *Mahé* requires that minority community representatives have "exclusive authority to make decisions relating to the minority language instructions and facilities".[37]

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33 *Mahé*, *supra*, note 6, p. 386-389.
34 *Quebec English School Board*, *supra*, note 5, para. 23; quoting *Mahé*, *supra*, note 6, p. 380 and *Arsenault-Cameron*, *supra*, note 10, para. 53.
35 See *Trial judgment*, *supra*, note 3, paras. 966-968.
36 *Mahé*, *supra*, note 6, p. 376.
37 *Mahé*, *supra*, note 6, p. 377.

39. The Supreme Court stated that at a minimum, this includes the following enumerated matters:

> (a) expenditures of funds provided for such instruction and facilities;
>
> (b) appointment and direction of those responsible for the administration of such instruction and facilities;
>
> (c) establishment of programs of instruction;
>
> (d) recruitment and assignment of teachers and other personnel; and
>
> (e) making of agreements for education and services for minority language pupils.[38]

40. This Court should recognize that matters in this list are presumed to be aspects of minority language education which pertain to or have an effect upon minority language and culture. In other words, government regulation of any of these matters should be presumed to affect the minority's language and cultural concerns. For any government regulation of these enumerated matters, it should fall to the government to demonstrate that the regulation does not affect the minority's language or culture.

41. Thus, for example, government regulation of "recruitment and assignment of teachers and other personnel" should be presumed to be a matter of language and culture over which a minority-language school board has exclusive management and control. Some such regulation will easily be demonstrated not to affect minority language and culture. For example, the government could demonstrate that the regulation of academic credentials and professional qualifications, or a requirement to conduct criminal background checks, does not affect language and culture.

42. Such a presumption is consistent with the purpose of s. 23 and the purpose of management and control. It gives meaning to the list set out in *Mahé*, while also recognizing that some provincial regulation of those matters may be demonstrated not to affect the minority's linguistic and cultural concerns. Because the majority cannot be expected to appreciate all the ways in which its practices may influence minority language

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[38] *Ibid.*, see also *Quebec English School Board*, *supra*, note 5, para. 21.

and culture, the scope of "matters of language and culture" should be robustly protected. Such a presumption would provide this robust protection, consistent with the purpose of s. 23, while providing ample space for government regulation of matters that demonstrably do not affect minority language and culture.

B. As a matter of law, the infringement of section 23 is not justified under section 1 of the *Charter* because the Attorney General has not pleaded or argued any justification

43. It is fundamental to Canada's constitutional system that courts, when seized with a constitutional challenge to legislation, must rule on whether the law violates a provision of the *Charter*. If a court finds that a given law violates a right guaranteed by the *Charter*, it must then decide whether such a violation can be justified under s. 1 of the *Charter*.

44. In the case at bar, the Attorney General of Québec did not plead any s. 1 justification.[39] At trial, the Attorney General made no argument in this regard.[40] Despite the trial judge's findings, the Attorney General did not list s. 1 justification in its grounds of appeal.[41] In its brief before this Court, the Attorney General makes no s. 1 arguments.

45. Similarly, the Attorney General did not plead any s. 1 justification for the breach of s. 3 of the *Charter*. On this basis alone, the trial judge found that the breach of s. 3 was not justified.[42]

46. Respecting the s. 23 breach, the trial judge noted that the complete absence of argument from the Attorney General placed him in an unusual position:

> [1011] Cependant, cela place le Tribunal devant une situation pour le moins inusitée en ce que le législateur affirme ne pas vouloir défendre sa loi en vertu de l'article 1 de la Charte, tout en produisant une preuve qui pourrait permettre de faire cet exercice, mais en ne plaidant rien de

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39 *Défense du Procureur général du Québec en réponse à la Demande de révision judiciaire et en jugement déclaratoire et avis de question constitutionnelle des demandeurs English Montreal School Board* (500-17-109983-190), July 31, 2020, Joint Annexes, Schedule II, vol. 3, p. 623.

40 See *Trial judgment*, *supra*, note 3, paras. 1008-1011, 1039.

41 *Déclaration d'appel du Procureur général du Québec* (500-09-029550-217), June 4, 2021, Joint Annexes, Schedule II, vol. 2, p. 350.

