SUMMER 2025 SUPPLEMENT

for

CANADIAN CONSTITUTIONAL LAW, 6TH EDITION

NOTE: This supplement consists of case excerpts and comments intended to supplement main text Chapters 8 (federalism), 14 (Indigenous peoples' rights), 23 (equality rights) and 24 (language rights).

The content relating to Chapter 23 incorporates an earlier supplement issued in 2023 dealing with the s.15 issues in *R. v. Sharma,* 2022 SCC 39, along with new material (including coverage of the decision in *Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10 (CanLII)*).

This supplement does NOT incorporate a separate 2023 supplement covering the s.7 issues in *Sharma*; instructors may want to review and assign that earlier supplement as well.

Chapter 8: Interpreting the Division of Powers

Reference re Impact Assessment Act, 2023 SCC 23 (CanLII)

This case is relevant to many topics in Chapter 8, but especially to Part III: Validity. The Court's opinion makes brief references to interjurisdictional immunity (but does not extend or evolve that doctrine); and both the majority and dissenting reasons affirm the importance of cooperative federalism.

Facts:

In 2019, the federal government enacted the *Impact Assessment Act* ("IAA"). The IAA and associated regulations establish a complete scheme for identifying and regulating the environmental impact of land use projects of two broad types: projects carried out or financed by federal authorities on federal lands or outside Canada; and "designated projects" proposed to be developed on non-federal lands within Canada. Alberta initiated a reference to the Alberta Court of Appeal asking whether the IAA and the related regulations were beyond the legislative authority of Parliament under the Constitution and/or applying to certain activities that relate to matters entirely within provincial jurisdiction. After a majority of the Court of Appeal concluded that the IAA and the Regulations were *ultra vires,* the Attorney General of Canada appealed to the Supreme Court of Canada.

Since its decision in *Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, the Supreme Court has affirmed that both Parliament and the provincial legislatures have the ability to enact laws to address various facets of environmental protection, including schemes of environmental assessment, provided that those schemes are confined to each level of government's legislative jurisdiction.

Opinion: by a 5-2 majority, with reasons by Wagner J (Karakatsanis and Jamal JJ. dissenting in part), the Supreme Court granted the appeal in part.

Dissent: Karakatsanis and Jamal JJ. would have ruled that the IAA and the Regulations are *intra vires* in their entirety. Dissenting reasons begin at para [217].

Majority reasons highlights:

[on the dangers of conflating the characterization and classification steps of the pith and substance analysis:]

...

[66] The judges in the court below, the parties and the interveners adopt differing articulations of the impugned scheme's pith and substance. With respect, several of these articulations erroneously combine or conflate the characterization of the scheme with its classification.

[67] The Attorney General of Canada submits that the pith and substance of the *IAA* is to "establish a federal environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction" (A.F., at para. 47). The latter part of this characterization — "in relation to matters within federal jurisdiction" — predetermines the classification of the matter of the scheme under federal heads of power. ...

[68] The majority of the Court of Appeal fell into the same error when it concluded... that the scheme's purpose and effects reveal an "impermissible degree of federal jurisdictional overreach" (para. 373). This is the language of classification; the characterization step of the analysis must focus exclusively on the "pith and substance" or "dominant characteristic" of the law.

...

[On the presumption of constitutionality and its limits:]

[73] I emphasize, however, that the presumption of constitutionality is not an impermeable shield that protects legislation from constitutional review by courts. Nor can courts employ the presumption of constitutionality to rewrite legislative text as they see fit in order to bring it into compliance with the Constitution. Courts cannot rely on the presumption of constitutionality to disregard a statute that speaks clearly and is *ultra vires* its enacting body. [Here, the majority cites Justice Gonthier in *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, para. 66, stating the presumption of constitutionality "only applies when both competing interpretations are reasonably open to the court".] ...[W]hile the presumption of constitutionality is a "cardinal principle" that must be borne in mind, it does not displace the duty of courts to meaningfully review the constitutionality of legislation.

[74] Similarly, a court cannot circumvent its duty to meaningfully review the constitutionality of legislation by suggesting that, insofar as an administrative decision maker applies a law unconstitutionally, the application of that law may be judicially reviewed. The constitutional validity of a law and its administrative application are distinct concepts. Where a constitutionally valid law grants a decision maker broad and imprecise discretion, that discretion must be exercised reasonably and in accordance with the purpose for which it was given (*References re GGPPA*, at para. 73). But where a law is ultra vires and therefore unconstitutional, it

cannot be saved by the prospect of administrative judicial review. As Lamer C.J. and Iacobucci J. explained in Hydro-Québec, at para. 73:

> . . . the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all. [Emphasis in original.]

...

[On the judicious use of extrinsic evidence:]

[89] ...Courts must approach parliamentary debates with great care, acknowledging that the record will often be full of contradictory statements, that speakers may make inadvertent errors in presenting and discussing legislation and that it is bad practice to cherry-pick seemingly helpful passages from the record.

[90] In the current case, however, a consideration of this extrinsic evidence confirms what is already apparent from the intrinsic evidence: that the scheme is designed to identify potential changes not just to the environment, but also to health, social or economic conditions, and that it grants the executive branch broad impact assessment powers as well as an ultimate decision-making power.

[91] Reading the intrinsic and extrinsic evidence together, I conclude that the scheme articulates a broad array of purposes, including protecting the environment and fostering sustainability; satisfying Canada's environmental obligations; assessing and regulating the broad effects of certain physical activities, such as effects on health, social and economic conditions; facilitating the participation of Indigenous peoples and the public; and establishing an efficient and transparent process. To achieve these purposes, the scheme not only involves information gathering but also has a regulatory component.

...

[Under the classification step of the pith and substance analysis, a recognition that the environment is an "aggregate of matters":]

[114] ... This Court has recognized that the environment is a "constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty" (*Oldman River*...)

...

[116] Accordingly, neither level of government has exclusive jurisdiction over the whole of the "environment" or over all "environmental assessment" ...Rather, this Court has acknowledged

that both levels of government can legislate in respect of certain aspects of environmental protection, including certain aspects of the environmental assessment of physical activities (*Moses*; *Reference re Environmental Management Act* (BCCA), at para. 93). Shared federal and provincial responsibility for environmental impact assessment is "neither unusual nor unworkable" (*Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159, at p. 193). Rather, it is a central feature of environmental decision making in Canada...

[Leading into a discussion of the double aspect doctrine and cooperative federalism:]

...

[118] This is consistent with the double aspect doctrine, which reflects the idea that the same fact situation can be regulated from different perspectives, one falling within s. 91 and the other falling within s. 92...

...

[121] ... the fact that environmental assessment of physical activities may have a double aspect — with some elements falling within the legislative authority of each level of government — does not mean that it is an area of *concurrent* jurisdiction... If a fact situation can be regulated from both a federal perspective and a provincial perspective, it follows that each level of government can only enact laws which, in pith and substance, fall under its respective jurisdiction. In other words, both levels of government have the *exclusive* power to legislate within their respective jurisdictions, even if by doing so they both regulate the same fact situation (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749, at p. 766).

[122] The notion that both levels of government may legislate in respect of certain aspects of environmental protection, each pursuant to its own legislative competence, is also consistent with the principle of cooperative federalism. This "more flexible view of federalism . . . accommodates overlapping jurisdiction and encourages intergovernmental cooperation" (Reference re Securities Act, at para. 57; see also Reference re Pan-Canadian Securities Regulation, at para. 17; Rogers Communications, at para. 85). However, "[w]hile flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers" or "make ultra vires legislation intra vires" (Reference re Securities Act, at paras. 61-62; Reference re Pan-Canadian Securities Regulation, at para. 18; Rogers Communications, at para. 39). The division of federal and provincial powers, including more recent additions such as exclusive provincial jurisdiction over non-renewable natural resources under s. 92A, is the product of negotiation and compromise. Courts may not, under the guise of cooperative federalism, "erode the constitutional balance inherent in the Canadian federal state" (Reference re Securities Act, at para. 62).

[The court then noted that, as determined in *Oldman River*, some heads of power, under the constitution, relate to *activities*: for example, navigation and shipping in s. 91(10); while others relate to the *management of resources* – such as fisheries s. 91(12). This distinction helps to clarify the double aspect doctrine as follows:]

...

[127] The "activities" and "management of a resource" descriptors help to explain how a particular project may be validly regulated by both levels of government. An activity that seems to fall within a head of power assigned to one level of government may nevertheless have certain aspects — such as its impacts on certain resources — that can be regulated pursuant to a head of power assigned to the other level of government. Thus, for example, while the activity of constructing a mine falls primarily within provincial jurisdiction, the construction's impacts on resources such as fisheries and navigable waters are aspects that may be regulated pursuant to federal legislative competence (*Moses*, at para. 36).

[Turning to the classification analysis as it applies to the "designated projects" portion of the IAA, the court warned that Parliament's jurisdiction is subject to important limits; for instance, to addressing federal aspects and impacts of activities:]

...

[131] As discussed, there is no doubt that Parliament can enact impact assessment legislation that is directed at the federal aspects of projects... But Parliament's jurisdiction is more restricted where the activity falls outside of its legislative competence; in these cases, it can validly legislate only from the perspective of the federal aspects of the activity, such as the *impacts* of the activity on federal heads of power. Federal legislation that is insufficiently tailored — that is, whose pith and substance is to regulate the activity *qua* activity, rather than only its federal aspects — is *ultra vires* (*Reference re Environmental Management Act* (BCCA), at paras. 98-101).

[132] The scheme treats all "designated projects" in the same way, regardless of whether Parliament is vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity's impacts on federal heads of power. And many of the physical activities to which the scheme applies are primarily regulated through the provincial legislatures' powers over local works and undertakings or natural resources. Parliament can enact impact assessment legislation to regulate these projects from a federal perspective, so long as the regulation of *federal aspects* represents the dominant characteristic of the law.

...

[134] In my view, the pith and substance of the portion of the scheme that deals with "designated projects" exceeds the bounds of federal jurisdiction, and this portion of the scheme is therefore *ultra vires*. This is so for two overarching reasons.

[135] First, even if I were to accept Canada's contention as to the defined federal effects, these effects do not drive the scheme's decision-making functions. Consequently, the scheme is not in pith and substance directed at regulating these effects.

[136] Second, I do not accept that the defined term "effects within federal jurisdiction" aligns with federal legislative jurisdiction under s. 91. This overbreadth exacerbates the constitutional frailties of the scheme's decision-making functions.

...

[142] ...The fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. Even a "provincial" project may cause effects

in respect of which the federal government can properly legislate. Accordingly, the inclusion in the Regulations of some "provincial" projects — in the sense that they involve activities primarily regulated by the provinces — is not itself problematic.

...

146] Requiring definitive proof that a project will have effects on areas of federal jurisdiction prior to an impact assessment would put the cart before the horse and undermine the precautionary principle (Johnston, at pp. 105-6). Therefore, in my view, the designation mechanism's imperfect focus on federal effects is both practically necessary and constitutionally sound.

[The court went on to find that the screening process prescribed by s. 16(2) of the IAA was not driven by possible federal effects, but rather required consideration of a broad and open-ended set of factors, many of which intruded on provincial jurisdiction.

While the court found the screening process unconstitutional, it did not find the impact assessment process to be so, primarily because the process is designed as an information-gathering exercise, which is not outside federal jurisdiction. However, the court found that the decision-making process that follows an impact assessment was an unacceptable intrusion on provincial jurisdiction:]

...

[166] ... This decision-making process transforms what is *prima facie* a determination of whether adverse federal effects are in the public interest into a determination of whether the project as a whole is in the public interest.

...

[169] The central problem with the public interest decision is not the s. 63 factors themselves but rather the manner in which these factors drive decision making. The public interest decision must reflect a focus on the project's federal effects... [H]owever, s. 63 permits the decision maker to blend their assessment of adverse federal effects with other adverse effects that are not federal, such as the project's anticipated greenhouse gas emissions (under s. 63(e)). Put another way, the adverse *non-federal* effects can amplify the perceived severity of the adverse *federal* effects and, effectively, become the underlying basis for the conclusion that the latter are not in the public interest. The mandatory cumulation of adverse non-federal effects shifts the focus of the decision from the adverse effects within federal jurisdiction to the overall adverse effects of the project.

...

[177] ... It would be artificial and ineffective to restrict the collection of information at the assessment phase to those components of the environment that are within federal jurisdiction. Nevertheless, at the ultimate decision-making juncture, the focus on federal impacts must be restored. Parliament can validly regulate only the impacts that fall within its jurisdiction or that arise from activities within its jurisdiction.

...

[194] As a result of the overbreadth of the "effects within federal jurisdiction"... the *IAA* prohibits the project proponent from doing *any* "act or thing in connection with the carrying out of the designated project, in whole or in part", following a negative public interest determination. This is so even where federal legislative authority does not support such wide-ranging regulation of the proposed project.

...

[204] In sum, I am satisfied that the matter of the "designated projects" scheme cannot be classified under federal heads of power and that the scheme is therefore *ultra vires*. ...It exceeds the bounds of federal jurisdiction for two overarching reasons. First, even if this Court were to accept Canada's submission that the defined "effects within federal jurisdiction" are within federal jurisdiction, these effects do not drive the scheme's decision-making functions. Consequently, the scheme is not in pith and substance directed at regulating these effects. Second, I do not accept Canada's submission that "effects within federal jurisdiction" comport with federal legislative competence under s. 91 of the *Constitution Act, 1867*. As I have explained, this overbroad definition further dilutes the focus of the scheme's decision-making functions. It also extends the conduct prohibited by s. 7 beyond that which Parliament can validly regulate pursuant to its assigned heads of power.

...

[206] As I emphasized at the outset, it is clear that Parliament can enact legislation to protect the environment under the heads of power assigned to it in the *Constitution Act, 1867*. ...However, such a scheme must be consistently focused on federal matters. ... The Agency's screening decision must be rooted in the possibility of adverse federal effects. The public interest decision must focus on the acceptability of the adverse federal effects. The scheme must ensure that, in situations where the activity itself does not fall under federal jurisdiction, the decision does not veer towards regulating the project *qua* project or evaluating the wisdom of proceeding with the project as a whole. Finally, the effects regulated by the scheme must align with federal legislative competence. ...

[The court then went on to find that ss. 81 to 91 of the IAA, which create a scheme to evaluate the environmental effects of projects on federal lands and outside Canada, was within federal constitutional jurisdiction.

While Karakatsanis and Jamal JJ. agreed that ss. 81-91 of the IAA were intra vires the federal government, they would also have found the rest of the statute to be constitutional. The justices emphasized that the broad wording of the screening and assessment criteria is necessary to permit the federal government to properly consider *all* effects of projects – those both consistent and inconsistent with public interest – before determining whether the federal effects require the imposition of restrictions:]

...

[222] Like all regulatory regimes, the *IAA* scheme is constrained by the statute itself and by the Constitution. The *IAA*'s text, context, and purpose demonstrate that all major decisions under the federal impact assessment scheme must be based on a project's adverse effects within federal jurisdiction. The presumption that legislatures do not intend to exceed the constitutional limits on their authority confirms this interpretation. The breadth of the factors that may be considered under the *IAA* scheme simply ensures that federal authorities can make a fully informed decision on whether a project that adversely impacts areas of federal jurisdiction should be allowed to proceed based on identified and transparent public interest considerations. Federal authorities are directed to make an integrated decision that involves a cost-benefit analysis weighing the adverse federal effects against the project's other positive and negative effects.

[The dissenting judges agreed with most of the reasons of the judge in the Court of Appeal below, including that "The fact that the IAA could conceivably be used unconstitutionally in some cases does not mean that the legislation is unconstitutional." (para 224). Where the exercise of broad discretion permitted under such statutes leads to unconstitutional effects, the two judges wrote that "…*the particular exercises of discretion in such cases* would be unreasonable and properly subject to judicial review based on an appropriate evidentiary record." (para 230) They continued: "Any federal decision that sought to permit negligible federal effects to stop a project, in the face of substantial public interest factors, would be disproportionate, unreasonable, and subject to judicial review (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). The public interest factors in s. 63 thus promote political accountability, the rule of law, and meaningful judicial review." (para 294)]

For further commentary on *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII) see:

- Olszinsky, Martin; Nigel Bankes and David Wright, "Wait, What?! What the Supreme Court Actually Said in the IAA Reference", ABlawg.ca (University of Calgary Faculty of Law blog) October 16, 2023
- Blake, Sara, "Hypothetical Scenarios and Judicial Review" CanLII Connects, October 19, 2023 [a comment on the majority's reliance on – and the dissent's rejection of – the use of hypothetical scenarios to characterize legislation in the context of a reference]

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***Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 (CanLII)**

For consideration in the context of the discussion of the double aspect doctrine in Part III, and re: operability and the paramountcy doctrine in Part IV.

Summary:

In a unanimous decision, the Supreme Court dismissed an appeal from a decision of the Court of Appeal of Quebec upholding the constitutional validity of two provisions of the *Cannabis Regulation Act, CQLR, c. C-5.3*. These provisions completely prohibited the residential cultivation of cannabis in Quebec, even though the federal *Cannabis Act*, SC 2018, c 16 permitted the cultivation of up to four plants in a residence.

The court found that the Quebec legislation did not frustrate the purpose of the federal legislation. Because the purpose of the federal legislation was not to create positive rights to cultivate cannabis in a private residence, the provincial legislation could not be said to frustrate the purpose of the federal law. Relying on the double aspect doctrine, the court found that both levels of government could validly legislate with respect to residential cultivation of cannabis. The doctrine of paramountcy did not apply, and the challenged Quebec provisions remained operative.

Some relevant excerpts:

[On the double aspect doctrine:]

[77] This appeal is a textbook case for the application of the double aspect doctrine. The regulation of the use of drugs, including cannabis, has both federal and provincial aspects, which makes it conceivable that laws enacted by both levels of government will apply concurrently. This matter has a double aspect, since it may be addressed from two different perspectives: (1) that of the criminal law (under s. 91(27)), by suppressing some "evil" or injurious or undesirable effect upon the public; and (2) that of health or trade (under s. 92(13) and (16)), by regulating, among other things, the conditions of production, distribution and sale of the substance. Sections 5 and 10 of the provincial Act regulate cannabis use from this second, normative perspective and are therefore within provincial jurisdiction.

...

[On paramountcy:]

[83] ...I will address whether the doctrine of federal paramountcy applies in this case, which would mean that ss. 5 and 10 of the provincial Act would be declared to be of no force or effect only to the extent of their inconsistency with the federal Act. Like the Court of Appeal, I am of the view that the impugned provisions are operative. The application of the absolute prohibitions set out in the provincial Act does not frustrate the federal purpose identified by the appellant. Contrary to what he argues, the purpose of the federal Act is not to create — with a view to reducing illicit activities in relation to cannabis — positive rights to possess and cultivate up to four cannabis plants for personal purposes. Such an interpretation of the purpose of the federal Act does not reflect the essentially prohibitory nature of the criminal law power and is not supported by the wording of that Act.

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***Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII)**

For discussion as a new Note on page 269.

Background:

In 2019, the federal government enacted *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, SC 2019, c 24 (the Act). The government stated that it sought to honour its commitment to integrate the *United Nations Declaration on the Rights of Indigenous Peoples*

(UNDRIP) into Canada's domestic law, and to further the goal of reconciliation with Indigenous peoples.

The Attorney General of Quebec referred the Act's constitutional validity to the Quebec Court of Appeal. The Court of Appeal held that the Act was constitutional with the exception of two provisions, ss. 21 and 22(3), which give the laws of Indigenous groups, communities or peoples priority over provincial laws, and therefore "impermissibly alter Canada's constitutional architecture" (para 30). The Attorneys General of Quebec and of Canada appealed that decision to the Supreme Court of Canada.

In a unanimous opinion, the Supreme Court advised that the Act is entirely within the jurisdiction of Parliament, and therefore constitutional.