42 See *Trial judgment*, *supra*, note 3, para. 921.

> spécifique à cet égard, affirmant même, dans ses défenses écrites, qu'il n'entend pas faire de démonstration en vertu de cet article de la Charte.
>
> [1012] De plus, il apparaît incongru que des tiers intervenants, en l'occurrence le MLQ et PDF, s'attaquent seuls à cette tâche. À charge de faire erreur, cette situation apparaît inédite. Usant de prudence, le Tribunal conclut que cela ne lui enlève cependant pas le devoir de décider en fonction de la preuve et des arguments soumis par toutes les parties aux débats judiciaires.

47. In the absence of argument from the Attorney General, the trial judge relied on arguments from two interveners, Mouvement Laïque Québécois and Pour les droits de femmes du Québec – PDF Québec. Those parties now make s. 1 submissions before this Court.[43]

48. This appeal thus raises an important constitutional issue: in the complete absence of pleadings or arguments from an Attorney General to justify a *Charter* breach arising from legislation, can the breach ever be justified?

49. In the QESBA's submission, it cannot.

50. As a matter of constitutional law, the burden is on the government to justify why legislation that has been found to breach the *Charter* can be justified in a free and democratic society. This follows from the plain wording of s. 1, from the constitutional framework itself, from the jurisprudence, and from practical considerations.

51. In its plain wording, s. 1 of the *Charter* provides that the *Charter* guarantees rights "subject only to such reasonable limits" that are "demonstrably justified in a free and democratic society" [emphasis added].[44] The word "demonstrably" clearly puts the onus on the state to justify limitations to fundamental rights and freedoms.[45]

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[43] See *Mémoire de l'Appelant Mouvement Laïque Québécois*, December 2, 2021, paras. 181-242; *Mémoire de l'Appelant Pour les droits des femmes Québec – PDF Québec*, December 2, 2021, paras. 215-246.

[44] *Charter*, *supra*, note 1, s. 1.

[45] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], para. 128.

52. Canada's constitutional framework requires the government to justify a *Charter* breach arising from legislation. The *Charter* guarantees the individual certain rights and freedoms opposable to the state. In this framework, the party claiming that government legislation violates the *Charter* bears the onus of demonstrating the *Charter* breach. Once a Court finds that a *Charter* breach has occurred, "the party seeking to uphold the limitation"[46] bears the burden of justification. In the case of a constitutional challenge to legislation, the government is the party whose legislation has caused the *Charter* breach; thus, the government alone bears the burden of justification. This is the basic premise of the test carefully developed in *Oakes* and applied in countless constitutional cases.

53. The jurisprudence has repeatedly confirmed that where legislation limits a *Charter* right, the government bears the onus of justifying that limitation. Below is a selection of excerpts from leading Supreme Court decisions on s. 1:

a. *RJR-MacDonald* at para. 128:

> [t]o meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.[47]
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> [First emphasis added; second emphasis in original]

b. *Sauvé* at para. 7:

> To justify the infringement of a *Charter* right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified.[48]
>
> [Emphasis added]

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46 *R. v. Oakes*, [1986] 1 S.C.R. 103, p. 137.
47 *RJR-MacDonald*, *supra*, note 45.
48 *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

c. *R. v. K.R.J.* at para. 58:

> To establish that the limitation on the appellant's s. 11(*i*) right is reasonable and demonstrably justified, the government must show that the 2012 amendments have a sufficiently important objective "and that the means chosen are proportional to that object[ive]."[49]
>
> [Emphasis added]

54. This Court and the Supreme Court have found that, in the absence of submissions from the government on s. 1 justification, a *Charter* breach cannot be justified.[50]

55. In *Boudreault* c. *R.*,[51] this Court ruled on whether the mandatory victim surcharge[52] constituted a violation of s. 12 of the *Charter* (cruel and unusual punishment). While the majority found that the surcharge did not violate s. 12, Duval Hesler C.J.Q. (as she then was) found that the surcharge violated s. 12. Further, she found that the violation could not be justified under s. 1. The state had not brought any evidence or submissions on s. 1. While she nonetheless assessed the issue, Duval Hesler C.J.Q. made special note of the prosecution's "lapse of its duty to provide the Court with the means to assess the issue."[53]

56. On appeal, however, the Supreme Court agreed with Duval Hesler C.J.Q.'s finding on the *Charter* infringement, but outright declined to rule on s. 1. The Court found that the lack of argument or evidence from the Attorney General of Canada led to an automatic finding that the infringement could not be justified. The Court stated that it was "unnecessary and unwise" to engage in such analysis in the absence of submissions:

> [96] In many cases where a *Charter* breach has been established, the state seeks to justify the infringement under s. 1 of the *Charter*. In such cases, it must articulate a pressing and substantial objective and must demonstrate that the impugned law is proportional to that objective. […]

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49 *R. v. K.R.J.*, 2016 SCC 31 [*R. v. K.R.J.*].