Relevant excerpts:

[On the purpose of the law, as a factor to consider under pith and substance analysis:]

[47] Taken as a whole, the intrinsic evidence suggests that the purpose of the Act is to protect the well-being of Indigenous children, youth and families. This overarching purpose has three elements: affirming Indigenous communities' jurisdiction in relation to child and family services; establishing national standards applicable across Canada; and implementing aspects of the UNDRIP in Canadian law. As the extrinsic evidence of Parliament's intention makes plain, however, these three elements are interwoven.

[On how, by enacting s. 18(1) of the Act, Parliament has affirmed the constitutional status of Indigenous peoples' inherent right to self-government; and how this affirmation engages the principle of the Honour of the Crown:]

[64] It is open to Parliament to affirm, as it has in s. 18(1), what it considers to be the constitutional requirements for reconciliation, even if it cannot, by doing so, unilaterally amend the Constitution. By linking the affirmation in s. 18(1) to s. 35 of the *Constitution Act, 1982*, particularly its first subsection, Parliament has nevertheless intentionally embarked on a particular path to reconciliation. Indeed, it has set out, in an ordinary statute, its understanding of the scope of a constitutional provision, and it has done so while ensuring that the Crown is bound to act on the basis of this same understanding, that is, in accordance with the legislative affirmation that the inherent right of self-government has constitutional status and with the idea that, from a jurisdictional standpoint, this right includes the jurisdiction of Indigenous governing bodies in relation to child and family services. The honour of the Crown is thus engaged.

[65] The affirmation in ss. 8(a) and 18(1) will inform the context and content of the resulting obligations, as if this affirmation was enshrined in the Constitution. As the Court has explained, "[the Constitution] is at the root of the honour of the Crown" (*Manitoba Metis*, at para. 70). Under the Act, the government formally undertakes to act in accordance with the position that this right has constitutional status (see *Manitoba Metis*, at paras. 69-70) ...

...

[On classification, and on the scope of the federal power set out in s. 91(24):]

[93] The Act falls squarely within s. 91(24) of the *Constitution Act, 1867*. Binding the federal government to the affirmation set out in s. 18(1), establishing national standards and facilitating the implementation of the laws of Indigenous groups, communities or peoples are all measures that are within Parliament's powers under s. 91(24).

[94] The jurisdiction provided for in s. 91(24) is broad in scope and relates first and foremost to what is called "Indianness" or Indigeneity, that is, Indigenous peoples as Indigenous peoples.

...

[On the application of the double aspect doctrine, and the necessity of federal-provincial cooperation to ensure the Indigenous child welfare:]

[98] The minimum national standards are within federal jurisdiction and can accordingly be binding on the provincial governments. ...Youth protection in the Indigenous context has a double aspect...: protection of the ties between Indigenous families and communities, in a spirit of cultural survival, under s. 91(24) ... or child and family services and youth protection, under s. 92(13) and (16)... While the provinces are generally "the keeper[s] of constitutional authority over child welfare"..., the federal government also has jurisdiction to legislate in relation to child and family services for Indigenous children. As Professors Hogg and Wright have noted, "[i]f s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary" (§ 28:2).

[99] Child welfare in the Indigenous context is not only a field in which Parliament and the provinces can act, but also one in which concerted action by them is necessary. The importance of cooperation in this area between these two levels of government is illustrated, for example, by Jordan's Principle, according to which intergovernmental disputes may not interfere with the right of Indigenous children to access the same services as other children in Canada. With regard to such disputes, the Truth and Reconciliation Commission noted that the federal government and the provincial governments have historically tended to shift responsibility for Indigenous child welfare services to one another (*Honouring the Truth, Reconciling for the Future*, at pp. 142-43). However, today it is recognized that providing such services is the responsibility of both levels of government, which must act in a concerted fashion (*House of Commons Debates*, vol. 142, No. 31, 2nd Sess., 39th Parl., December 5, 2007, at p. 1780 (S. Blaney)). Since there is overlapping federal and provincial jurisdiction with respect to Indigenous children, it was entirely open to Parliament to legislate as it did (see, e.g., Grammond (2018), at pp. 137-38).

...

[On rejecting the AG Quebec argument that the Act unilaterally amends the Constitution:]

[107] [In] this case, Parliament is not unilaterally amending s. 35 of the *Constitution Act, 1982*. Rather, it is stating in the Act, through affirmations that are binding on the Crown (s. 7), its position on the content of this constitutional provision... The words "affirm" and "includes" in ss. 8(a) and 18(1) do not convey any intention to amend s. 35, nor could they have this effect. Instead, they "state as a fact" (*Canadian Oxford Dictionary* (2nd ed. 2004), *sub verbo* "affirm") Parliament's position on the scope of s. 35. The affirmations take this position [translation] "as true"

(*Le Grand Robert de la langue française* (electronic version), *sub verbo* "*affirmer*"), without any need for an amendment. Thus, the effect of these provisions is to affirm, not to amend.

...

[Quebec argued that s. 21 of the Act gives Indigenous laws the force of federal law, or unilaterally establishes a third sphere of constitutional jurisdiction. The court disagreed:]

[122] ... [The Act] is simply an incorporation by reference provision. It incorporates by reference the laws adopted by an Indigenous group, community or people and gives them the force of law as federal law. Moreover, because such laws may be amended, s. 21 incorporates the amendments that may be made to them in the future, on an *anticipatory* basis. Such an anticipatory incorporation by reference provision is constitutional.

...

[127] ... Here, s. 21(1) of the Act validly incorporates by reference the laws in relation to child and family services, as amended from time to time, of an Indigenous group, community or people referred to in s. 20(3). As concluded above, Parliament has independent legislative authority to enact such laws pursuant to its jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. To answer the reference question before the Court, it suffices to say that the laws of Indigenous groups, communities or peoples derive force of law from s. 91(24) of the *Constitution Act, 1867* and from compliance with the requirements set out in ss. 20 and 21 of the Act. That being said, the Court is taking care not to exclude the possibility that the right of self-government has a distinct constitutional source. In particular, our conclusion certainly does not negate the possibility that such a right of self-government may be recognized under s. 35 of the *Constitution Act, 1982*. This remains an open question.

...

[And finally, the paramountcy provision of the Act, s. 22(3), did not "alter the architecture of the Constitution":]

[132] ... Although paramountcy is a judicial doctrine whose scope and application are matters for the courts rather than Parliament or the legislatures..., this does not prevent Parliament or a legislature from declaring its understanding of federal paramountcy "[f]or greater certainty", as Parliament has done in s. 22(3), where these words precede its explanation. But it is ultimately for the courts to adjudicate any alleged conflict between federal law and provincial law and to make any necessary declaration of paramountcy.

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***Sanis Health Inc. v. British Columbia*, 2024 SCC 40 (CanLII)**

To be incorporated as a new note on page 275, on multijurisdictional class actions as an aspect of cooperative federalism.

In a 6 to 1 decision (with dissent by Côté J), the Supreme Court upheld the constitutional validity of s. 11 of British Columbia's *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 (the ORA).

Facts:

BC enacted the ORA to create a statutory cause of action for plaintiffs seeking to recover costs incurred while providing health care services to individuals harmed by opioid drugs. Section 11 of the ORA authorizes the province of BC, as representative plaintiff in a class action against drug manufacturers, to represent the interests of other provincial and territorial governments. The provision allows any of these other governments to opt out of the litigation as provided in s. 16 of BC's *Class Proceedings Act,* RSBC 1996, c 50.

The appellants, drug manufacturers named as defendants in the class action, brought an application to strike down s. 11 on the basis that it fails to respect the jurisdiction of other provinces and territories by intruding on their authority to legislate regarding the administration of justice in the province (or territory) as provided in s. 92(14) of the Constitution Act, 1867. The British Columbia Supreme Court dismissed the application, and the BC Court of Appeal dismissed the defendants' appeal.

Supreme Court majority decision:

Chief Justice Wagner and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ dismissed the appeal, ruling that s. 11 was *intra vires* the government of BC. In finding that the provision creates a procedural mechanism without affecting the substantive interests of other governments, and has a meaningful connection to BC, the court concluded that it falls wholly within the province's powers under s. 92(14) without affecting the sovereignty of other jurisdictions.

Selected excerpts:

[1] In an increasingly complex modern world, where governments assume greater regulatory roles in multifaceted areas overlapping jurisdictional boundaries, there is a greater need for cooperation between governments and between courts that cross those borders. Our Court has recognized this need in a more flexible approach to interjurisdictional cooperation. It is reflected in the interpretative principle of "cooperative federalism"; the respect and recognition of each province's adjudicative jurisdiction in the spirit of mutual comity; and the development of procedural frameworks to permit cross-border collective actions. It is reflected in the horizontal cooperation between governments for the public good.

[2] National class actions in Canada, and in particular multi-Crown class actions, represent the convergence of these ideas…

…

[The court held that class action litigation involving participation by multiple governments is an aspect of cooperative federalism:]

[37] This Court has long recognized that the "rigid, watertight compartments approach to the division of legislative power" risks hindering cooperative regulatory regimes undertaken in the

public interest… Between the federal government and the provinces, this idea of cooperation arises in the principle of "cooperative federalism", an interpretative principle for approaching the division of powers (see *GGPPA Reference*, at para. 50). Horizontally, between provinces, valid cooperation can manifest as shared participation in interprovincial trade agreements to ensure seamless regulatory schemes… in cooperative capital market regulatory systems… and in interlocking class proceedings mechanisms like those created by the *CPA* and its equivalents in other provinces.

[The court noted that the presumption of constitutionality is strengthened where the attorneys general of the affected jurisdictions support a law's validity (as they did in this case):]

[45] The court will approach the question of a law's validity under the interpretive presumption of constitutionality… This presumption is especially strong when the attorneys general of the jurisdictions affected by the law support its validity (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 73; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 33; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at pp. 19-20). That said, the court's role is to adjudicate constitutional compliance and not simply defer to an Attorney General's opinion of a law's validity.

…

[The court found that while joining a class proceeding may impose certain limits on a party's litigation autonomy, these consequences do not render s. 11 unconstitutional:]

[71] …participating in class proceedings involves both benefits and burdens for a participant's litigation autonomy. When a Crown takes the benefits of a class proceedings statute, it also accepts its burdens… It does not violate the Crown's autonomy for it to accept the consequences of its litigation choices as a plaintiff. Consequences are not substantive law.

…

[The court also noted that in this case, the opportunity to join a multi-government class action promoted affordable access to litigation for smaller jurisdictions:]

[74] … As the Attorneys General for the Northwest Territories and Prince Edward Island point out, the existence of this choice may be the only way that smaller jurisdictions could achieve recovery (I.F., Attorney General of the Northwest Territories, at paras. 11-22; I.F., Attorney General of Prince Edward Island, at para. 18). The appellants' arguments, if accepted, would prevent the Crowns from exercising their autonomy to efficiently pursue their claims collectively by telling them that this is not a choice they can make. I conclude that a government can agree to be bound by another province's rules in a class action proceeding, even if the consequences may limit the powers of its legislature and its successors to avoid the consequences of that choice.

…

[In determining that s.11 of the ORA created procedural, not substantive law, the court held that the Act fell under s.92(14) of the Constitution:]

[80] Under this head of power, the provinces may "enact laws and adopt regulations pertaining to courts, rules of court and civil procedure" (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 33; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 79). A law will generally fall under s. 92(14) when it applies to the administrative functioning of a province's courts or to the procedural functioning of actions taking place before the province's courts (*Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 37, per Bastarache J., concurring; see also *Criminal Lawyers' Association of Ontario*, at para. 33).

[81] Section 11 of the *ORA* is a procedural mechanism which operates with the purely procedural *CPA* and presumptively authorizes the government of B.C. to act on behalf of a class of consenting Canadian governments. Like all procedural rules, s. 11 will play a role in the resolution of substantive rights and affects them to some extent, but s. 11 neither creates nor changes substantive rights. Rather, s. 11 helps Crowns to cooperate in a collective pursuit of their individual claims, and assists B.C.'s courts in presiding over that pursuit.

...

[On the second stage of the test set out in *Imperial Tobacco*, examining whether 1) the legislation has a meaningful connection to the province; and 2) respects the sovereignty of other provinces:]

[92] The appellants' argument that the foreign nature of the Crowns' claims negates a meaningful connection is also flawed. Superior courts often adjudicate cases with claims arising elsewhere or requiring the application of foreign law (see, e.g., Van Breda). Applying foreign law to a foreign party does not necessarily destroy a "real and substantial connection" for the court's jurisdiction over the claim; nor does it undermine the "meaningful connection" between the procedural law facilitating that action and the province which enacted it. Neither test demands the complete absence of all connections to other provinces (see Imperial Tobacco, at paras. 37-38).

[93] Accepting the appellants' arguments on this point would contradict decades of established jurisprudence affirming that superior courts can preside over class actions that are national in scope. When courts preside over these claims, they must follow their home province's procedural rules, while often applying the substantive laws from other provinces to each class member's individual claims...

...

[101] ... the application of those *procedural* rules to the foreign, participating Crowns does not determine which *substantive* laws will apply to those Crowns (see *Wilson*, at para. 83; *Thorpe*, at para. 135; Walker, at § 4.03). Here, the harms underlying each Crown's causes of action occurred in their own jurisdictions and thus are subject to their own substantive law (see *Tolofson v. Jensen*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, at pp. 1050 and 1064-65; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at paras. 25 and 80; *Van Breda*, at para. 37; Walker, at § 1.02[2][e]). That substantive law remains subject to each legislature's sovereignty, including their own *ORA*-type legislation to establish their causes of action.

Chapter 14: Indigenous Peoples and the Constitution

Part IV: The Constitutional Entrenchment of Aboriginal Rights

Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10 (CanLII)

This case is covered in greater detail in the Chapter 23 content of this supplement, where the *Charter* s. 15 issues are discussed.

For the purpose of Chapter 14, it may be covered as a new Note for page 583, preceding the *Gladstone* excerpt.

Background:

In *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII), the court considered the interplay between s. 35 and s. 25 of the *Charter of Rights and Freedoms,* which provides:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

A summary of the majority's views about the interplay of s. 35 of the Constitution and s. 25 of the Charter is found at para. 139:

[139] The clear relationship between ss. 25 and 35 suggests that their purposes must be seen as related. Section 35 speaks to how the Canadian Constitution protects Indigenous difference from unjustified legislative or executive infringement. In the same spirit, s. 25 ensures that the individual rights in the Charter do not themselves undermine Indigenous difference where they abrogate or derogate from the measures that protect that difference.

For further discussion, see: Brett Carlson, Nadia Effendi, Laura M. Wagner and Chris Roine "Individual Charter Rights vs Collective Indigenous Rights".

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Part VI: Treaty rights

Ontario (Attorney General) v. Restoule, 2024 SCC 27 (CanLII)

This decision ties Crown treaty obligations not to fiduciary duties, but to the constitutional principle of the honour of the Crown.

In 1850, via a pair of treaties – the Robinson-Superior Treaty and the Robinson-Huron Treaty – two groups of Anishnaabe nations, one from the Lake Superior region and the other from the Lake Huron region ceded certain lands to the Crown. Under the treaties the Crown agreed to pay each group an annuity calculated based on the number of individuals in each group. The annuity initially was set at the equivalent of $1.60 per person for the Superior group and $1.70 per person for the Huron group. The treaties further provided that:

> "…should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order…

The Crown increased the annuity payment once, in 1875, to $4.

In 2001 and 2014 respectively, the Superior and Huron plaintiffs filed claims against the Crown (both Ontario and Canada) seeking declaratory and compensatory relief for the failure to increase the annuities paid despite the increasing profitability of the ceded lands.

The claims were heard together, and the litigation was split into three stages: interpreting the treaties; Ontario's defences of Crown immunity and limitations; and compensation and liability as between Ontario and Canada.

The trial judge held that the Crown had a mandatory duty to review the annuities and to increase them, based on a "fair share" analysis and following consultation with the recipients – if the economic circumstances warranted it. This duty, she found, was not *sui generis*, but rather flowed from the honour of the Crown and an *ad hoc* fiduciary duty. She held that provincial limitations rules were not a bar to the claim and that Crown immunity did not apply. Prior to the final stage, the Huron plaintiffs settled with the Crown with respect to compensation, while the Superior claims were stayed pending hearing of Crown appeals on the first two stages. The Court of Appeal partially granted the appeals, and the parties appealed the decision to the Supreme Court.

In a unanimous decision written by Justice Jamal, the court held that the Crown was subject to a reviewable, mandatory requirement to exercise its discretion with respect to increasing the annuities over time.

The court held that the Anishnaabe appellants were entitled to declaratory relief and to compensation. Instead of ordering specific compensation, the Court provided directions to guide the Crown in engaging in a process of negotiation with the claimants.

From the decision:

…

[10] In what follows, I conclude that although a trial judge's findings of historical fact attract deference, the interpretation of historic Crown-Indigenous treaties is reviewable for correctness. Correctness review is mandated for treaty interpretation because of the precedential and constitutionally protected nature of treaty rights and because treaties engage the honour of the

Crown. Applying this standard of review, along with the treaty interpretation principles articulated by this Court, the Crown has a duty to consider, from time to time, whether it can increase the annuities without incurring loss. If the Crown can increase the annuities without incurring loss, it *must* exercise its discretion and decide whether to increase the annuities and, if so, by how much. This discretion is not unfettered; it is to be exercised liberally, justly, and in accordance with the honour of the Crown. The frequency with which the Crown must consider whether it can increase the annuities must also be consistent with the honour of the Crown. Although the Augmentation Clause is not in itself a promise to pay the Anishinaabe a certain sum of money, no party doubts that the Crown was able to increase the annuities beyond $4 per person without incurring loss, and that it should have exercised its discretion to do so. Thus, in my view, the Crown *must* increase the annuity under the Robinson Treaties beyond $4 per person retrospectively, from 1875 to the present. It would be patently dishonourable not to do so. I further conclude, as both courts below did, that the plaintiffs' breach of treaty claims are not statute-barred by Ontario's limitations legislation. Finally, although no specific fiduciary duties apply in respect of the Augmentation Clause, the honour of the Crown requires the Crown to diligently fulfill this promise. The Crown's ongoing breach of its augmentation promise, in the circumstances, is also a breach of the treaties themselves.

[11] For almost a century and a half, the Anishinaabe have been left with an empty shell of a treaty promise. In this context, … given the longstanding and egregious nature of the Crown's breach, a declaration alone will not help repair the treaty relationship or restore the Crown's honour. … The Crown has reached a negotiated settlement concerning past breaches with the Huron plaintiffs, but not with the Superior plaintiffs. With a view to respecting the nature of the treaty promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation, I would also direct the Crown to engage in time-bound and honourable negotiation with the Superior plaintiffs about compensation for past breaches of the Augmentation Clause. If the Crown and the Superior plaintiffs cannot arrive at a negotiated settlement, the Crown will be required, within six months of the release of these reasons, to exercise its discretion and determine an amount to compensate the Superior plaintiffs for past breaches.

…

[18] The Anishinaabe's system of governance and their relationship with the Crown have always been based on the values of *respect*, *responsibility*, *reciprocity*, and *renewal*. The Anishinaabe sought *respect* for their jurisdiction and their authority to conclude agreements to share their territory. They acted with a sense of *responsibility* to ensure their people could continue to depend on the land for sustenance, shelter, medicines, and spiritual well-being. *Reciprocity*, essential to the formation of alliances, meant that a gift would attract a reciprocal gift of commensurate value, based on the idea of mutual interdependence. This value reflects the notion that people must rely on one another to survive, not simply as an economic necessity, but also as a moral imperative. *Renewal* invoked the idea that relationships, such as the treaty relationship with the Crown, are ongoing and must be renewed continually.

C. *The Historical Context of Anishinaabe-Crown Relations*

(1) <u>The Covenant Chain Alliance</u>

[19] At the end of the Seven Years' War (1756-1763) between the British and the French, the British sought to secure the neutrality of various Indigenous nations, including the Anishinaabe of the upper Great Lakes, who had fought alongside the French. They did so by extending to them an alliance, known as the Covenant Chain, which dated back to the early 17th century and was a symbol of the close connection between British settlers and Indigenous peoples. The alliance was originally between the British and the Haudenosaunee Confederacy, and was later extended to others, including the Anishinaabe of the upper Great Lakes.

[20] The Covenant Chain alliance was symbolized by a ship tied to a tree with an iron chain to signal the interdependence of the British settlers and Indigenous nations. As the trial judge noted, "[t]he metaphor associated with the chain was that if one party was in need, they only had to 'tug on the rope' to give the signal that something was amiss, and 'all would be restored'" (2018 ONSC 7701, 431 D.L.R. (4th) 32 ("Stage One reasons"), at para. 65 (footnote omitted)). The trial judge described the Covenant Chain alliance as exemplifying the kind of "cross-cultural merging of diplomatic protocols and legal orders" that was common in the decades leading up to the signing of the Robinson Treaties (para. 89).

...

[45] After years of demands by various chiefs, in 1875 the Government of Canada increased the annuity to $4 per person, which since then has been paid to the beneficiaries of the Robinson Treaties. The chiefs successfully petitioned for the government to pay arrears for 1850 to 1874 to recognize that the economic conditions for increasing the annuity had existed before the 1875 increase. After a dispute between Canada, Ontario, and Quebec over who was constitutionally required to pay arrears after Confederation was appealed to this Court and the Judicial Committee of the Privy Council (*In re Indian Claims*), the Crown finally began paying arrears to treaty beneficiaries in 1903.

...

V. Analysis

[Justice Jamal's analysis of the interpretation of historic Aboriginal treaties relied on the following principles discussed earlier in this chapter, namely, that treaties are *sui generis* agreements intended to advance reconciliation; treaty rights must be interpreted in accordance with the honour of the Crown. Justice Jamal then reiterated the interpretative factors articulated in Justice McLachlin's opinion (dissenting on other grounds) in *R. v. Marshall*, 1999 CanLII 665 (SCC):]

[80] Justice McLachlin noted that because a court must consider both the words of a treaty and the historical and cultural context, it is useful to approach treaty interpretation in two steps. At the first step, the court focuses on the words of the treaty clause at issue and identifies the range of possible interpretations. At the second step, the court considers those interpretations against the treaty's historical and cultural backdrop...

...

[103] ...there are at least two significant reasons why the interpretation of historic Crown-Indigenous treaties should be, as a matter of sound legal policy, subject to correctness review.

First, treaty rights are constitutionally protected by s. 35(1) of the *Constitution Act, 1982*, and relatedly, treaties are nation-to-nation agreements that engage the constitutional principle of the honour of the Crown. And second, treaty interpretation has significant precedential value because it concerns enduring, multi-generational compacts. I will address each point in turn.

(i) Treaty Rights Are Constitutional Rights and Engage the Honour of the Crown

...

[105] The special significance of constitutional rights for selecting the appropriate standard of review has been highlighted in various legal contexts. For example, despite lowering the presumptive standard of review for contractual interpretation, this Court in *Sattva* ruled that, in the commercial arbitration context, correctness would continue to apply where a "constitutional questio[n]" is at issue (paras. 50 and 106). Similarly, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, this Court clarified that, in reviewing administrative decisions, the correctness standard applies to certain "constitutional questions", including the "scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*" (paras. 17 and 55).

[106] All the courts below recognized the constitutional character of treaty interpretation.
...

[107] Relatedly, as noted above, treaties are nation-to-nation agreements that must be interpreted in accordance with the constitutional principle of the honour of the Crown. This transforms the interpretive exercise from a simple determination of the rights and obligations between private parties into an exercise of constitutional interpretation. The goal of this exercise of constitutional interpretation is ultimately to advance a matter of utmost public interest and concern — the process of reconciliation itself.

...

[197] The Crown must exercise its discretion, including its discretion as to how often it turns its mind to increasing the annuity, diligently, honourably, liberally, and justly, while engaging in an ongoing relationship with the Anishinaabe based on the values of respect, responsibility, reciprocity and renewal. To do so, the Crown must consider factors such as: the number of treaty beneficiaries and their needs; the benefits the Crown has received from the territory and its expenses during the relevant timeframe; the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada; and the principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise to share in the wealth of the land if it proved profitable. I will discuss several of these points in more detail below when I discuss the appropriate remedy in this case.

...

E. *The Crown's Obligation To Diligently Implement the Augmentation Clause*

...

(1) The Honour of the Crown Is Not a Cause of Action but Can Generate Various Duties

[219] … The honour of the Crown imposes upon governments "a high standard of honourable dealing" with Indigenous peoples (*R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at p. 1109; *Manitoba Metis*, at para. 69). It is a flexible and capacious doctrine that can "measure and regulate conduct of the government in relation to [A]boriginal peoples" (J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at p. 53).

[220] Although the honour of the Crown is a powerful constitutional doctrine, it "is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled" (*Manitoba Metis*, at para. 73 (emphasis in original)). At the same time, it is "not a mere incantation, but rather a core precept that finds its application in concrete practices", and "gives rise to different duties in different circumstances" (*Haida Nation*, at paras. 16 and 18). The specific duties flowing from the honour of the Crown depend "heavily" on the context in which that honour is engaged (*Mikisew Cree 2018*, at para. 24; *Manitoba Metis*, at para. 74; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 25).

[221] …In *Wewaykum*, the Court recognized that the honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a cognizable Aboriginal interest (paras. 79 and 81). And in *Manitoba Metis*, the honour of the Crown imposed a "duty of diligent, purposive fulfillment" of the constitutional obligation set out in s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 (para. 94). The Huron and Superior plaintiffs say that the latter two duties — fiduciary duties and the duty of diligent fulfillment — arise in this case. I will address each.

(2) The Crown Has No Fiduciary Duties in Respect of the Augmentation Promise

(a) *Introduction*

[222] This Court has recognized that the Crown may owe *ad hoc* and *sui generis* fiduciary duties to Indigenous peoples in respect of certain interests. *Ad hoc* fiduciary duties arise as a matter of private law and require utmost loyalty to the beneficiary … By contrast, *sui generis* fiduciary duties are unique to the Crown-Indigenous relationship, flow from the honour of the Crown, and permit the Crown to balance competing interests (*Williams Lake*, at paras. 44 and 165; Hogg and Dougan, at p. 307)…

[223] The trial judge held that the Crown owes an *ad hoc* fiduciary duty to the Huron and Superior plaintiffs regarding the Augmentation Clause because it "undertook to act exclusively in the best interest of the Treaties' beneficiaries" when engaging in a *process* to determine if an increase to the annuities was warranted (Stage One reasons, at para. 519; see also para. 525). She found, however, that the Crown does not owe a *sui generis* fiduciary duty in relation to the treaty promise, because "there was no Crown undertaking of discretionary control over the Anishinaabe's interest in land" (para. 511).

[224] …[The Court of Appeal] held that the trial judge erred in law in finding that the Crown owes an *ad hoc* fiduciary duty. There was no evidence that the Crown agreed to act solely in the best interests of the treaty beneficiaries regarding procedural matters stemming from the Augmentation Clause. Such a duty… would put the Crown in an inevitable conflict of interest by requiring the disclosure of confidential budgetary, land use, and other information relevant to its

decision making about possible increases (paras. 608-9). Concerning the *sui generis* fiduciary duty, [the court] agreed with the trial judge that no such duty arose (para. 585). ...

...

[243] Although this Court now uses the language of fiduciary *duties* to denote specific duties owed by the Crown in respect of cognizable Aboriginal interests, this conception is of relatively recent vintage. ...[Under this Court's more recent jurisprudence, including *Manitoba Metis*, it is now recognized that "the honour of the Crown remains a much broader concept than fiduciary duty" (Hogg and Dougan, at p. 307). That said, the honour of the Crown has not subsumed or overtaken the Crown's fiduciary duties to Indigenous peoples. Rather, *ad hoc* and *sui generis* fiduciary duties continue to play an important and distinct role in shaping the relationship between the Crown and Indigenous peoples in certain circumstances.

...

[246] The trial judge and Court of Appeal correctly concluded that ...the second requirement for a *sui generis* fiduciary duty is not met. Specifically, as the trial judge found, neither the treaty text nor the context in which the Robinson Treaties were signed provide any evidence that the Crown would "administer the land on behalf of the Treaties' beneficiaries" (Stage One reasons, at para. 512). There was no undertaking by the Crown of discretionary control over the interest in land (paras. 511-12).

[247] I conclude the Crown is not subject to an *ad hoc* or *sui generis* fiduciary duty in respect of the augmentation promise in the Robinson Treaties. As I explain in the next section, however, the Crown *is* subject to a duty to diligently implement or fulfill that promise, and its failure to do so is a breach of treaty.

...

[271] In my view, ... given the longstanding and egregious nature of the Crown's breach of the Augmentation Clause for almost a century and a half, a declaration, while helpful, would be insufficient to renew the treaty relationship and restore the Crown's honour. ...

...

[284] The treaties concluded between the parties were fundamentally alliances of equals founded on the principles of mutual respect, mutual responsibility, reciprocity, and renewal (Stage One reasons, at para. 423). In requiring the Crown to periodically revisit the annuity and consider increasing the amount, the Augmentation Clause embodies the parties' desire for a continually renewing bond that would keep them in a relationship with one another in perpetuity. Yet today, well over a century has passed since the Crown has turned its mind to that promise, and by extension to the renewal of the relationship itself. Ontario expresses concern that any remedy beyond a pure declaration would "drive the parties into an adversarial relationship" (A.F., at para. 111). The Superior plaintiffs respond that it is not the requested remedy that has done this, but rather the Crown's "abject failure" for almost 150 years to honour sacred treaty rights (R.F., at para. 113). I agree with the Superior plaintiffs. The Crown cannot reasonably have believed that giving its treaty partners $4 each annually since 1875 was in any way honourable.

...

[286] Before leaving this point, it is appropriate to recall that the trial judge found that the Robinson Treaties were motivated largely by the principles of kinship and mutual interdependence, as reflected in the Covenant Chain. This enduring alliance has been depicted using the metaphor of a ship tied to a tree with a metal chain: "The metaphor associated with the chain was that if one party was in need, they only had to 'tug on the rope' to give the signal that something was amiss, and 'all would be restored'" (Stage One reasons, at para. 65). The Anishinaabe treaty partners have been tugging on the rope for some 150 years now, but the Crown has ignored their calls. The Crown has severely undermined both the spirit and substance of the Robinson Treaties.

...

[297] These principles concerning the proper role of the courts dovetail with the idea that "[r]econciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences" (*First Nation of Nacho Nyak Dun*, at para. 4). As Lamer C.J. wrote in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, "it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve . . . a basic purpose of s. 35(1) — 'the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown'" (para. 186...) [other citations omitted].

[298] Even so, as my colleague Martin J. wisely observed during Ontario's oral submissions before this Court, accountability most certainly *does* take place in a courtroom (transcript, day 1, at p. 9). Indeed, "judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance" (*First Nation of Nacho Nyak Dun*, at para. 34). ...

[299] Although it is not the business of the courts to force the Crown to exercise its discretion in a particular way, it is very much the business of the courts to review exercises of Crown discretion for constitutional compliance — to ensure that the Crown exercises its discretion in accordance with its treaty obligations and the constitutional principle of the honour of the Crown...

[300] I am also guided by the fact that the Robinson Treaties were not only about securing land in exchange for a monetary annuity. As the trial judge found, "[f]rom the Anishinaabe perspective, the central goal of the treaty was to renew their relationship with the Crown" (Stage One reasons, at para. 412 (emphasis added)). ... The Huron plaintiffs say this best: "What the Treaty promises is . . . an 'ongoing relationship' with procedural and substantive aspects. The Crown cannot fulfill its duty by paying an arbitrary sum of money without engaging its Treaty partner" (R.F., at para. 101 (emphasis added)). The Superior plaintiffs would be deprived of the relational aspect of the treaty if Stage Three of this litigation were to proceed as currently conceived. Accordingly, even though the Crown now concedes that it has breached the Augmentation Clause, Stage Three should not proceed directly to a traditional damages calculation.

...

[303] Although I recognize that the augmentation promise does not expressly require the parties to negotiate and agree on an annuity increase, it is undeniable that negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown. After all, historic treaties represent the "establishment of a relationship of trust and mutual assistance" between Indigenous peoples and the Crown, but the details of that relationship "must be the object of permanent negotiations, in view of fleshing out the general principles governing the relations between the two peoples" (S. Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (2013), at p. 286).

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For more on *Restoule*, see: Bankes, Nigel, Restoule: Tugging on the Rope and the Duty of Diligent Implementation of Treaty Promises

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Shot Both Sides v. Canada, 2024 SCC 12 (CanLII)

This decision considered possible remedies for the Canadian government's failure to comply with a land entitlement formula agreed to under Treaty 7, an 1877 treaty between the Crown and the Blackfoot Confederacy of First Nations.

In 1971, the Blood Tribe (part of the Blackfoot confederacy) determined via historical research that the reserve lands designated for them were smaller than what the treaty land entitlement (TLE) provision under Treaty 7 prescribed for them. They commenced an action for compensation for this in 1980 – outside the limitation period prescribed under BC legislation. Nevertheless, the trial court ruled that the action was not statute-barred on the basis that the Blood Tribe's claim did not arise until the coming into force of *Charter* s. 35 in 1982.

The province appealed, and the Court of Appeal allowed the appeal, holding that the tribe's cause of action was not rooted in s. 35 of the Charter, but rather, in the terms of the treaty itself. Once the claim was discoverable (in 1971), the limitations clock began to run, and therefore the 1980 claim was statute-barred.

The Blood Tribe appealed to the Supreme Court. In a unanimous decision, the Court held that the claim was indeed statute-barred. Treaty rights flow from the relevant treaty, not from the Constitution.

However, the Court held that the appellants were entitled to a declaration that the Crown had behaved unconscionably and unconstitutionally:

...

[62] In its action, the Blood Tribe seeks declaratory relief. At trial, the Blood Tribe sought, among other claims, a declaration that the Crown breached the TLE (C.A. reasons, at paras. 3 and 31). The Crown has subsequently conceded it breached its treaty obligation with respect to the Blood Tribe's land entitlement (R.F., at para. 2). At the hearing of this appeal, the Crown conceded that declaratory relief may be appropriate and could assist with reconciliation efforts with the Blood Tribe (transcript, at pp. 111-16).

[63] The law of limitations set out above does not preclude a declaration in this matter. Although claims for personal relief or damages flowing from treaty breaches may be subject to limitations statutes, limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct. (*Manitoba Metis*, at paras. 135, 137, 139 and 143). At issue here is a constitutionally protected treaty right and the honour of the Crown, itself a constitutional principle (para. 136). This Court has recognized that declarations can be obtained to assist with extra-judicial negotiations with the Crown even where personal relief may be statute-barred as discussed below (para. 137).

[64] Declaratory relief is warranted in this appeal...

...

[68] Declarations should not be issued where there is no practical effect...

...

[70] Declaratory relief takes on a "unique tenor" in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship (citation omitted). It relies in part on the government acknowledging the declaration promptly and acting honourably in determining the means for advancing reconciliation (citation omitted). That this assumption can be difficult in breach of treaty cases, as reconciliation efforts often follow decades of dishonourable Crown conduct and adversarial litigation, does not diminish the possible salutary effect of declarations.

[71] The reconciliation process differs from the conflict driven, adversarial litigation process that is often antithetical to meaningful and lasting reconciliation. ...

[72] Reconciliation can be fostered by declaratory relief. The non-coercive nature of declaratory relief can help "the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach" and can help to restore the honour of the Crown (Sarna, at p. 178).
...

[73] In Aboriginal and treaty rights claims, declaratory relief can assist in providing a clear statement on the legal rights of Indigenous parties, the duties placed on the Crown, and the Crown's conduct in relation to those sacred promises. Clarity on these rights, duties, and conduct can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship.

[74] Declarations in the context of breach of treaty claims can serve a corrective function ... A clear statement setting out the Crown's infringement of an Indigenous party's rights may spur reconciliation efforts between the parties to address the wrongs suffered. Declaratory relief is not meant to represent the end of the reconciliation process for the Crown's breach of Treaty No. 7: it merely helps set the stage for further efforts at restoring the nation-to-nation relationship and the honour of the Crown.

Part VII: The Duty to Consult

Refining the duty to consult:

In the past several years, decisions about the duty to consult with Indigenous people about projects and activities potentially affecting their rights have helped to develop the content of this duty. Important examples include:

- ***Métis Nation of Alberta Association v Alberta (Indigenous Relations)***, 2024 ABCA 40 (CanLII) (leave to appeal to SCC dismissed):

  After working on a draft Métis Consultation Policy for several years, the Alberta government abandoned plans to create one, deciding instead to continue relying on a Credible Assertion Process for assessing non-settlement Métis rights claims. The Metis Nation of Alberta (MNA) sought judicial review of the decision to abandon the development of the policy, asserting that the decision engaged the honour of the Crown, and that they had not been adequately consulted about the decision. Alberta argued that the decision not to proceed with the policy was not subject to judicial review.

  The application judge held that the government's decision was subject to judicial review and that the honour of the Crown was engaged, but that Alberta did not act contrary to the honour of the Crown. She held that the decision was reasonable and that the MNA had been afforded adequate procedural fairness.

- ***Thomas v. Rio Tinto Alcan Inc.***, 2024 BCCA 62 (CanLII) (leave to appeal to SCC dismissed): From a case comment by Kate Gunn of First Peoples Law:

  "The Court varied the declaration to confirm that the federal and provincial governments have a fiduciary duty to protect the First Nations' right to fish, including by consulting the First Nations about decisions regarding the management and flow regime for the Nechako River pursuant to the company's licences and authorizations.

  The Court further held that in circumstances involving the rights and interests of Indigenous Peoples, courts can, and should, consider issuing specific declarations aimed at ensuring the Crown's future actions are consistent with its obligations under section 35."

- ***Kebaowek First Nation v. Canadian Nuclear Laboratories***, 2025 FC 319 (CanLII)

  The Canadian Nuclear Safety Commission (the Commission) approved an application authorizing Canadian Nuclear Laboratories to construct a nuclear waste disposal facility near the Ottawa River. Kebaowek First Nation challenged the decision, arguing that the Commission failed to apply the UNDRIP consultation principle of free, prior and informed consent. The Court held that the UNDRIP principle did not amount to a veto over the decision-making process, but that it did require the Commission to implement an enhanced approach to consultation, and to consider Kebaowek laws, knowledge and processes in an effort to come to a mutual agreement:

> [128] In my opinion, Canada's adoption of the UNDRIP into Canadian law via the *UNDA* must mean more than a status quo application of the section 35 framework. The UNDRIP must be interpreted in the ordinary sense of the words set out. The words of the UNDRIP and the resulting commentary regarding its development and interpretation must be used to guide our interpretation of the section 35 framework, and in this application, how the UNDRIP is to be used to interpret the Crown's analysis of the duty to consult and accommodate.
>
> ...[139] Process rights must be considered from the perspective of the rights holding collective and must consider the customs, traditions, and laws of the Indigenous rights holders. This ensures that consultation processes are robust and align with the spirit of reconciliation and the continuing evolution of the Canadian legal framework, which now includes the UNDRIP. Processes that meaningfully accommodate the Indigenous collective's perspectives ensure that the necessary trust and give and take required to nourish the ongoing Crown-Indigenous relationship will be reinvigorated and strengthened over time.

Part X: Indigenous Rights of Self-Government

Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5 (CanLII)

Reference to this case might be made in the context of the content on page 693, before the paragraph that begins "Professor John Borrows has suggested..."