50 See *Dennis c. R.*, 2018 QCCA 1033, para. 102; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, paras. 278-280; and *R v. Ruzic*, 2001 SCC 24, para. 91.

51 *Boudreault c. R.*, 2016 QCCA 1907 [*Boudreault* QCCA].

52 Namely the victim surcharge required by s. 737 of the *Criminal Code*, R.S.C. 1985, c. C-46.

53 *Boudreault* QCCA, *supra*, note 51, para. 129.

> [97] In this case, the respondents did not put forward any argument or evidence to justify the mandatory surcharge if found to breach *Charter* rights. It is, therefore, unnecessary and unwise to engage in a s. 1 analysis, especially considering that only in exceedingly rare cases can a s. 12 infringement be justified under s. 1: *Nur*, at para. 111. […] Consequently, the mandatory surcharge is not justified under s. 1.[54]
>
> [Emphasis added]

57. Courts should be very reluctant to make s. 1 findings when the government does not plead or argue s. 1. This is particularly true for rights whose violation can only be justified on a particularly stringent standard. In *Boudreault*, the Supreme Court was particularly reluctant to engage in the s. 1 analysis because "only in exceedingly rare cases can a s. 12 infringement be justified".[55] As argued below, the Supreme Court has explicitly stated that breaches of s. 23 are exceedingly hard to justify.[56] Thus, as a matter of law, courts should decline to carry out a s. 1 analysis of a s. 23 breach in the absence of submissions from the Attorney General.

58. Further, as a practical matter, it is problematic for a Court to draw upon arguments and evidence from other parties to fill in the blanks left by the lack of argument from the Attorney General. As a starting point, the lack of a position from the Attorney General on the legislative objective could lead a Court to make an erroneous finding regarding the legislative objective, or a finding that the government itself would not seek to defend.

59. Further, where the Attorney General fails to plead a s. 1 justification, this restricts the scope of the trial and the evidence that all parties adduce. This puts the Court in the perilous position of conducting a s. 1 analysis in a vacuum.

60. While courts have made s. 1 determinations based on inference and common sense,[57] courts must be "wary of stereotypes cloaked as common sense, and of

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54 *R. v. Boudreault*, 2018 SCC 58, paras. 96-97.
55 *Ibid.*, para. 97.
56 See Part III-C, below.
57 See for e.g. *R. v. K.R.J.*, *supra*, note 49, para. 60.

substituting deference for the reasoned demonstration required by s. 1."[58] Common sense does not relieve the government of its burden to plead and argue a s. 1 justification.

61. In this appeal, the Attorney General has failed to state the pressing and substantial objective that it pursues with the legislation, leaving it to other parties and to the Court to divine a pressing and substantial objective. The absence of this fundamental step in justification is problematic and poses obstacles for the rest of the s. 1 analysis. As a matter of principle, once a *Charter* breach is found, it falls to the state to plead and establish a pressing and substantial objective for its *Charter*-infringing legislation.

62. Indeed, the pressing and substantive objective necessarily informs all other stages of the analysis. For example, deference may be due when the legislation deals with complex social problems,[59] or where the government has made difficult governance choices.[60] However, the lack of an accurate and precise statement of the legislative objective makes it difficult to determine whether such deference is due. This compromises the remaining stages of the analysis.

63. Further, the Court lacks the Attorney General's submissions on how the means chosen are rationally connected, minimally impairing, or proportional to the legislative objective. In the absence of a position from the Attorney General, third parties have sought to fill the void. However, without knowing the position of the Attorney General — the party charged with defending government legislation that has been found to violate the *Charter* — the submissions of third parties are of no assistance.

64. Third parties cannot carry the burden that belongs to a government seeking to limit fundamental rights. Courts should not bootstrap s. 1 analysis with arguments from other parties where the government fails to even state its position. Since the Attorney General failed to plead or make any arguments to defend the legislation under s. 1 in the court

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58 *Sauvé*, *supra*, note 48, para. 18.

59 *Trial judgment*, *supra*, note 3, para. 1015, citing *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, paras. 41-43.

60 *Trial judgment*, *supra*, note 3, para. 1016, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras. 37, 53.

below and before this Court, it should automatically follow that the s. 23 breach is not justified under s. 1.