In 2024, in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), the Supreme Court, in a unanimous decision, dismissed appeals by the Attorney General of Quebec and the Attorney General of Canada of a decision by the Quebec Court of Appeal about the constitutionality of the 2019 federal *Act respecting First Nations, Inuit and Métis children, youth and families* (SC 2019, c 24). Quebec had sought a declaration that the Act was an *ultra vires* attempt by Parliament to "alter the architecture of the Constitution". Canada appealed the carve-out as unconstitutional of two provisions that give the laws of Indigenous groups, communities or peoples priority over provincial laws.

The Act in question establishes national standards for the provision of culturally appropriate child and family services and affirms that the inherent right of Indigenous self-government recognized and affirmed by s. 35 includes legislative authority in relation to Indigenous child and family services.

In ruling that the entire Act is *intra vires* the federal government, the Supreme Court held that "Nothing prevents Parliament from affirming, as it does in s. 18(1) of the Act, that Indigenous peoples have jurisdiction to make laws in relation to child and family services" (para 9), and that Parliament is entitled, on the basis of its jurisdiction under s. 91(24) of the Constitution, to pass legislation that binds the Crown to commitments to Indigenous peoples (para 57):

... [57] One fundamental postulate of our constitutional architecture is parliamentary sovereignty (see, e.g., *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 56-58). This general principle of parliamentary sovereignty in Canada is [that] "Not only may the Parliament or a Legislature, acting within its allotted sphere of competence, make any law it chooses, it may repeal any of its earlier laws" [citation omitted]. The logical corollary of this postulate is that Parliament and the legislatures may bind the Crown through legislation [citation omitted]. They may do so expressly or by necessary implication (*IBEW v. Alberta Government Telephones*, 1989 CanLII 79 (SCC), [1989] 2 S.C.R. 318, at pp. 326-30). Through this power to bind the Crown, parliamentary sovereignty is thus exercised over government actors of all sorts. By imposing limits on these actors through legislation that is binding on the Crown, lawmakers can shape how public powers are exercised [citations omitted]. Government actors are bound by legislative limits imposed on them by Parliament and the legislatures, subject to constitutional imperatives. It is in light of these foundational principles that the legal effects of ss. 8(a) and 18(1) must be interpreted.

[58] Here, s. 7 expressly makes the Act binding on the Crown in right of Canada or of a province. This provision therefore "clearly lift[s]" the rule that "[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner" (*Thouin*, at para. 20; *Interpretation Act*, s. 17). The question, for the purposes of analyzing the Act's constitutional validity, is what the legal effects of ss. 8(a) and 18(1) are when these provisions are considered in conjunction with s. 7. As the Court of Appeal noted, [translation] "[a]dmittedly, the process is unusual. Of course, when drafting laws, legislatures naturally act on the basis of their belief in what the Constitution allows them to do, but express legislative affirmation of the meaning or scope of a constitutional provision is out of the ordinary" (para. 222). Indeed, the Court of Appeal noted that this declaratory approach is [translation] "uncommon, if not unusual" (para. 515). This reference provides an opportunity to explain the legal effects of these provisions.

[59] By enacting a binding affirmation, Parliament has bound the federal government to the position it has affirmed as a matter of statutory positive law (see, e.g., Wilkins, at pp. 184-85). ... The obligation imposed by s. 7 is a statutory one. It binds the Crown, both federal and provincial, because it "clearly lift[s]" Crown immunity in a statute that is constitutionally valid under s. 91(24) of the *Constitution Act, 1867* (see *Thouin*, at para. 20).

...

While the Court endorsed the Act's acknowledgment that s.35 affirms an inherent right of self-government for Indigenous peoples, the court did not explicitly affirm such a right (see paras 114-118). For a critique of this aspect of the reference, see Bruce McIvor: "The Troubling Basis for the Supreme Court's Child Welfare Law Decision".

Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39 (CanLII)

In this case Quebec appealed a decision requiring the province to reimburse the Pekuakamiulnuatsh First Nation in Mashteuiatsh, Quebec nearly $800,000 for an accrued deficit. Under the terms of a tripartite agreement between the first nation, Quebec, and the government of Canada, the two governments committed to provide funding to support Pekuakamiulnuatsh First

Nation in establishing and maintaining its own police force. In each of the years 2013 to 2017, the funding provided was not sufficient to maintain the force, and the first nation accrued a deficit of over $1.5M.

Pekuakamiulnuatsh Takuhikan claimed reimbursement under the private contract law terms of the Civil Code of Quebec as well as according to the public law principle of the honour of the Crown. After the group lost at trial, the Quebec Court of Appeal held that the governments' refusal to fund the police force violated the principle of good faith and failed to uphold the honour of the Crown. Quebec appealed to the Supreme Court of Canada.

In an 8-1 decision (Justice Côté dissenting), the Supreme Court dismissed the appeal, holding that in choosing to renew the agreement permitting Pekuakamiulnuatsh First Nation to operate its own police force, Quebec became bound by a duty of good faith, which it violated by refusing to revisit the funding for the agreement despite knowing that the SPM was underfunded. The court also held that the principle of the honour of the Crown applied to the negotiations:

...

(a) *Application of the Honour of the Crown to Contractual Undertakings*

[146] Our task at this first stage of the analysis is to identify the relevant test in this case for determining whether the honour of the Crown applies to an agreement that is not constitutional in nature. ...[N]ot all contracts between the State and Indigenous peoples engage this principle. Since the Court has never addressed this question, I propose to proceed by analogy with the jurisprudence recognizing situations in which the honour of the Crown is engaged in order to draw therefrom the principles underlying its application.

...

[148] The underlying purpose of the principle of the honour of the Crown is to facilitate the reconciliation of the Crown's interests and those of Indigenous peoples, including by promoting negotiation and the just settlement of Indigenous claims (Mikisew Cree, at para. 22; see also MMF, at para. 66; Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24; Desautel, at para. 22). This purpose transcends the corrective justice at the heart of private law to make room for repairing and maintaining the special relationship with the Indigenous peoples on whom European laws and customs were imposed (see MMF, at para. 67; Haida Nation, at para. 17). This is what I will call justice linked to reconciliation or reconciliatory justice.

[149] I hasten to add that the principle of the honour of the Crown is not a cause of action. It "speaks to *how* obligations that attract it must be fulfilled" (*MMF*, at para. 73 (emphasis in original)). ....

[150] ...[T]he honour of the Crown and the obligations flowing from it are part of the public law governing the liability of the State. As author Daniel Jutras observes, [translation] "[i]t is public law that determines in what circumstances, and under what conditions, the State may be held liable" [citations omitted].

[151] In this regard, the core of the analysis rests on art. 1376 *C.C.Q.*, which "is a public law" rule (*Prud'homme*, at para. 27). According to art. 1376 *C.C.Q.*, the rules in Book Five ("Obligations") of the *Civil Code* apply to the State, "subject to any other rules of law which may be applicable to [it]", whether these other rules are written or unwritten [citations omitted].

[152] Public law rules can thus "derogat[e]" from the general civil liability regime... These rules can also change the nature of the State's private law obligations, or even intensify them...

[153] I therefore agree ... that art. 1376 *C.C.Q.* is the provision that makes Quebec subject to private law obligations [translation] "without, however, releasing [it] from its public law obligations", including those flowing from the honour of the Crown[.] .... Unlike good faith under art. 1375 *C.C.Q.*, the obligations flowing from the honour of the Crown are not contractual obligations that have binding force by reason of a validly formed contract between an Indigenous entity and the State. Moreover, the remedy for a breach of the obligations flowing from the honour of the Crown is not governed by the rules of contractual liability or by the fundamental principle of *restitutio in integrum*. The honour of the Crown gives rise to public law obligations, anchored in the distinct logic of reconciliation [citations omitted]. Failure to comply with these obligations requires the Crown to restore the nation-to-nation relationship damaged by the dishonourable conduct.

[154] In sum, under art. 1376 *C.C.Q.*, the principle of the honour of the Crown and the obligations that flow from it are part of the "other rules of law" relating to the civil liability of the State. These obligations intensify the State's liability in the circumstances where they apply. ...

[156] The common element among the circumstances that the Court has so far recognized as engaging the honour of the Crown is that they relate to the reconciliation of specific Indigenous claims, rights or interests with the Crown's assertion of sovereignty (see *MMF*, at para. 73). ...

[157] Some courts have recognized that the honour of the Crown may apply to contractual undertakings that are not constitutional in nature and that also relate to reconciliation. For example, the Manitoba Court of Appeal held that a contract whose purpose was to resolve claims by the Métis people that, up to that point, had not been addressed constructively and in good faith engaged the honour of the Crown (*Manitoba Metis Federation Inc. v. Brian Pallister*, 2021 MBCA 47, 458 D.L.R. (4th) 625). The Ontario Superior Court of Justice approved an arbitration decision finding that the honour of the Crown was engaged by a gaming revenue-sharing agreement because the agreement "represents the reconciliation of the constitutionally protected Aboriginal right of self-government . . . with the Crown's sovereignty" (*Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516, at para. 110). That decision was affirmed by the Court of Appeal for Ontario, which found it unnecessary to address the question of the honour of the Crown (2021 ONCA 592, at para. 75).

[158] Similarly, the jurisprudence recognizes that the principle of the honour of the Crown applies to treaty land entitlement agreements that are not themselves treaties protected by s. 35(1) of the *Constitution Act, 1982* (*Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105, 482 D.L.R. (4th) 352, at paras. 127-30; *Long Plain First Nation v. Canada (Attorney General)*, 2015 FCA 177, 475 N.R. 142, at para. 118; *Pasqua First Nation v. Canada*

(Attorney General), 2016 FCA 133, [2017] 3 F.C.R. 3, at para. 64). … As these cases show, contracts are one of the instruments available to governments for undertaking or continuing a process of reconciliation[.]

…

[160] That being said, not every agreement between the Crown and an Indigenous group will necessarily engage the honour of the Crown. For example, simple commercial contracts between a government and an Indigenous entity would not necessarily engage the principle of the honour of the Crown. However, the Court's jurisprudence and the circumstances of this case point to a way of differentiating agreements in this regard.

[161] First, the agreement in question must be entered into by the Crown and an Indigenous group by reason and on the basis of the group's Indigenous difference, which reflects its distinctive philosophies, traditions and cultural practices (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at para. 51, quoting *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at p. 234).

…

[163] Second, contractual agreements will engage the honour of the Crown where they relate to an Indigenous right of self-government, whether the right is established or is the subject of a credible claim. In the case at bar, Pekuakamiulnuatsh Takuhikan argues that having an Indigenous police force is an exercise of its right of self-government. I therefore take care to limit my comments accordingly. While we do not have to decide the question in order to resolve this case, I am not, however, excluding the possibility of recognizing, in a different context, that other Indigenous rights or interests might also engage the honour of the Crown in connection with a contractual undertaking.

[164] It is not necessary, in order for the principle of the honour of the Crown to apply, that an implicated Indigenous right already be recognized by the courts or the Crown.

…

[168] … For the purposes of this appeal, it is the existence of an established right or a credible claim to a right of self-government in a particular situation that justifies the application of the principle of the honour of the Crown to some contracts and not to others. Such a right or claim serves to situate the contract in circumstances similar to those that the Court has already recognized as engaging the honour of the Crown…

…

[177] The honour of the Crown applies to the tripartite agreements because they concern the Indigenous right of self-government claimed by the Pekuakamiulnuatsh First Nation in matters of public safety in the community. The purposes of the tripartite agreements are to establish and maintain an Indigenous police force and to determine its funding. While it is true that the entire population benefits from police services, the establishment and maintenance of Indigenous police forces that are managed by the communities covered by an agreement and that provide culturally

appropriate services to those communities distinguish these police forces from those serving the population in general.

...

[183] It is therefore clear that the purpose of the tripartite agreements under consideration is to reconcile the Crown's assertion of sovereignty and the prior presence of the Pekuakamiulnuatsh on the territory concerned. [The Court cited the evidentiary record showing the need for "culturally appropriate police services", and "the difficult, and at times even traumatizing, relationship" between Indigenous peoples and police.] ...

Chapter 23: Introduction and History of Equality Rights

The next several pages, about the decision in *R. v. Sharma,* 2022 SCC 39, were released as a supplement in 2023. They are reproduced here for convenience. New for 2025 content begins with a discussion of the *Dickson v. Vuntut Gwitchin First Nation* case.

***R. v. Sharma,* 2022 SCC 39 (To replace Note 2, ch 23, section II.B, pp 1228-1229)**

[Cheyenne Sharma was a 20-year-old member of the Saugeen First Nation, a single mother, a survivor of gender-based violence and substance use, and an intergenerational survivor of residential schools. Facing homelessness with her daughter, she imported 1.97 kg of cocaine into Canada in exchange for a promise of $20,000 from her boyfriend. She confessed, pled guilty, and a *Gladue* report was ordered. Sharma had no criminal record and sought a conditional sentence – a type of incarceration that can be served in the community under strict conditions and supervision.

Conditional sentences were first introduced in 1996 as part of a package of sentencing reforms that also included s 718.2 of the *Criminal Code,* which requires sentencing judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances … with particular attention to the circumstances of Aboriginal offenders." Before 2012, conditional sentences were available for many offences if the court imposed a sentence of imprisonment of less than two years. In *Sharma*, the sentencing judge removed one barrier to the availability of a conditional sentence by finding that the mandatory minimum sentence of two years' imprisonment for Sharma's offence, established by s 6(3)(a.1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, amounted to cruel and unusual punishment under s 12 of the *Charter*. The Crown did not appeal this ruling.

However, a second barrier was enacted by the *Safe Streets and Communities Act*, SC 2012, c. 1, s. 34 (SSCA), which removed the availability of conditional sentences for certain offences with maximum sentences (see s 742.1 of the *Criminal Code*). Sharma brought a *Charter* application to have the relevant provision struck, arguing that it violated s 15(1) because it discriminated against Indigenous offenders on the basis of race. The sentencing judge heard expert evidence on the relationship between Indigenous peoples' historic disadvantage and their overrepresentation in the Canadian criminal justice system and on how drug-related offences committed by Indigenous women are connected to "the legacies of colonia[l] racism" (2018 ONSC 1141 at para 25). However, the judge held that Sharma's s 15 argument failed on the first step of the test because she had not provided statistics on how many Indigenous offenders would have received conditional sentences if the impugned provision had not been enacted. Sharma was sentenced to 18 months imprisonment. She appealed the ruling.

In the Ontario Court of Appeal, Sharma also argued that the impugned provision violated s 7 for depriving her of liberty in a manner that was arbitrary and overbroad. A majority of the Court of Appeal accepted both her s 7 (overbreadth) and s 15 arguments and rejected the government's s 1 arguments. They noted the "extensive evidentiary record" that had been put before the sentencing judge (2020 ONCA 478 at para 90), including statistics on the number and percentage of incarcerated Indigenous women and how many of the conditional sentences granted before 2012 could have been granted after that year. The majority found that the most useful statistical evidence would have been about the population of Indigenous offenders who were sentenced after 2012 and

incarcerated when they otherwise would have been eligible for a conditional sentence, which meant they also must have received a sentence of less than two years. However, because Sharma's offence had a mandatory minimum of two years' imprisonment before that mandatory minimum was struck down under s 12 of the *Charter* by the sentencing judge, the majority found that "[s]tatistics would … have been unable to capture the impact of the impugned provisions on Aboriginal offenders, as it would be difficult to identify the population that was specifically deprived of a conditional sentencing option" (at para 104).

The Crown appealed to the Supreme Court of Canada, which allowed the appeal 5:4. Justices Brown and Rowe wrote for the majority, finding no violation of s.7 or s. 15. Justice Karakatsanis wrote for the dissent, which would have dismissed the appeal on both s 7 and s 15 grounds.

Brown and Rowe JJ quoted the two-step test for s. 15(1) claims from *Fraser* and stated that the test "is not at issue in this case" (at para 28). However, they added that the "proper application and the burden of proof at each step is not clear. That is particularly so in cases of adverse impact discrimination… This is the allegation here: that, while facially neutral, the impugned provisions disproportionately impact Ms. Sharma, as an Indigenous woman" (at para 29). They continued:]

BROWN and ROWE JJ (Wagner C.J., Moldaver and Côté JJ concurring):

[30] Uncertainty in the evidentiary burden in adverse impact cases has arisen when courts collapse the two steps of analysis into one, as the majority at the Court of Appeal did here.... The two steps are not watertight compartments or "impermeable silos" (*Fraser*, at para. 82), since each step considers the impact of the impugned law on the protected group. While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other.

[31] The first step examines whether the impugned law created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or the general population.... The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

[32] Deciding the issues raised in this appeal requires us to resolve three particular uncertainties associated with the s. 15(1) framework:

(a) whether the claimant must prove that the impugned law or state conduct caused (in the sense of created or contributed to) the disproportionate impact on the claimant;

(b) whether the entire legislative context is relevant to the s. 15(1) inquiry; and

(c) whether s. 15(1) imposes a positive obligation on the legislature to enact remedial legislation, and … whether the legislature can incrementally address disadvantage.

[33] On a careful reading, this Court's jurisprudence answers these questions. In so saying, we do not alter the two-step test for s. 15(1). Rather, we seek to bring clarity and predictability to its

application, with a view to assisting parties to *Charter* challenges, judges adjudicating them, and legislators seeking to further s. 15's equality guarantee.

...

(1) Guidance on the Section 15(1) Framework

(a) *Preliminary Point About Substantive Equality*

[37] Several recent decisions of this Court refer to substantive equality as the "animating norm" of s. 15 ... In these decisions, the Court stated that s. 15 of the *Charter* specifically protects substantive equality.

[38] The means by which substantive equality is protected is the application of the two-step test, as set out within each of these decisions (*Fraser*, at para. 27; *Withler*, at para. 30; *Kapp*, at para. 17; *Alliance*, at para. 25). This test has been affirmed repeatedly at this Court. While our colleague stresses the "touchstone" of substantive equality, a court's focus must ultimately be directed to *the test*, as stated by the jurisprudence. And where, applying that test, the claimant's burden at either step of s. 15(1) is not met, there is no infringement of s. 15 (and, therefore, no substantively unequal outcome).

(b) Step One: Proving the Law, on its Face or in its Impact, Creates or Contributes to a Distinction on the Basis of a Protected Ground...

[40] We start with the difference between impact and *disproportionate* impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s. 15(1) test, claimants must demonstrate a *disproportionate* impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).

[41] The disproportionate impact requirement necessarily introduces comparison into the first step.... This Court no longer requires a "mirror comparator group" .... However, *Withler* confirms that comparison plays a role at both steps of the s. 15(1) analysis. At the first step, the word "distinction" itself implies that the claimant is treated differently than others, whether directly or indirectly (*Withler*, at para. 62, cited in *Fraser*, at para. 48).

[42] As we have explained, in adverse impact cases, the law appears facially neutral. At step one, the claimant must present sufficient evidence to prove the impugned law, in its impact, *creates or contributes to* a disproportionate impact on the basis of a protected ground (*Fraser*, at para. 60, citing *Taypotat*, at para. 34; *Alliance*, at para. 26; *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695, at pp. 764-65). Causation is thus a central issue. In *Withler*, the Court observed:

In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.... In that kind of case, the claimant will have more work to do at the first step. [para. 64]

...

[44] This is confirmed by a long line of s. 15 jurisprudence: the claimant must establish a link or nexus between the impugned law and the discriminatory impact. In *Symes*, the Court stressed the importance of distinguishing between adverse impacts "caused" or "contributed to" by the impugned law and those which "exist independently of" the impugned provision or the state action (p. 765)....

[45] The causation requirement between the impugned law or state action and the disproportionate impact is recognized in the jurisprudence through the words "created" or "contributed to". Section 15(1) claimants must demonstrate that the impugned law or state action *created or contributed to* the disproportionate impact on the claimant group at step one (*Symes*, at p. 765). Both terms — "created" and "contributed to" — describe cause. "Contributed to" merely recognizes that the impugned law need not be the only or the dominant cause of the disproportionate impact.

[46] This is consonant with *Fraser*. In that case, Abella J. confirmed that once a claimant demonstrates that the impugned law or state action creates or contributes to the disproportionate impact on a group, they need not go further and show exactly *why* the law being challenged has that impact (*Fraser*, at paras. 63 and 70...).

[47] ... In *Fraser*, ... the claimants had to prove that state action (the legislated restrictions to the pension plan) created or contributed to the impact (disproportionately reduced pensions) for individuals who were part of a protected group (women). The Court, however, imposed no further burden of demonstrating that being part of a protected group caused the impact: the claimants did not have to prove they were unable to acquire full-time pension credit *because* they were women.

...

[49] ... In *Fraser*, Abella J. referred to two types of evidence that are helpful in proving that a law has a disproportionate impact: evidence about the "full context of the claimant group's situation" (*Withler*, at para. 43, cited in *Fraser*, at para. 57) and evidence about "the outcomes that the impugned law or policy ... has produced in practice" (*Fraser*, at para. 58.) Ideally, claims of adverse impact discrimination should be supported by *both* (para. 60). To give proper effect to the promise of s. 15(1), however, a claimant's evidentiary burden cannot be unduly difficult to meet....

[50] In summary, the first step asks whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. If a claimant establishes that the law or state action creates or contributes to a disproportionate impact, the court should proceed to the second step. But to be clear, while the evidentiary burden at the first step should not be undue, it must be fulfilled. The particular evidentiary burden on claimants will depend on the claim. What remains consistent is that there is a burden on claimants at step one.

(c) *Step Two: Proving the Law Imposes Burdens or Denies Benefits in a Manner That Has the Effect of Reinforcing, Perpetuating, or Exacerbating Their Disadvantage*

(i) Evidentiary Burden

[51] It has never been the view of this Court that every distinction is discriminatory (*Andrews*, at p. 182). Hence the importance of the second step of the s. 15(1) test, requiring the claimant to

establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage. The question becomes, what does it mean to reinforce, perpetuate, or exacerbate disadvantage?

[52] Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: "The goal is to examine the impact of the harm caused to the affected group", which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added))... In *Withler*, this Court explained that a negative impact or worsened situation was required:

Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation. [para. 37]

[53] This Court has outlined several factors that may assist a judge in determining whether claimants have met their burden at step two: arbitrariness, prejudice, and stereotyping. These factors are not necessary components; while "[t]hey may assist in showing that a law has negative effects on a particular group, . . . they 'are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit'" (*Fraser*, at para. 78...). Nonetheless, courts may usefully consider whether these factors are present:

(a) **Stereotyping or prejudice**: These factors played a critical role at step two in *Ontario (Attorney General) v. G*, 2020 SCC 38....

(b) **Arbitrariness**: A distinction that does not withhold access to benefits or impose burdens, or that is based on an individual's actual capacities, will rarely be discriminatory (*Andrews*, at pp. 174-75) ....

[54] Again, *Fraser* is illustrative. To recall, at step one, the claimants had to demonstrate that the pension plan created or contributed to a disproportionate impact on the enumerated ground of sex. Once that requirement was met, at step two they had to show that the disproportionate impact imposed burdens or denied benefits in a manner that had the effect of reinforcing, perpetuating or exacerbating the historic or systemic disadvantage against that group. Since pension plans have been historically designed "for middle and upper-income full-time employees with long service, typically male" (para. 108...), the state action "perpetuate[d] a long-standing source of economic disadvantage for women" (para. 113). Thereby, the second step was satisfied.

[55] In light of that test, it is helpful to underline three points regarding the evidentiary burden at step two:

(a) The claimant need not prove that the legislature intended to discriminate....

(b) Judicial notice can play a role at step two.... Of note here, the Court has taken judicial notice of the history of colonialism and how it translates into higher levels of incarceration for Indigenous peoples (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60).

(c) Courts may *infer* that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence (*Law*, at para. 75). One must bear in mind, however, that inference is not mere assertion; nor is it *a priori* reasoning.

(ii) Legislative Context

[56] To determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context.

[57] Such an approach is well-supported in our jurisprudence.... [I]n *Withler*, the analysis was said to entail consideration of "the full context of the claimant group's situation and the actual impact of the law on that situation" (para. 43). Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the "ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis" (para. 38 (emphasis added)) ....

[58] Most recently, in *C.P.*, the constitutionality of s. 37(10) of the *Youth Criminal Justice Act*... ("*YCJA*") was at issue.... Chief Justice Wagner, writing for four members of this Court, explicitly and carefully considered the entire legislative scheme, observing that the *YCJA* is designed to balance multiple goals—not only enhanced procedural protections, but also timely intervention and prompt resolution (para. 146).... In choosing not to provide young persons with an automatic right to appeal, he concluded "Parliament did not discriminate against them, but responded to the reality of their lives" (para. 162). Therefore, step two was not satisfied. We would endorse this approach, as it is consistent with *Withler*, *Taypotat*, and *Vriend*.

[59] Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors (*Withler*, at para. 67; see also paras. 3, 38, 40 and 81).

[60] A contextual approach is particularly significant when analyzing the constitutionality of sentencing regimes. Here, the impugned provisions cannot properly be considered in a manner that is divorced from the broader context of sentencing law.... Part XXIII reflects a balance or interaction among the statutory principles set out in s. 718 of the *Criminal Code*, including rehabilitation, denunciation and deterrence, reparations to victims, separation from society, and the principle of restraint in s. 718.2(e). Also relevant to the legislative context is the internal limit contained in s. 718.2(e). The provision instructs courts to consider for all offenders "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community ..., with particular attention to the circumstances of Aboriginal offenders" ....

[61] Parliament has the exclusive authority to legislate in matters of sentencing policy. There is no constitutional right to any particular sentence, including a conditional sentence .... Parliament had no positive obligation to create the conditional sentence regime. This Court stated in *Proulx* that

Parliament could "have easily excluded specific offences" from the conditional sentencing regime when it came into force in 1996 (para. 79). It chose to do so later, and may choose to do so in the future. That is inherent in the role of Parliament, informed by experience and by the wishes of the electorate.... Parliament is not bound by its past policy choices, and sentencing legislation must be assessed on its own to determine whether it is constitutionally compliant, without having regard to the prior legislative scheme (*Alliance*, at para. 33). In the context of equality claims regarding criminal sentencing policy, an area of law that involves multi-faceted and complex policy considerations, the s. 15(1) analysis must be conducted with sensitivity and due regard to the present legislative scheme.

(iii) The Scope of the State's Obligations to Remedy Social Inequalities

[62] Given the questions raised in this appeal, it is important to confirm two principles related to the government's obligations under s. 15(1).

[63] First, s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation.... Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. In *Alliance*, this Court struck down amendments to Quebec's pay equity legislation that "interfere[d] with access to anti-discrimination law" by undermining existing legislative pay equity protections (para. 39). But in so doing, Abella J. expressly *declined* to impose a "freestanding positive obligation on the state to enact benefit schemes to redress social inequalities" (para. 42). The Court further affirmed that s. 15(1) does not bind the legislature to its current policies...

[64] Secondly, this Court in *Alliance* confirmed that, when the state does legislate to address inequality, it can do so *incrementally*:

> The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. [Emphasis added; para. 42.]

[65] Incrementalism is deeply grounded in *Charter* jurisprudence. In *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, the Court accepted that the state may implement reforms "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (p. 772 (emphasis added))..... [Brown and Rowe JJ also cited *inter alia* *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84].

(2) Application to the Impugned Provisions

[66] For the reasons that follow, we are of the view that Ms. Sharma's claim fails at the first step of the s. 15(1) analysis. The impugned provisions do not create or contribute to a disproportionate impact on Ms. Sharma as an Indigenous offender.

...

[71] To recall, the focus at the first step is on a disproportionate impact, not historic or systemic disadvantage. The Court of Appeal addressed the wrong question at step one, focusing on the link between colonial policies and overincarceration of Indigenous peoples. While the situation of the claimant group is relevant at step one (see *Fraser*, at paras. 56-57), it is not sufficient on its own to establish disproportionate impact. Nor is it enough to show that the law restricts an ameliorative program.

[72] To explain this point, we must directly address Ms. Sharma's argument before this Court… that "conditional sentences are inextricably connected with s. 718.2(e), which *does* draw a race-based distinction, by expressly identifying Indigenous offenders as requiring particular consideration in the sentencing process. Any modification to the *Gladue* framework necessarily impacts Indigenous offenders differently than non-Indigenous offenders" … (emphasis in original)). She further submits that "[w]hile the Impugned Provisions apply to both Indigenous and non-Indigenous offenders, the undermining of the *Gladue* framework affects only Indigenous offenders" (para. 63). Our colleague adopts this argument, saying the distinction flows "from the combined effect of ss. 718.2(e) and 742.1" (para. 211).

[73] We accept that there is a link between the *Gladue* framework relating to s. 718.2(e) and the conditional sentence regime. Both were adopted as part of the same legislation aimed at reducing the use of prison as a sanction and expanding the use of restorative justice principles in sentencing …. However, Ms. Sharma's burden at step one was to demonstrate that the specific provisions she challenged created or contributed to a disproportionate impact on Indigenous offenders. While she did not have to prove that the impugned provisions removed access to a conditional sentence *because* she was Indigenous or that the impugned provisions were the *only* or the *dominant* cause of the disproportionate impact, she *did* have to demonstrate a causal connection.

[74] The sentencing judge did not accept that the impugned provisions disproportionately impact Indigenous offenders, for good reason. Dr. Murdocca testified that it was "unknown if recent statutory amendments that have restricted the use of conditional sentences may affect Aboriginal offenders disproportionately compared to non-Aboriginal offenders."… In light of all the evidence, the sentencing judge determined Ms. Sharma failed to satisfy step one. While the Court of Appeal overturned the sentencing judge's conclusion, it failed to identify *any* evidence supporting Ms. Sharma's argument that the impugned provisions created or contributed to a disproportionate impact on Indigenous offenders (see paras. 68-89)….

…

[76] In short, the Court of Appeal erred by removing Ms. Sharma's evidentiary burden at step one. This is inconsistent with the sentencing judge's finding that Ms. Sharma failed to establish a distinction on the basis of a protected ground (para. 257)…. [W]hile Ms. Sharma was not required to adduce a specific type of evidence, she had to demonstrate that the impugned provisions created or contributed to a disproportionate impact. Ms. Sharma, for example, could have presented expert evidence or statistical data showing Indigenous imprisonment disproportionately increased for the specific offences targeted by the impugned provisions, relative to non-Indigenous offenders, after the *SSCA* came into force….

[77] By overturning the sentence, the Court of Appeal not only departed from its proper role but misapplied the jurisprudence of this Court. In light of the sentencing judge's findings, Ms. Sharma's argument before this Court — that the impugned provisions "necessarily impac[t] Indigenous offenders differently" — cannot be accepted.

[78] Ms. Sharma argued that removing the availability of conditional sentences undermined a trial judge's ability to give effect to s. 718.2(e). She alleges that the removal of one "accommodation", the availability of conditional sentences for certain offences, disproportionately impacts Indigenous offenders. We do not accept this argument. It is clear that s. 718.2(e) is still meaningfully operable, as it was given effect in this case. As long as judges retain broad discretion to impose a range of available sentences, we query whether altering a single sentencing provision could undermine s. 718.2(e) in the manner Ms. Sharma suggests.

[79] It is undisputed that the sentencing judge must take account of the particular circumstances of Indigenous offenders, as that is what Parliament has directed in s. 718.2(e). How this is to be done may take various forms and the *Criminal Code* provides judges broad discretion to craft a proportionate sentence, given the offender's degree of responsibility, the gravity of the offence and the specific circumstance of each case .... For instance, sentencing judges may consider other non-carceral options such as suspended sentences and probation. They may also reduce sentences below the typical range.

...

[81] In any event..., it is clear that s. 718.2(e) was given effect in the circumstances of this case. The judge sentenced Ms. Sharma to 18 months' incarceration, taking into account her experience as an Indigenous person under the *Gladue* framework, which was well below the established range for similar offences .... As a reminder, s. 718.2(e) does not guarantee that Indigenous offenders will not receive carceral sentences.

[82] As a final point, although our colleague assures us that "[r]epealing or amending s. 742.1, or even s. 718.2(e), will not automatically contravene s. 15(1)" (para. 244), the logical conclusion of her reasons suggests the contrary. While s. 718.2(e) sets out an important policy, it is a legislative provision, not a constitutional imperative, and it is open to Parliament to amend it, even if to narrow the circumstances in which it applies. Viewed in this light, our colleague's proposition is novel and its implications are profound and far-reaching. Parliament would be prevented from repealing or amending existing ameliorative policies in many cases, unless courts are persuaded that such changes are justified under s. 1. This would amount to a transfer of sentencing policy-making from Parliament to judges. Such an outcome would be contrary to the separation of powers, at odds with decades of our jurisprudence stressing Parliament's latitude over sentencing within constitutional limits, and must be rejected.

[83] Given the above, there is no need to consider step two. Section 15(1) is not infringed.

[Brown and Rowe JJ went on to hold that s 742.1 did not violate s 7 of the *Charter*. Their reasons on this issue are in the supplementary materials for chapter 22, note 5 added at p 1151.

Karakatsanis J wrote the dissenting reasons and began with the following discussion:]

KARAKATSANIS J (Martin, Kasirer and Jamal JJ concurring):

[114] The overrepresentation of Indigenous people in Canada's prisons is a present-day product of this country's colonial past. As Indigenous incarceration rates have climbed, and those of Indigenous women have soared, some have compared Canadian correctional facilities to residential schools (see Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5, *The Legacy* (2015), at p. 219). Like residential schools before it, this overincarceration is an ongoing source of intergenerational harm to families and communities.... And it remains a poignant obstacle to realizing the constitutional imperative of reconciliation.

[115] Sentencing law cannot erase this country's colonial past. Nor can it remove the causes behind an offender's crime. But it is uniquely positioned to ameliorate — or aggravate — the racial inequalities in our criminal justice system. Ensuring that Canadian sentencing provisions are consistent with the liberty and equality guarantees under the *Canadian Charter of Rights and Freedoms* is therefore essential. This case requires us to do so.

[Karakatsanis J first considered Sharma's s 7 argument. Her reasons for finding a violation of s 7 based on overbreadth are in the supplementary materials for chapter 22, note 5 added at p 1151. On s 15, Karakatsanis J cited the following purpose of equality rights from *Andrews*: "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (at para 186, quoting *Andrews* at p 171). She then noted that "[t]he touchstone of that commitment is substantive equality" (at para 187). After setting out the test for s 15(1) from *Fraser*, she stated:]

[204] ... [This] framework is settled law. While changing in form over time, the current iteration has been affirmed five times in the last four years .... Yet under the guise of offering "clarity", my colleagues seek to revise the test. In so doing, they resurrect their rejected arguments in *Alliance* and *Fraser*, lending credence to the concern that equality claimants must, "with each new case, stand ready to defend the exact gains that have been won multiple times in the past" (*Fraser*, at para. 135...).

[205] My colleagues' revisions permeate their reasons. Their thrust is to raise the bars at each step of the test: by renewing focus on causation (at paras. 42-49), which adds nothing to the existing framework and is reminiscent of rejected pre-*Charter* approaches ...; by eschewing the test's language of "created a distinction" for the more ambiguous "created or contributed to a disproportionate impact" (paras. 3, 29, 31, 32(a), 35-36, 40-42, 45-50, 54, 66, 71, 73-74 and 76); by claiming that "[l]eaving the situation of a claimant group unaffected is insufficient to meet the step two requirements" (para. 52), potentially undermining the term "perpetuate" in step two of the test; by importing elements of state justification into step two, requiring courts to consider Parliament's "policy choices" and legislative "goals" (paras. 57-61); by pre-emptively foreclosing the possibility of "general, positive obligation[s] on the state to remedy social inequalities or enact remedial legislation" (para. 63); by asserting, without support, that it is "[not] enough to show that the law restricts an ameliorative program" at step one (para. 71); and by diminishing the role of interveners

(paras. 74-75), critiquing their use of social science and other legislative fact evidence that this Court has regularly relied upon....

[206] My colleagues' revisions are not only unsolicited, unnecessary, and contrary to *stare decisis*; they would dislodge foundational premises of our equality jurisprudence. This is not "clarification"; it is wholesale revision.

[Karakatsanis J went on to apply the test for s 15(1) to the facts. At step 1 she found that:]

[211] ... Removing conditional sentences for some offences has a differential impact on Indigenous offenders because it prevents sentencing judges from fulfilling the *Gladue* framework's substantive equality mandate. This distinction flows not... from the mere existence of historical disadvantage, but from the combined effect of ss. 718.2(e) and 742.1.

...

[226] My colleagues ... adopt the sentencing judge's reasoning that Ms. Sharma had failed to lead sufficient evidence at stage one, and fault the Court of Appeal for failing to "identify *any* evidence" presented by Ms. Sharma at stage one (para. 74 (emphasis in original)) ....

[227] But given the relationship between s. 718.2(e) and ss. 742.1..., the challenged provisions *necessarily* impact Indigenous offenders differently; a distinction arises from the interaction of these provisions, against a backdrop of facts of which courts must take judicial notice (*Ipeelee*, at para. 60). Further evidence is not required because the distinction is plain.

[228] And in any event, neither expert evidence nor evidence of statistical disparity are mandatory in s. 15(1) claims (*Fraser*, at paras. 57 and 67). My colleagues offer no reasons for effectively raising the evidentiary bar of the first step.

[At step 2 of the s 15(1) test, Karakatsanis J found that "By failing to account for the distinct needs and circumstances of Indigenous offenders, the challenged provisions reinforce, perpetuate, and exacerbate the historical disadvantages of Indigenous peoples in sentencing" (at para 231). She continued:]

[234] Those disadvantages are worse still for Indigenous women, many of whom continue to face multiple and compounding forms of discrimination. Policies that have removed children from Indigenous families — from the residential school system and the "Sixties Scoop", to today's overrepresentation of Indigenous children in care — have disproportionately impacted Indigenous mothers, who are typically primary caretakers (National Inquiry into Missing and Murdered Indigenous Women and Girls, at pp. 281-83). Disenfranchisement under the *Indian Act*, R.S.C. 1985, c. I-5, coercive birth control measures like forced sterilization, pervasive stereotypes, and the ongoing epidemic of violence against Indigenous women and girls have been more direct causes of harm to Indigenous women ....

[235] This history follows Indigenous women and shapes their experiences — both as victims and offenders — in the criminal justice system. It helps explain why Indigenous women are imprisoned at a higher rate than any other population; why, behind bars, they are more likely to have traumatic histories, mental health challenges, and self-harming tendencies ...; why they bear the brunt of prisons' most punitive conditions ...; and why they disproportionately face the risk of permanently

losing parental rights .... Pulling the intergenerational cycle forward, their children often fall into the criminal justice system themselves in the so-called "child-welfare-to-prison pipeline" ....

[236] Tracing the lineage of intergenerational trauma makes clear that our criminal justice system is a significant and ongoing source of discrimination against Indigenous peoples. The fact that the challenged provisions did not create the problem is irrelevant (*Alliance*, at para. 32; *Vriend* ... at para. 84; *Fraser*, at para. 71). To blame overrepresentation solely on the pre-existing disadvantages suffered by Indigenous peoples is to ignore the plain reality that incarcerating people is an exercise of state power. And since the state is deeply implicated in the incarceration of Indigenous women through the criminal justice system, it has a constitutional obligation under s. 15(1) of the *Charter* to ensure that its laws do not operate to reinforce, perpetuate, or exacerbate conditions of inequality.