C. Should this Court decide to make findings on section 1, a "particularly stringent standard" applies for infringements of section 23

65. Because of the special nature of s. 23, the Supreme Court has recognized that a special standard applies to justify breaches of s. 23. In *Conseil scolaire*, the Supreme Court established that a "particularly stringent standard" must be applied in determining whether a breach of s. 23 can be justified.[61] The Court gave three reasons for this higher standard. First, s. 23 imposes positive and time-sensitive obligations on governments, and a flexible approach to justification "could jeopardize the section's remedial purpose".[62] Second, and particularly relevant here, s. 23 is not subject to s. 33 of the *Charter*, which "reflects the importance attached to this right by the framers of the *Charter* as well as their intention that intrusions on it be strictly circumscribed."[63] Third, because s. 23 already has an internal limit (the "numbers warrant" requirement), the s. 1 analysis should not duplicate considerations already taken into account in the s. 23 analysis.[64]

66. Because the Supreme Court has established a special higher threshold for infringements of s. 23, the justification analysis for a s. 23 breach ought to be specific to the s. 23 breach. Moreover, the "particularly stringent" standard should be reflected at every step of the justification analysis.

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61 See *Conseil scolaire*, *supra*, note 2, paras. 143-151.

62 *Conseil scolaire*, *supra*, note 2, para. 147.

63 *Ibid.*, para. 148, referencing *Frank v. Canada (Attorney General)*, 2019 SCC 1 [*Frank*], and *Sauvé*, *supra*, note 48.

64 *Conseil scolaire*, *supra*, note 2, para. 150. The Court noted that since the balancing of the right is already provided for in s. 23, it would be redundant to balance the same considerations again under s. 1: "Balancing [the considerations related to cost and pedagogical needs] again in the s. 1 analysis should normally lead to the same result. It would make no sense if considerations that justify the exercise of the right at one stage could also justify its infringement at a second stage."

67. Further, because a "particularly stringent standard" of justification applies, no deference is due in the s. 1 analysis at any step,[65] especially where the government fails to plead or argue why deference is warranted.

68. Finally, from the Court's reasoning in *Conseil Scolaire*, it is also clear that the invocation of s. 33 of the *Charter* has no effect whatsoever on the justification analysis for a breach of s. 23. The justification analysis is not constrained in any way by the invocation of s. 33.

69. The trial judge correctly noted the higher justification threshold at the outset.[66] However, the trial judge did not mention the higher threshold anywhere else in the s. 1 analysis. Further, the trial judge mentioned that deference is due to the legislator "*lorsque celui-ci s'attaque à un problème social complexe et qu'il vise à enrayer ce qu'il considère un mal qui nécessite la violation de droits fondamentaux*".[67] However, given the Supreme Court's overriding guidance on the justification threshold for s. 23 breaches, no deference was due in the justification analysis for the s. 23 breach.

70. It is possible that a breach of s. 23 could be justified under s. 1. However, the Supreme Court has yet to determine that any breach of s. 23 has been justified — an indication of the rigorous standard of justification that s. 23 imposes.[68]

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[65] See *Frank*, *supra*, note 63, paras. 43-44, regarding the stringent justification for s. 3 violations. By virtue of *Conseil Scolaire*, this applies to justification of s. 23 violations.

[66] *Trial judgment*, *supra*, note 3, para. 1006, citing *Conseil scolaire*, *supra*, note 2, paras. 148-149.

[67] *Trial judgment*, *supra*, note 3, paras. 1015-1016.

[68] See *Conseil scolaire*, *supra*, note 2, para. 143. Likewise in *Conseil scolaire*, the Supreme Court found that the breaches of s. 23 were not justified: see paras. 152-163.

PART V. CONCLUSIONS

71. For the above reasons, the intervener QESBA asks this Court to:

AFFIRM the trial judge's finding that Bill 21 infringes s. 23 of the *Charter* and that this infringement is not justified under s. 1;

AFFIRM the trial judge's order at paragraph 1138-1140 of the trial judgment;

THE WHOLE without costs.

72. The whole of which is respectfully submitted.

Ottawa and Montréal, the 18th of February, 2022.

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PART VI. AUTHORITIES

ATTESTATION

We, the undersigned, Conway Baxter Wilson LLP, attest to the brief's conformity with the rules of the *Civil Practice Regulation (Court of Appeal)*.

The time requested for the presentation of oral argument is 30 minutes.

Ottawa, February 18, 2022

Legal counsel for the Intervener Quebec English School Boards Association