[237] Conditional sentences were never meant to be a catch-all solution. But by impairing the *Gladue* framework, the challenged provisions removed an accommodation capable of ameliorating, to some degree, these historical disadvantages for Ms. Sharma and other Indigenous offenders. And in my view, that reinforces, perpetuates, and exacerbates their historical disadvantage.

[238] First, the impugned provisions logically require sentencing judges to impose more prison sentences than they otherwise would.... For Indigenous offenders whose background conditions make them especially unfit for prison, whose circumstances rest on the cusp of a prison sentence, but for whom a lesser non-custodial sentence would be inappropriate, this only compounds their disadvantage.

[239] Second, ... the failure to accommodate the needs, experiences, and perspectives of Indigenous offenders undermines the effectiveness of the sentence itself (*Ipeelee*, at para. 74).

[The dissent concluded by noting the "floodgates argument" of the Crown and majority that dismissing the appeal "would have far-reaching repercussions for our constitutional landscape and criminal justice system." They responded that their reasons reinforce "the rule of law by giving force to s. 15(1) of the *Charter*" (at para 243) and noted that Parliament retains other options for amending sentencing laws and criminal law more broadly (at paras 244-248). Under s 1, Karakatsanis J found that the state had not justified the violation of s 7 or s 15(1)].

Notes and Questions for Discussion

1. Note 1 following *Eldridge* describes Dianne Pothier's typology of adverse effects discrimination ("categorical exclusion" and "disproportionate impact"). Another typology is presented by Melina Buckley and Fiona Sampson, "Relief in the Supreme Court of Canada Appeal of *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*" (2005) 17:2 CJWL 473, who describe adverse effects cases as either "disparate impact" or "failure to take difference into account." Using these typologies, how did the majority and dissent characterize the type(s) of adverse effects that were at play in *Sharma?* How did this affect the evidence they required and their willingness to consider positive government obligations under s 15? Which approach do you find more persuasive? Does either approach adequately capture the place of Indigenous laws in our legal order and the imperatives of reconciliation?

2. The *Sharma* majority raised three issues with the Court's approach to s 15(1) that they said required clarification (see para 32). However, the dissent listed seven ways in which the majority's "clarifications" amounted to a "wholesale revision" (at paras 205-206). How much of the "clarification" or "revision" is (or should be) confined to cases of adverse effects discrimination?

3. One of the points of contention in *Sharma* flows from the majority's statements that "leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1)" (para 40) and that "a negative impact or worsened situation" on the part of the claimant group is required (at para 52). According to the dissent, this statement "potentially undermine[s] the term "perpetuate" in step two of the test" (at para 205). For a discussion of the different meanings of "exacerbate", "reinforce" and "perpetuate", see Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)*" (2021) 30:2 Const Forum Const 1 at 8-9 (arguing in favour of *Fraser*'s recognition that a law that "perpetuates" disadvantage (i.e. causes it to continue) is sufficient under s 15(1)).

4. The dissent expressed concerns with the majority's consideration of "Parliament's 'policy choices' and legislative 'goals'", noting this approach imports elements of s 1 into s 15(1) (at para 205). However, Karakatsanis J also considered the legislative context surrounding s 742.1, including its connection to the ameliorative purpose of s 718.2(e) of the *Criminal Code*. Should the consideration of legislative context outside the s 1 analysis be restricted to cases challenging the repeal of ameliorative legislation? How would this affect a case like *R v C.P.*, discussed at para 58 of *Sharma* and in Note 2 following *Fraser*?

5. The majority and dissent in *Sharma* accepted that the relevant distinction, if any, was based on the ground of "race" without analysis of the suitability of this ground for Indigenous peoples. Is it less problematic to accept race as the appropriate ground in a case like *Sharma,* where the issue was the adverse impact of the law, than it was to accept it without analysis in a case like *Kapp,* which involved a constitutionally-recognized fishing priority for three First Nations? See Note 7 below and Section II.C for further discussion of grounds, race, and Indigeneity.

6. In November of 2022, after *Sharma* was released, Parliament passed Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*. Bill C-5 amends s 742.1 of the *Criminal Code* such that conditional sentences are now available where a court imposes a sentence of imprisonment of less than two years, unless the offence in question is attempt to commit murder, torture, or genocide. Bill C-5 also repeals certain mandatory minimum penalties and establishes diversion measures for simple drug possession offences. This Bill will have no impact on Ms. Sharma, as her 18-month sentence has already been served.

7. The outcome of *Sharma* means that the Supreme Court has still not found in favour of a claim of systemic race-based discrimination under the *Charter*, apart from the so-called "reverse discrimination" in *Kapp* (see section II.C). For further discussion see Note 7 below. See also Sonia Lawrence, "'That Admittedly Unattainable Ideal': Adverse Impact and Race under Section 15" (2017) Law Society of Upper Canada, Special Lectures 2017: *Canada at 150: The Charter and the Constitution* 547 at 548; Joshua Sealy-Harrington, "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada", in Emmett Macfarlane and Kate Puddister, eds, *The Constitution Act, 1982: 40 Years Later* (UBC Press, 2022).

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In *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII) [“*Dickson*”] the Supreme Court of Canada considered a requirement by the Vuntut Gwitchin First Nation (“VGFN”) that its elected leaders reside on the settlement land of the First Nation or to relocate there within 14 days of their election. Cindy Dickson, a citizen of the VGFN, challenged this provision under s. 15(1) of the *Charter*.

The majority found that Ms. Dickson’s s. 15 claim was barred by s. 25 of the *Charter*. The majority used this opportunity to set out a comprehensive framework for the application of s. 25. The majority found that Ms. Dickson’s s. 15 rights were in irreconcilable conflict “with Aboriginal rights, treaty rights, or “other rights or freedoms” that are shown to protect Indigenous difference” (para 5) protected by s. 25.

Justices Martin and O’Bonsawin disagreed with the majority’s application of s. 25 and raised concerns that the majority’s reasons would lead to *Charter*-free zones in self-governing Indigenous communities. (para 236) Justice Rowe also wrote a dissent, not reproduced here, in which he argued that the *Charter* does not apply to the VGFN.

In reading this decision, consider the different approaches of the majority and the dissent to the issue of claims alleging breaches of the *Charter* made by Indigenous Canadians against Indigenous governments. Which approach do you agree with, and why? What do you think is the correct interpretation of s. 25 of the *Charter*?

***Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII)**

The judgment of Wagner C.J. and Côté, Kasirer and Jamal JJ. was delivered by

Kasirer and Jamal JJ. —

I. Overview

[1] As a self-governing Indigenous community in the Yukon, the Vuntut Gwitchin First Nation (or the VGFN) has its own Constitution that provides for certain rights and freedoms for its citizens, rules for the organization of its government, as well as electoral rules and standards. At the heart of this appeal is a requirement in the VGFN Constitution that the elected Chief and Councillors reside on the settlement land of the First Nation, or relocate there within 14 days of the election. The VGFN’s seat of government is based in Old Crow, a village located about 800 kilometres north of Whitehorse in the traditional territory of the Vuntut Gwitchin and constituting the VGFN’s main community in its settlement land.

[2] Cindy Dickson, a citizen of the VGFN and of Canada, lives in Whitehorse and is constrained, for personal reasons, to stay there. She wishes to stand for election as a VGFN Councillor and says the residency requirement discriminates against her as a non-resident of the settlement land. She brought a petition in the Supreme Court of Yukon arguing that the requirement violates both her right to equality guaranteed under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and her right to equality guaranteed by Article IV of the VGFN Constitution (in this Court, Ms. Dickson did not pursue her original challenge based on the equality guarantee in the VGFN Constitution).
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[3] Here the debate has focused on the application of the *Charter* to the VGFN, the ambit of Ms. Dickson's equality right under s. 15(1), and the proper interpretation of s. 25 of the *Charter*. The VGFN says the *Charter* does not apply to it as a self-governing First Nation. Alternatively, should the *Charter* apply, the residency requirement does not violate Ms. Dickson's right to equality and, even if it did, the requirement is nevertheless valid as it is "shielded" by s. 25 of the *Charter*. Specifically, the VGFN submits that the residency requirement protects collective minority rights relating to its traditional Indigenous modes of government and leadership. As a collective Indigenous right, the provision of the VGFN Constitution cannot be abrogated or derogated from by Ms. Dickson's individual *Charter* right.

[4] This appeal raises two novel issues .... First, it invites the Court to consider whether, pursuant to s. 32(1) of the *Charter*, the VGFN is a government by nature or whether it is exercising a governmental activity so that Ms. Dickson's individual *Charter* right would apply to its residency requirement. Second, if the *Charter* does apply to the VGFN, the Court must determine whether s. 25 can be invoked by the VGFN to shield the residency requirement from Ms. Dickson's *Charter* challenge. Both the Supreme Court of Yukon and the Court of Appeal held that the *Charter* applied and that if Ms. Dickson's s. 15(1) equality right was infringed, the residency requirement was shielded by s. 25. Ms. Dickson appealed on the question of the constitutional validity of the residency requirement, and the VGFN cross-appealed on the question of the application of the *Charter*.

[5] We would dismiss Ms. Dickson's appeal. The *Charter* applies to the VGFN and to its citizens like Ms. Dickson, principally, but not only, because the VGFN is a government by nature. The circumstances here show that for Indigenous communities, s. 32(1) and s. 25 are intimately connected. It is true that the application of individual *Charter* rights to a self-governing Indigenous community may be thought to inhibit the pursuit of rules designed to protect minority Indigenous rights and interests. But s. 25, by providing protection for collective Indigenous interests as a social and constitutional good for all Canadians, acts as a counterweight. Properly understood, s. 25 allows for the assertion of individual *Charter* rights except where they conflict with Aboriginal rights, treaty rights, or "other rights or freedoms" that are shown to protect Indigenous difference.

[6] While Ms. Dickson has succeeded in showing a *prima facie* infringement of her right to equality ... the VGFN has satisfied us that s. 25 protects its residency requirement from abrogation or derogation by her *Charter* right. Tied to ancient practices of government that connect leadership of the VGFN community to the settlement land, the residency requirement protects Indigenous difference and, pursuant to s. 25, cannot be abrogated or derogated from by Ms. Dickson's individual *Charter* right with which it is in irreconcilable conflict.

[....]

B. *Ms. Dickson's Constitutional Challenge*

[10] Ms. Dickson wishes to stand for election as a VGFN Councillor — a paid full-time position. ....

[11] The VGFN says the residency requirement reflects the VGFN's longstanding practice that its Chief and Councillors live on its traditional territory. .... From time immemorial, all VGFN

Chiefs and Councillors have lived on the VGFN's traditional territory. In the last 30 years, they have always lived in Old Crow. Under funding arrangements with the federal and Yukon governments, most programs and services administered by the VGFN government are for VGFN citizens living on the VGFN's settlement land.

[....]

V. Issues

...

[The majority's analysis of the principles governing the application of the *Charter*, which determined that the *Charter* does apply to the VGFN's residency requirement is omitted in this excerpt.]

B. *Sections 15, 25, and 1 of the Charter*

(1) Overview

[102] Section 25 of the *Charter* is central to evaluating Ms. Dickson's claim .... The VGFN agrees with the courts below that s. 25 operates as a shield to protect the residency requirement from challenge under the s. 15(1) *Charter* right. Ms. Dickson answers that s. 25 is not a bar to her claim. ....

[....]

[104] Over the life of the *Charter*, this Court has had relatively few occasions to consider the meaning of s. 25. ... This case involves a dispute between a First Nation and one of its own members, and invites the Court to interpret s. 25 in connection with a residency requirement that is itself part of the constitutional law of a self-governing First Nation.

[105] *Corbiere* did consider the constitutionality of a voting requirement that might be compared to the rule contested by Ms. Dickson, but the requirement in that case was under the *Indian Act* rather than an Indigenous constitution. *Kapp* ... was brought by a non-Indigenous person and did not concern an Indigenous law. And while *Taypotat* (SCC) involved a challenge under s. 15(1) of the *Charter* to a First Nation's rule on electoral qualifications brought by an Indigenous community member, the appeal was decided without addressing s. 25. Further complicating the relationship between the VGFN's collective right in s. 25 and the individual right invoked by Ms. Dickson is the reality that, ultimately, they are both rooted in Indigeneity (see generally Swiffen, at p. 34).

[106] ... The Court's existing jurisprudence thus provides only a modest guide for deciding this appeal. This invites caution. ... As a result, our reasons focus on the task at hand: determining how s. 25 applies to the residency requirement in the constitution of a self-governing First Nation challenged by one of its members under s. 15(1) of the *Charter*.

[107] The purpose of s. 25 is to uphold certain collective rights and freedoms of Indigenous peoples when those collective rights conflict with an individual's *Charter* rights. When an individual's *Charter* right would abrogate or derogate from an Aboriginal, treaty, or other right, s. 25

requires the collective Indigenous right to take precedence, even if the *Charter* claimant is a member of the First Nation concerned.

[108] When Aboriginal, treaty, or "other rights or freedoms" specified in s. 25 are engaged, the limits on a competing individual *Charter* right need not be justified as would ordinarily be the case under s. 1 of the *Charter*. Unlike s. 1, s. 25 reflects a constitutional choice to protect the collective rights and freedoms associated with Indigenous peoples in Canada as a distinct minority. "[R]espect for minority rights" was identified by the Court in the *Secession Reference*, at para. 49, as an underlying constitutional principle that infuses the Constitution as a whole. The protection of linguistic and religious minorities are examples of this underlying principle, as is the protection of the rights of Indigenous peoples as a distinctive minority. This Court stated that, in keeping with a long tradition of respect for minorities, s. 35 of the *Constitution Act, 1982* provides protection for existing Aboriginal and treaty rights, while s. 25 similarly set forth a "non-derogation clause in favour of the rights of [A]boriginal peoples" (*Secession Reference*, at para. 82). The Court allied the protection of s. 25 with the "strength [of the] promise" to the Indigenous peoples of Canada in s. 35 that it had explained in *Sparrow*, at p. 1083. That promise "recognized not only the ancient occupation of land by [A]boriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments" (*Secession Reference*, at para. 82).

[109] Consonant with the principle of the protection of Indigenous peoples as a distinct minority, the "other rights or freedoms" in s. 25 are limited to those that protect Indigenous difference. All the collective Indigenous rights and freedoms referred to in s. 25 must be upheld, even when they conflict with individual *Charter* rights, in order to ensure respect for minority rights as a constitutional value.

[110] The protection of Aboriginal, treaty, and other rights in s. 25 is not, however, absolute. Priority is given to collective Indigenous rights only when they conflict with an individual's *Charter* right. In any given case, the individual and collective rights referred to in s. 25 may not actually be in conflict. Some individual rights are part of Indigenous law and coexist with collective interests, as both the *UNDRIP Act* and the VGFN Constitution itself make plain (see Metallic, at p. 15; G. Otis, "Élection, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada" (2004), 49 *McGill L.J.* 393, at pp. 409-11). In addition, s. 25 would not apply if the individual *Charter* right invoked conflicted with an Indigenous right that does not rest on Indigenous difference. In such circumstances, any limit on the individual right must be justified under s. 1 of the *Charter*. And like s. 35 rights, the primacy afforded to the collective rights under s. 25 is subject to the equality guarantee for "male and female persons" under s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*.

[111] In the reasons that follow, we seek to develop a framework to apply s. 25 to the circumstances of this case. The parties and interveners have described s. 25 as either a "shield" or an "interpretative prism" (or "interpretive prism"), but in our respectful view, neither term offers a full account of the provision. Section 25 mandates that when a *Charter* right abrogates or derogates from an Aboriginal, treaty, or other right belonging to the Aboriginal peoples of Canada, it can "shield" collective Indigenous rights from certain applications of the *Charter*. But to determine whether the individual *Charter* right conflicts with the collective Indigenous right or freedom, s. 25

directs that the individual *Charter* right must first be "construed". Similarly, determining whether the residency requirement in the VGFN Constitution is an "other righ[t] or freedo[m] that pertain[s] to the aboriginal peoples of Canada" under s. 25 requires an exercise of interpretation.

[....]

[The majority's reasons on the interpretation and operation of s. 25 are omitted.]

(5) Summary of the Section 25 Framework

[178] The analysis above suggests a four-step framework under s. 25.

[179] First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s. 25.

[180] Second, the party invoking s. 25 — typically the party relying on a collective minority interest — must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s. 25. That party bears the burden of demonstrating that the right for which it claims s. 25 protection is an Aboriginal, treaty, or other right. If the right at issue is an "other" right, then the party defending against the *Charter* claim must demonstrate the existence of the asserted right and the fact that the right protects or recognizes Indigenous difference.

[181] Third, the party invoking s. 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty, or other right or its exercise. If the rights are irreconcilably in conflict, s. 25 will act as a shield to protect Indigenous difference.

[182] Fourth, courts must consider whether there are any applicable limits to the collective interest relied on. When s. 25's protections apply, for instance, the collective right may yield to limits imposed by s. 28 of the *Charter* or s. 35(4) of the *Constitution Act, 1982*.

[183] Finally, where s. 25 is found not to apply, the party defending against the *Charter* claim may show that the impugned action is justified under s. 1 of the *Charter*.

(6) Application of Sections 15(1) and 25 to This Case

[184] Applying the above analysis, we conclude that Ms. Dickson's s. 15(1) *Charter* right was *prima facie* breached by the residency requirement, which created a distinction based on non-resident status in a self-governing Indigenous community and reinforced and exacerbated her existing disadvantage as a non-resident member of the VGFN.

[185] Second, the VGFN has established that the residency requirement in the VGFN Constitution is an exercise of an Aboriginal, treaty, or other right under s. 25. It is an exercise of an "other right", namely, the right to set criteria for membership in its governing body — a right that protects Indigenous difference.

[186] Third, the VGFN has established that, properly interpreted, Ms. Dickson's s. 15(1) right and its right within the scope of s. 25 are irreconcilably in conflict, such that giving effect to Ms. Dickson's equality right would abrogate or derogate from the s. 25 identified right. This engages s. 25 as a protective shield, insulating the collective right from the individual *Charter* claim.

[187] Finally, we find that there are no other applicable limits to the application of s. 25 in this case.

(a) *Section 15(1) of the Charter Is Prima Facie Breached*

(i) What Constitutes a *Prima Facie* Section 15(1) Breach?

...

[189] The VGFN and some interveners advocated against undertaking a complete s. 15(1) analysis before considering s. 25. The argument is that making out a distinction based on enumerated or analogous grounds furnishes courts with sufficient information to assess the extent of a potential conflict between the *Charter* right and the relevant Aboriginal, treaty, or other right, while still presenting a low threshold for considering the impact of s. 25. Full consideration of the s. 15(1) claim would thus be logically unnecessary and would also place needless strain on Indigenous communities' litigation resources — as well as the resources of courts and *Charter* claimants — and subject Indigenous legal orders to unnecessary scrutiny against non-Indigenous standards (see R.F., at paras. 125-26; I.F., A.G. Canada, at para. 41; I.F., Carcross/Tagish First Nation, at para. 30; see also Wilkins, at pp. 115-17).

[190] In our view, however, limiting the debate to the first branch of the s. 15(1) test does not provide courts with sufficient information to interpret the *Charter* right before determining whether it abrogates or derogates from the right within the scope of s. 25. Enumerated or analogous grounds ... do not provide information about the particular claim at issue. As this Court noted in *Corbiere*, "distinctions made on analogous grounds may well not be discriminatory" (para. 8). Whether or not the ground is used in a discriminatory manner is fact-specific and is answered by the second stage of the s. 15(1) analysis. To understand the distinction's effect on the claimant, the court needs to know whether the distinction reinforced, perpetuated, or exacerbated the claimant's existing disadvantage.

(ii) Ms. Dickson Has Demonstrated a *Prima Facie* Section 15(1) Breach

1. *Aboriginality-Residence Is Insufficient as an Analogous Ground*

[191] With respect to the first step of the s. 15(1) test, Ms. Dickson argues that the residency requirement creates a distinction on the basis of the analogous ground of "Aboriginality-residence", relying on this Court's decision in *Corbiere*. The VGFN distinguishes *Corbiere* on the basis that the case was decided in relation to off-reserve band membership under the *Indian Act*. It submits that any distinction drawn by the residency requirement here is not based on an analogous ground.

[192] We agree that *Corbiere* is not fully dispositive of the question. *Corbiere* dealt with a s. 15(1) claim based on a residency requirement under the *Indian Act* that required band members to reside on reserve to vote in band elections. Contrary to the provision at issue in *Corbiere*, the residency requirement in this case is part of the constitution of a self-governing First Nation. As the VGFN observes, the residency requirement "is not imposed by the Crown, but by VGFN Citizens freely and democratically exercising their inherent right to self-government" (R.F., at para. 143).

Since Aboriginality-residence, as set out in *Corbiere*, does not take this into account, we will not rely on it as an analogous ground in this case.

2. *Non-Resident Status in a Self-Governing Indigenous Community Is an Analogous Ground*

[193] The governing principles for identifying analogous grounds relied on by the majority in *Corbiere* remain useful here. Enumerated and analogous grounds serve to screen out those claims "having nothing to do with substantive equality and hel[p] keep the focus on equality for groups that are disadvantaged in the larger social and economic context" (L. Smith and W. Black, "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301, at p. 336; see also *Taypotat* (SCC), at para. 19). The common ground shared by enumerated and analogous grounds in s. 15(1) is the "immutability" of personal characteristics, including those that are "constructively immutable", like religion or citizenship. Such grounds are "changeable only at unacceptable cost to personal identity" such that "the government has no legitimate interest in expecting us to change [them in order] to receive equal treatment under the law" (*Corbiere*, at para. 13). In *Corbiere*, McLachlin and Bastarache JJ. recognized an Aboriginal person's off-reserve residence as an analogous ground because this characteristic is constructively immutable. It is essential to a band member's personal identity and changeable only at great personal cost.

[194] Ms. Dickson submits that "Indigenous persons living in urban areas or otherwise away from their communities are historically disadvantaged as a result of Canada's colonial policies of assimilation and displacement, directed at all Indigenous peoples and maintained for generations" (R.F. on cross-appeal, at para. 52). She submits that "the historical disadvantages, prejudices and socio-economic conditions experienced by Indigenous persons living away from their communities [were not] automatically extinguish[ed] when their nations entered self-government agreements" (para. 45). Ms. Dickson argues that to exclude the non-resident VGFN members from s. 15(1) protection on the basis that they are no longer subject to the *Indian Act* would "fail to recognize the long-lasting harm of Canada's policies" (para. 52).

[195] The VGFN, on the other hand, submits that its residency requirement is not based on any enumerated or analogous grounds (R.F., at para. 51). The VGFN submits, correctly on this point, that new analogous grounds are not lightly identified (para. 145, citing *Fraser*, at paras. 114-23). ...The VGFN submits that the distinction at play in the residency requirement is not inherently suspect as it "does not subject a group subject to historic disadvantage to differential treatment, or bear the kind of stigma reflected in *Corbiere*" (para. 147).

[196] We disagree with the VGFN's position. While *Corbiere* is not directly applicable in the case of an impugned provision enacted by a self-governing First Nation, this Court's discussion of disadvantage faced by non-resident Indigenous people was not constrained to the context of *Indian Act* provisions and provides helpful guidance. [The majority reiterated the nature of the disadvantage of this characteristic, discussed in *Corbiere*.] ....

[197] Intervening on behalf of Indigenous people living away from their traditional lands, the Congress of Aboriginal Peoples submits that discrimination faced by off-reserve or remote members is a direct legacy of "colonial and assimilationist policies and practices", including the residential school system and the unequal rights afforded to individuals on- and off-reserve under the *Indian Act* (I.F., at para. 9; see also para. 10). This history has resulted in "a large number of off-

reserve status Indians who are nominally members of First Nations hav[ing] little or no connection to the reserves or to 'home' communities" (para. 12). Yet these individuals remain "subject to the decisions of First Nations governments that control access to benefits, opportunities, and services for them, but do not always prioritize their interests" (para. 12).

[198] We conclude that recasting Ms. Dickson's potential analogous ground from "Aboriginality-residence" to "non-resident status in a self-governing Indigenous community" qualifies as an analogous ground under *Corbiere*. The historical and continuing disadvantage faced by Indigenous people living away from their traditional lands means that distinctions based on "non-resident status in a self-governing Indigenous community" will serve as "constant markers of suspect decision making or potential discrimination" (*Corbiere*, at para. 8).

3. *The Residency Requirement Reinforces, Perpetuates, or Exacerbates Disadvantage*

[199] At the second stage of the s. 15(1) analysis, the inquiry is whether the distinction drawn on enumerated or analogous grounds reinforces, perpetuates, or exacerbates disadvantage (*Taypotat* (SCC), at paras. 19-20). Does the residency requirement, which draws a distinction on the basis of non-resident status in a self-governing First Nation, reinforce, perpetuate, or exacerbate Ms. Dickson's disadvantage as a non-resident VGFN citizen?

[200] Ms. Dickson argues that … the residency requirement reinforces a stereotype "that non-resident citizens are less knowledgeable of, and less interested in preserving, their nation's Indigenous culture" (A.F., at para. 14). The VGFN counters that "the [r]esidency [r]equirement does not contribute to pre-existing disadvantage experienced by [Ms. Dickson] as part of a group, and does not impose marginalization, stigma and stereotyping, which are the target harms addressed by s. 15" (R.F., at para. 153). Acknowledging that Indigenous people, including Ms. Dickson, have been and remain subject to discrimination in Canadian society, the VGFN submits that there is no evidence of historical disadvantage experienced by VGFN citizens who live away from the traditional territory (paras. 154-55). The VGFN points to the finding by the trial judge that VGFN citizens who reside in urban settings like Whitehorse have access to more opportunities and resources (para. 155; trial reasons, at paras. 151 and 156).

[201] We cannot accept the VGFN's submissions on this point. As the Court of Appeal noted, the trial judge's conclusion that Ms. Dickson had been advantaged by living in Whitehorse stands contrary to *Corbiere*, and the evidence in that case, detailed above, remains applicable to non-resident citizens of Indigenous communities. The Royal Commission on Aboriginal Peoples observed perceptions of incompatibility between Indigenous cultures and urban life, leading to the "assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed — that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant" (RCAP Final Report, vol. 4, *Perspectives and Realities* (1996), at p. 519). Similarly, the 2019 report issued by the National Inquiry into Missing and Murdered Indigenous Women and Girls found that, because of past government conduct, Indigenous women in urban areas have found themselves "alienated from their home communities, sometimes as single parents and sole providers for their children" and are "often hundreds of kilometres from their homes and social support systems, navigating racist barriers deeply embedded in urban services and experiences" (*Reclaiming Power*

and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol. 1a (2019), at p. 273).

[202] It is helpful to recall Abella J.'s explanation in *Taypotat* of the relevance of discriminatory disadvantage rooted in arbitrariness for the second branch of s. 15(1). A court should consider "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (para. 20).

[203] Here, Ms. Dickson is being denied, or at least significantly deterred from, the exercise of a fundamental democratic right — the right to run for Council — because of her non-resident status. This distinction on the basis of the analogous ground of non-resident status in a self-governing Indigenous community reinforces, perpetuates, and exacerbates her disadvantage as a non-resident. Not allowing her to participate in the electoral politics of her community further distances her from that community, making it difficult "to preserve her identity as a VGFN citizen" (R.F. on cross-appeal, at para. 65). We conclude that Ms. Dickson has made out both branches of a *prima facie* s. 15(1) breach.

(b) *The Residency Requirement Falls Within the Scope of Section 25 as an "Other" Right*

[204] The adoption of the residency requirement is an exercise of an "other" right under s. 25. The VGFN has a right to restrict the membership and composition of its governing bodies. The VGFN's exercise of this right through the residency requirement protects interests associated with Indigenous difference. Whether or not the residency requirement might also be understood as an exercise of an inherent right to self-government, we conclude that it is an "other" right protected under s. 25.

[....]

[209] For a party seeking s. 25 protection to show that a collective Indigenous right, or its exercise, constitutes an "other" right or freedom, it must demonstrate the existence of the right and also show that the right, or its exercise, protects interests associated with Indigenous difference. In our view, both requirements are met here:

> (i) The VGFN has a statutory right to provide for the membership and composition of its governing bodies.
>
> (ii) There is no dispute that the VGFN has the right to enact a constitution providing for the membership and composition of its governing bodies. As we have seen, the Final Agreement, a s. 35 treaty, provides that negotiations regarding First Nation constitutions may include the composition, structure, and powers of the Yukon First Nation government institutions, as well as membership and election procedures (s. 24.5.1 generally, and see especially ss. 24.5.1.1, 24.5.1.2 and 24.5.1.3). The Self-Government Agreement and the federal *Yukon First Nations Self-Government Act* include similar language requiring First Nations like the VGFN to address such matters in their constitution ... It would be impossible to provide for a governing body's membership without setting out the parameters of such membership. The VGFN therefore has a right to restrict the membership

of its governing body. As a result, we turn to the question of whether this right, or its exercise, protects or recognizes Indigenous difference.

(c) *The Residency Requirement Protects and Recognizes Interests Associated With Indigenous Difference*

[210] As the Court of Appeal observed, the right to impose residency-based restrictions on the membership of its governing bodies enables Vuntut Gwitchin society to preserve the distinctive emphasis it places on "its leaders' connection to the land" (para. 147). This is plainly a foundation for the connection between Indigenous difference and the residency requirement in the VGFN Constitution.

[.....]

[216] The inquiry at this stage is whether the residency requirement protects Indigenous difference, such that it should be protected from abrogation or derogation by Ms. Dickson's s. 15(1) *Charter* right. We have considered Ms. Dickson's arguments that the residency requirement works to erode Indigenous difference by making non-resident citizens feel like "less valuable" members of the community and distancing them from the community's governance structure, on the one hand, and that the requirement is not based on traditional practices, on the other. However, we cannot accept Ms. Dickson's arguments that there is no evidence that the residency of the Councillors is "demonstrative of their knowledge of the land, or their interest in the land" or that the requirement is based on modern ideas of democracy (para. 83).

[217] In light of the evidence and the factual findings at trial, we are satisfied that the residency requirement *is* an exercise of a right that protects interests associated with Indigenous difference. Requiring VGFN leaders to reside on settlement land helps preserve the leaders' connection to the land, which is deeply rooted in the VGFN's distinctive culture and governance practices. ....

[218] Finally, we agree with both courts below that the residency requirement is of a "constitutional character" in a substantive, rather than formal, sense (trial reasons, at para. 207; C.A. reasons, at para. 147). The question of whether a "constitutional character" will always be required for s. 25 protection need not be decided: here it is clear that the residency requirement has a significant constitutional dimension. Beyond the mere fact that the residency requirement is part of the VGFN Constitution, it is an aspect of the First Nation's law that preserves and enshrines an important dimension of VGFN leadership traditions and practices, and VGFN leaders' connection to the land. We particularly note the Court of Appeal's conclusion that the residency requirement "is clearly intended to reflect and promote the VGFN's particular traditions and customs relating to governance and leadership — a matter of fundamental importance to a small first nation in a vast and remote location" (para. 147). On any reasonable understanding of what it means for a right or its exercise to have a "constitutional character", the residency requirement meets this standard.

(d) *The VGFN Has Established That the Conflict Between the Two Rights Is Irreconcilable*

[219] .... We conclude that the VGFN has demonstrated that the conflict between the two rights is irreconcilable and that, as a result, s. 25 can be invoked to protect the VGFN residency requirement.

...

[221] With respect to the content of Ms. Dickson's s. 15(1) right, she has made out a *prima facie* case as a result of the distinction drawn on the basis of the analogous ground of non-resident status in a self-governing Indigenous community. She is unable to hold a position on the VGFN Council because she lives away from the settlement land. This distinction on the basis of her non-resident status reinforces and exacerbates the historical and continuing disadvantage faced by Indigenous people living away from their traditional lands.

[222] Turning to the content of the "other" right: at its core, the residency requirement protects and recognizes Indigenous difference by preserving the connection between the members of VGFN leadership and VGFN lands. The other ways the residency requirement protects these interests, such as promoting the VGFN's ability to resist the pull of outside influences, are bound up in this connection.

[223] Ms. Dickson argues that the VGFN could have adopted measures that would "giv[e] effect to both the individual democratic rights at stake, and VGFN's collective rights to govern and set eligibility criteria for their elected leaders" (A.F., at para. 13). For example, at the 2019 General Assembly, Ms. Dickson proposed that a single Councillor be selected from the VGFN citizens living in Whitehorse (para. 119). Ms. Dickson presents this alternative in the context of her argument on minimal impairment under s. 1 of the *Charter*. However, her suggestion that this alternative would give effect to both her individual *Charter* right and the VGFN's right warrants consideration under s. 25, as it is essentially an argument that the two rights are, in fact, reconcilable.

[224] The VGFN points to the Court of Appeal's holding that "to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own particular values and traditions *and* in accordance with the 'self-government' arrangements entered into in 1993 with Canada and Yukon" (R.F., at para. 122, quoting C.A. reasons, at para. 149 (emphasis in original)).

[225] We agree with the Court of Appeal. Permitting one Councillor to reside in Whitehorse would undermine, in a non-incidental way, the VGFN's right to decide on the membership of its governing bodies. ... The Court of Appeal cited evidence from the Executive Director of the VGFN that Ms. Dickson's initial proposal to eliminate the residency requirement was not supported because it conflicted "with the widely held view that Vuntut Gwitchin self-government and the protection of our culture is critically linked to the seat of our government being in Old Crow" (para. 30 (emphasis deleted); A.R., vol. VIII, at p. 158). In our view, for this Court to allow one of the four Councillors to reside in Whitehorse would unacceptably diminish this connection.

[226] As a result, we cannot accept that the effects of such a change to the composition of the VGFN Council on the interests that the residency requirement advances would be merely incidental. To borrow the words of Professor Macklem, giving effect to Ms. Dickson's *Charter* right in such a manner would pose "a real risk to the continued vitality of [I]ndigenous difference" (p. 232).

Giving effect to Ms. Dickson's s. 15(1) right would abrogate or derogate from an "other" right that belongs to the VGFN. The two rights are, therefore, irreconcilably in conflict.

(e) *No Other Limits Apply*

[227] While s. 25 protections may be subject to other limits, including those imposed in relation to s. 28 of the *Charter* and s. 35(4) of the *Constitution Act, 1982*, no such restrictions are relevant here. The Court of Appeal found that s. 25's protections extended to the entire residency requirement, including the 14-day relocation rule. Before this Court, Ms. Dickson has not sought *Charter* relief regarding the 14-day relocation rule (A.R., vol. I, at pp. 209-10) or made arguments on severance. Given the burdens resting on *Charter* claimants under s. 25, we would not limit s. 25's protection in relation to that rule. Finally, because s. 25 applies to the residency requirement, the VGFN need not justify the residency requirement under s. 1 of the *Charter*.

[228] We conclude that s. 25 operates as a shield to protect the residency requirement from Ms. Dickson's s. 15(1) claim.

...

[230] As for Ms. Dickson's equality claim under Article IV of the VGFN Constitution, which was pleaded in the alternative before the Supreme Court of Yukon, we take due note of Newbury J.A.'s observation in the Court of Appeal reasons that, having pursued her claim under the *Charter*, Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution (par. 157). Since the application of Article IV was not addressed in this Court, we refrain from further comment on this issue.

....

[As seen in the brief excerpt below, Justices Martin and O'Bonsawin disagreed with the majority's interpretation of s. 25. Do you think the concern of Justices Martin and O'Bonsawin that the majority's interpretation would result in *Charter*-free zones in Indigenous communities is well-founded considering the safeguards identified by the majority?]

The following are the reasons delivered by

Martin and O'Bonsawin JJ. —

[....]

[235] The inclusion of s. 25 in the *Charter*, which stipulates that individual *Charter* rights "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", was motivated by a specific concern about Indigenous difference and the distinct rights Indigenous peoples possess as "aboriginal peoples of Canada". Section 25 is a unique provision with a particular purpose, operating as an important interpretive aid to help protect these special collective rights held by Indigenous peoples from abrogation or derogation. Section 25 primarily protects against non-Indigenous people making claims that would have the effect of taking away from Indigenous peoples what is rightly theirs precisely because they are Indigenous peoples.

[236] We do not accept the broader proposition that s. 25 shields the actions of a self-governing Indigenous nation from *Charter* claims brought by members of that community. To interpret s. 25 in such a non-purposive manner would lead to the far-reaching result of creating and affirming *Charter*-free zones, with the consequence that minorities within Indigenous communities would not be protected from the actions of their own governments. All Canadians, including Indigenous people, need constitutional tools to hold their governments accountable for breaches of their entrenched rights and freedoms. It is against the purposes of the *Charter* and s. 25, as well as being profoundly inequitable, to deny members of self-governing Indigenous nations similar rights, remedies and recourse.

[237] We therefore apply the *Charter*, and the claimed s. 15(1) equality right, to the impugned residency requirement. We conclude that Ms. Dickson's s. 15(1) *Charter* claim must succeed. The residency requirement draws a discriminatory distinction between VGFN citizens that live on the settlement land and those that do not. The analogous ground of "Aboriginality-residence" applies in this context. We are not satisfied that the residency requirement falls within the ambit of s. 25 as the requirement is directed at the internal regulation of the VGFN and is not aimed at recognizing the special status of Indigenous collectives within the broader Canadian state. Even under a contextual and culturally sensitive approach to applying s. 1 of the *Charter* in this case, one grounded in and respectful of Indigenous difference, the residency requirement is not minimally impairing and therefore not demonstrably justified in a free and democratic society.

Chapter 24: Language Rights

Language Rights Supplement

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 (CanLII), [2020] 1 SCR 678 ["*Conseil scolaire francophone*"] the Supreme Court of Canada considered whether the s. 23 rights of French speaking parents had been violated in British Columbia. The s. 23 rights holders argued that their schools had received insufficient funding and that they were entitled to additional or improved schools in several communities.

In his majority reasons, Chief Justice Wagner expressed concern over the fact that it had taken 10 years of litigation, or the equivalent of two generations of school children, for the case to reach the Supreme Court of Canada. (para 56) The Chief Justice created a comprehensive framework that explained how the principles first articulated in *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342 were to be applied in practice (para 56.) The Chief Justice expressed the hope that this comprehensive framework would reduce the need for the litigation of s. 23 rights in the future (para 56).

The framework expands on *Mahe* in some key areas. Of particular note is the presumption given the existence of majority language schools that serve students regardless of where they are located in a province, "it is appropriate from the standpoint of pedagogy and cost to create a comparably sized school for the minority." (para 69). While this presumption can be rebutted by a province, Justices Brown and Rowe wrote partially dissenting reasons responding to that point – they expressed concern at the cost implications and the effect on the sliding scale established by the Court to assess s. 23 rights (para 193).

When reading *Conseil scolaire francophone* consider the majority's argument that it needed to create a concrete framework to apply the *Mahe* principles. Is this framework too prescriptive, or necessary to avoid excessively long litigation? Do you think the dissent's concerns are warranted? How involved should the courts be in making decisions that involve the allocation of limited public funds for education?

***Conseil scolaire francophone de la Colombie-Britannique* v. British Columbia, 2020 SCC 13 (CanLII), [2020] 1 SCR 678**

English version of the judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Martin and Kasirer JJ. delivered by

The Chief Justice —

I. Overview

[1] A school is much more than just a place to pass on theoretical and practical knowledge. It is also a setting for socialization where students can converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture. That is the spirit in which the right to receive instruction in one of Canada's official languages was elevated to constitutional status by means of s. 23 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[2] This appeal concerns the scope of s. 23 and the interplay between that section and s. 1, as well as between it and the remedial provisions of Canada's Constitution. The appeal affords an opportunity to identify the approach to be taken in order to determine the level of services that is guaranteed to rights holder parents on the basis of a given number of students, consider the test to be applied in order to determine whether the educational experience of the children of those rights holders is equivalent to the experience provided to the majority, discuss the justification under s. 1 of infringements of language rights, and decide whether damages can be awarded as a remedy in the event of an infringement.

[3] The courts below conducted an exhaustive and rigorous analysis of certain of these issues. But I find that they adopted an inordinately narrow interpretation of s. 23 and its role in the Canadian constitutional order. Section 23 has a remedial purpose related to promoting the development of official language minority communities and changing the status quo. In my view, in accordance with an interpretation of that section that takes its remedial purpose fully into account, and in light of the trial judge's findings of fact, the appeal should be allowed in part.

...

[15] ...[I]n conducting the analysis under s. 23, a court must bear in mind that this section has three purposes, as it is at once preventive, remedial and unifying in nature. It 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 [citations omitted] ... In the face of this "inadequacy of the present regime", s. 23 was thus designed to alter the status quo. Finally, the section also has a unifying purpose in that it accommodates mobility by enabling citizens to move anywhere in the country without fearing that they will have to abandon their language and culture (*Solski*, at para. 30; *House of Commons Debates*, vol. 3, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286).

...

B. *Overview of Concepts Specific to Section 23: Sliding Scale and Substantive Equivalence*

[21] I feel that it will also be helpful to briefly explain two judge-made concepts that are specific to the interpretation of s. 23: the sliding scale and substantive equivalence. ...

[22] Under s. 23, the application of the rights of official language minorities depends on there being a sufficient number of children. But the section is silent as to what number ...

[23] In *Mahe*, this Court rejected what was called the "separate rights" approach, according to which s. 23 provides for only two rights: a right to educational facilities where there are a specific number of students and a right to only instruction where the number of students is smaller. The Court held that s. 23 must instead be understood "as encompassing a 'sliding scale' of requirement" (p. 366).

[24] By virtue of this "sliding scale" concept, s. 23 provides a basis for a range of educational services. The low end of the scale corresponds to the right only to instruction that is provided for in s. 23(3)(*a*), while the high end corresponds to the "upper level of management and control" provided for in s. 23(3)(*b*) (*Mahe*, at p. 370). In other words, at the low end, s. 23 rights

holders are entitled to have their children receive instruction in the language of the official language minority, but the extent to which the minority exercises control over the provision of instruction rises with the number of children of rights holders. In the middle, [the minority] might have control over one or more classrooms in a school of the majority or over one part of a school it shares with the majority. It might also have control over the hiring of teaching staff and over certain expenditures. At the high end, the minority has control over separate educational facilities, that is, over a homogeneous school. The number of children of rights holders might also entitle the minority to the management and control of a separate school board. In short, once the minimum threshold of s. 23(3)(*a*) is crossed, the sliding scale applies to determine the level of services that corresponds to the extent to which the minority will have control over the provision of educational services.

[25] Thus, this Court has recognized that s. 23 has an internal limit, the "numbers warrant" requirement. The courts developed the sliding scale concept in order to give substance to that internal limit. Section 23 imposes no constitutional obligation on a government where the number of students in question does not suffice to justify the creation of a minority language program of instruction (*Mahe*, at p. 367). The right to such a program of instruction corresponds to the low end of the sliding scale, a limit below which the government has no obligation under s. 23. In this way, the courts have recognized that public funds are limited and that governments cannot be required to set up educational facilities for a very small number of students. Where the number of students in question crosses the numbers warrant threshold, however, that number must then be situated on the sliding scale in order to establish the scope of the rights guaranteed to the rights holders by s. 23. This appeal affords us an opportunity to clarify the approach to be taken in order to situate a given number of students on the sliding scale.

[26] Section 23 is also silent regarding the quality of the instruction that must be provided to the official language minority. In *Rose-des-vents*, this Court affirmed that an official language minority is entitled to an educational experience that is substantively equivalent to that of the majority. The Court indicated that instruction is not substantively equivalent if a reasonable parent is discouraged from exercising his or her language rights because the minority language school is meaningfully inferior to that of the majority (para. 35). It follows that to assess the quality of instruction, courts must engage in a process of comparing the minority language school with majority language schools that represent realistic alternatives.
However, *Rose-des-vents* concerned a situation in which the number of students enrolled at the minority language school was comparable to the numbers of students enrolled at nearby majority language schools. This appeal affords us an opportunity to determine whether the substantive equivalence test from *Rose-des-vents* applies regardless of the number of minority language students in question, or whether the assessment of equivalence must vary with the number of such students.

C. *The Appellants and Their Claim*

[27] The appellants are the Conseil scolaire francophone de la Colombie-Britannique ("CSF"), the Fédération des parents francophones de Colombie-Britannique and three parents who are rights holders under s. 23 of the *Charter*. The CSF is the sole French-language school board in British Columbia. ...

[28] … The alleged infringements were numerous, and can be divided into two categories. The first, which involved systemic claims, concerned, among other things, the fact that the CSF had not received an annual grant for building maintenance, the formula used to set priorities for capital projects, a lack of funding for school transportation and a lack of space for cultural activities. The second category involved claims by the appellants for the purpose of obtaining new schools or improvements to existing schools in 17 communities.

[29] At trial, the appellants were partially successful. They appealed to the British Columbia Court of Appeal. Their appeal was dismissed, while the cross appeal the Province had subsequently filed was allowed.

…

V. Analysis

A. *What Is the Approach to Take in Order to Situate a Given Number of Students on the Sliding Scale?*

[51] This appeal is an opportunity for the Court to clarify the approach to … the sliding scale. The sliding scale, which serves to determine the level of services to which an official language minority is entitled, is used to decide whether the minority is entitled to a homogeneous school, to educational facilities shared with the majority or to another appropriate solution. It is also used to decide whether the minority is entitled to a separate school board. …

[52] In *Mahe*, this Court explained that situating a given number of students on the sliding scale requires that the analysis focus on "(1) the services appropriate, in pedagogical terms, for the number of students involved; and (2) the cost of the contemplated services" (p. 384). Obviously, however, given the remedial nature of s. 23, pedagogical requirements will have more weight than cost (p. 385). *Mahe* did not include an exhaustive definition of these two factors, but their scope can be established by reviewing the case law and terminology.

…

[56] A number of interveners representing or supporting official language minorities have stressed the need to clarify the *Mahe* framework. It is clear that, because of the lower courts' interpretation of *Mahe* and the interminable judicial proceedings that must be initiated in order to assert language rights, the exercise of those rights is too often delayed, if not diminished. The case at bar is a clear example of this. More than ten years has elapsed between the date of filing of the proceedings and this Court's judgment. … In my view, it must be explained how the courts are to apply the broad principles from *Mahe* in order to situate the number of students in question in a given case on the sliding scale. I find that the time has therefore come to set out a straightforward and predictable approach that might even enable rights holders to avoid, to the extent possible, resorting to litigation.

[57] To take the pedagogical and cost considerations discussed in *Mahe* into account, I propose that the following approach be taken in order to situate a given number of students on the sliding scale. This approach … is based on the premise that a homogeneous school, that is, a

separate facility under the control of the official language minority, is warranted where such a school is available to a comparable number of majority language students.

(1) First Step: Establishing the Number of Students in Question

[58] The first step in situating the number of students in question on the sliding scale is to determine how many students will eventually avail themselves of the contemplated service. This is the starting point for the "numbers warrant" analysis. The burden of proof regarding the number of students who will eventually avail themselves of the service is on the claimants from the official language minority. To discharge it, the claimants must adduce evidence that would enable the court to rule on this issue. That evidence might include expert testimony, various statistical tools such as the census, and statistical models that take into account the demographics of the community in question, its geographical location and any other factor that might have an impact on the number of students.

[59] Long-term projections are necessary. ....

[60] The number of students who will eventually avail themselves of the service lies between the known demand and the total number of children of s. 23 rights holders (*Mahe*, at p. 384). In my view, it is not necessary in this case to fix a precise number of years as the length of a long-term projection. On the one hand, such projections must take into account the fact that plans for school construction or expansion projects are prepared on a long-term basis. On the other hand, the projections must not relate to a future so remote that they do not allow a reliable number to be obtained.

(2) Second Step: Taking a Comparative Approach in Order to Determine Whether the School Contemplated by the Minority Is Appropriate from the Standpoint of Pedagogy and Cost

[61] At the second step, the court must determine whether the school or program proposed by the minority is appropriate from the standpoint of pedagogy and cost for the number of students in question. I favour a simple approach, that is, a comparative approach, which also has the advantage of limiting the need to resort to litigation.

...

[63] It is best to take a comparative approach in applying the sliding scale, because it is hard to associate a given number of students with academic standards. It will often be experience and practice that determine whether a given number of students will suffice for a school to function efficiently in light of the province's curriculum. In this sense, the existence of majority language schools of a similar size represents the best indicator, and in particular the easiest criterion to apply, in order to determine whether a given number of students is sufficient for the achievement of the curriculum's objectives. It would in fact be hard, for the purpose of showing that a school can satisfy academic standards, to find an argument that is more convincing than the fact that majority language schools of a similar size exist or are maintained.

[64] The particular characteristics of a minority language community are not helpful for the purpose of determining whether a proposed school is pedagogically viable. For example, the difference between communities with a strong historical presence and more recently established

communities is not relevant, as they all have the same pedagogical needs. … Moreover, a distinction that implied that long-established official language communities are more legitimate than communities that have been established more recently would be inconsistent not only with the letter but also with the spirit of the *Charter*. Section 23 guarantees rights to "citizens of Canada" from official language minority communities to which the *Charter* applies and requires equal treatment for all.

[65] In my view, situating a number of students on the sliding scale requires a province-wide comparative analysis. …Section 23(3)(*a*) reflects this fact, as it provides that the constitutional right it creates "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". ….

[66] In this Court, the Province maintained that a province-wide comparison would not be appropriate, because small rural schools are not valid comparators. It argued that such rural schools exist because of the geographical isolation of the students in question. I find that this does not justify systematically removing rural schools from the equation. The cultural isolation of the minority groups to which s. 23 applies is a circumstance that, although different in some respects, resembles, from a sociolinguistic standpoint, the geographical remoteness of certain majority language communities. I acknowledge that the analogy is not perfect. A small rural school is often the only solution when it comes to providing instruction to people living in remote locations, whereas, in the context of linguistic minorities, a homogeneous school, while it is of course one possible solution, is not the only one. It is sometimes possible to provide instruction to small groups either in a heterogeneous school or in a program of instruction. Moreover, financial considerations are not the same in urban and rural areas. … Nevertheless, official language minority schools, like rural schools, serve to meet the essential educational needs of isolated populations, needs that are distinctive from a geographical or a sociolinguistic standpoint. It therefore cannot be argued that small rural schools must be systematically excluded from the province-wide comparison. Instead, exceptional cases should be excluded one by one.

…

[69] I thus find that the existence of majority language schools that serve a given number of students, regardless of where they are located in the province, supports a presumption that it is appropriate from the standpoint of pedagogy and cost to create a comparably sized school for the minority. The province can, however, rebut this presumption by showing on a balance of probabilities either that the majority language schools used as comparators are not appropriate for that purpose or that the school proposed by the minority is not appropriate from the standpoint of pedagogy or cost. I also wish to be clear that the claimants, who are responsible for identifying comparator schools, must endeavour to submit to the court a reasonable number of schools that, to the best of their knowledge, are appropriate comparators in light of the principles set out in these reasons. This will favour judicial economy by ensuring, for example, that courts and parties do not have to analyze hundreds of schools in detail.

…

[73] This comparative approach is intended for the determination of whether the number of students of the official language minority is comparable to the numbers of students in the majority language schools. I wish to be clear that comparable does not mean identical. A formalistic approach … would have the effect of reinforcing the status quo and would be incompatible with the remedial purpose of s. 23. …

…

[75] There are two possible ways for the province to rebut this presumption. …

[76] First, the province can show that the *comparator school* is not an appropriate comparator. To do so, it might establish that the school in question does not meet the requirements of the provincial curriculum. Here are some examples. A school that serves a student population with very particular needs — disabled students or students in a specialized arts program — is one in which the learning outcomes might justify its having a small number of students. Such schools have very particular educational plans, which explains their departure from the province's usual standards.

[77] The province might also prove that the number of students at a given school has, owing to attrition, fallen to such an extent that the school no longer meets the requirements of the provincial curriculum. However, it would have to show clearly that the school in question no longer meets those requirements. …

[78] It might also happen that a comparator school is excluded on the basis of financial considerations. This would be true of a school whose operation depends on significant private financing. Such a school is not a valid comparator, because it does not reflect what the province considers to be appropriate education expenditures. … Moreover, a school that serves a particularly isolated location, such as a place that is accessible only by water or air, or a school that serves an isolated location separated from the rest of the province by a road that requires several hours of travel might justify incurring exceptional expenditures for a very small number of students if that is the only way to provide that isolated population with educational services.

[79] I wish to be clear that this should not be interpreted as an invitation to conclude that every small majority language school is an exception and that such schools cannot be used as comparators. The idea is to exclude majority language schools whose circumstances are genuinely exceptional.

[80] Second, the province can show that *the school contemplated by the minority* is not appropriate. To do so, it might establish that the service in question would not suffice to achieve the requirements of the provincial curriculum. This can be shown by means of expert testimony or any other evidence the province considers relevant. If, for example, the province wants to show that there are too few students from the official language minority and that this would prevent the socialization objectives of the provincial curriculum from being achieved, it must explain precisely what the objectives of the curriculum are and how the number of students in question would not suffice to achieve them. The province is in the best position to do this, as the education ministry's experts are the people who develop the curriculum's standards. As well, it is the provincial education ministry that issues diplomas and ensures that schools meet academic standards. It is

therefore entirely appropriate that the ministry be responsible for showing how, even if the contemplated service would be provided to a number of students comparable to the numbers in majority language schools, it would not suffice to satisfy the province's academic standards.

...

[83] Once again, the foregoing is not an invitation to try to show that every minority school project represents an unrealistic financial demand. ...Caution must be exercised in deciding against a school project of the official language minority on the basis of cost, because financial considerations are given less weight than pedagogical considerations when situating a given number of students on the sliding scale.

(3) Third Step: Determining the Level of Services That Must Be Provided

[84] At the third step, the level of services to be provided to the official language minority must be determined. If the court has found at the second step that the number of students is comparable and that the presumption has not been rebutted, that number is at the high end of the sliding scale and the minority is therefore entitled to have its children receive instruction in a homogeneous school.

[85] If, on the other hand, the court has found at the second step that the number of minority language students is not comparable, the number then falls below the high end and a homogeneous school is therefore not required. In such circumstances, there is a range of services that can be provided to the minority. These services vary from the provision of certain courses in the minority language to control over a portion of a school shared with the majority. These different levels of services represent a variety of possibilities.

[86] The provision of such limited educational services is a reality specific to the minority. Having to share premises or being able to provide only a few classes in their language are realities with which the managers of majority language schools, which are always homogeneous, do not have to deal. As a result, school boards of official language minorities have particular expertise in relation to the services that might be provided to a limited number of students. School boards are in fact favoured vehicles for the concerns of official language minorities. As Dickson C.J. explained in *Mahe*, although the majority's intentions may not be bad, "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" (p. 372). This observation justifies recognizing that, when the number of students falls in the lower levels of the sliding scale, the government and, in the event of litigation, the courts must show deference to the school board's expertise with respect to the appropriate level of services. ... The CSF itself was in fact created as a result of judicial proceedings (*Assn. des Parents Francophones*). If no school board exists to represent the interests of the official language minority, governments and courts will have to rely on groups or associations that, or witnesses who, are in a position to express the minority's special educational needs.

[87] At the lower levels of the sliding scale, it is obviously not possible to use the comparative approach I set out above in order to determine what is appropriate from the standpoint of pedagogy and cost. I reiterate that at this stage, the court will have found that the number of

minority language students in question is not comparable to the numbers at majority language schools, even at the smallest of those schools. Given that the parties have not proposed a specific approach in this regard and that this case does not turn on such an approach, it would be premature to rule on this issue.

...

[The Chief Justice then applied the above framework to the sliding scale in this case. He concluded that the applicants were entitled to eight homogeneous schools because of the numbers of minority language students in question. He then turned to section 1.]

...

D. *How Is an Infringement of Section 23 Assessed Under Section 1?*

[143] This Court has held that it is possible to justify a limit on s. 23 language rights under s. 1 of the *Charter* [citations omitted]... This Court has never yet determined that an infringement of s. 23 was justified under s. 1.

...

[147] In my opinion, three factors weigh in favour of applying a particularly stringent standard for justifying an infringement of the right to minority language instruction. First, the framers of the *Charter* imposed positive obligations on the provincial and territorial governments in s. 23. Under s. 23, governments must provide public funding for minority language instruction where the number of children so warrants. They must fulfill these obligations in a timely fashion in order to avoid the likelihood of assimilation and of a loss of rights (*Doucet-Boudreau*, at para. 29; *Rose-des-vents*, at para. 28). The adoption of a flexible approach to the justification of an infringement of s. 23 could jeopardize the section's remedial purpose, the importance of which I explained above.

[148] Second, s. 23 is not subject to the notwithstanding clause in s. 33 of the *Charter*. ... In *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, which concerned the right to vote of Canadians residing abroad, I reiterated McLachlin C.J.'s statement in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, that the framers had signalled the special importance of that right by excluding it from the scope of the notwithstanding clause. I added that, because of this exemption, any intrusions on the right are to be reviewed on the basis of a stringent justification standard (*Frank*, at para. 25; *Sauvé*, at paras. 11 and 14). This also applies in the context 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. By excluding s. 23 from the scope of the notwithstanding clause, the framers of the *Charter* sought to prevent the majority from being able to shirk its constitutional obligations and thus avert a return to the time when the minority was unable to develop in its own language and culture.

[150] Third, s. 23 has an internal limit, the numbers warrant requirement, according to which the exercise of the right for which the section provides will be warranted if there are a sufficient number of children, that is, of students. In adopting this limit, the framers sought to take account of practical considerations, including cost and pedagogical needs, related to the number of students who might benefit from the right in question. Where s. 23 is found to have been infringed, the government concerned will often advance a financial argument to justify the infringement. In such a case, the s. 1 analysis will then in some respects duplicate the numbers warrant analysis the court has already completed, because if there are enough students in a given case to exceed the numbers warrant threshold, the court will already have balanced the considerations related to cost and pedagogical needs in the first analysis. Balancing them 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. For an infringement of s. 23 to be justified under s. 1, it must not therefore be supported by considerations that have been taken into account at the numbers warrant stage.

[151] For the foregoing reasons, I am of the view that s. 23 is one of the *Charter* provisions whose infringement is especially difficult to justify. I conclude that any intrusions on s. 23 must therefore be analyzed and justified on the basis of a very stringent standard.

[152] That being said, the Court must determine whether the fair and rational allocation of limited public funds can be a pressing and substantial objective in the s. 23 context. ...

[153] In my view, the courts below erred in ruling that "the fair and rational allocation of limited public funds" is a pressing and substantial objective in the case at bar. Public funds are limited by definition. Every government allocates its funds among its various programs on the basis of certain scales, and as fairly as possible. If merely adding the words "fair and rational" to the word "allocation" sufficed to transform the allocation of public funds into a pressing and substantial objective, it would be disconcertingly easy for any government to intrude on fundamental rights. I cannot accept such a result. The fair and rational allocation of limited public funds represents the daily business of government. The mission of a government is to manage a limited budget in order to address needs that are, for their part, unlimited. This is not a pressing and substantial objective that can justify an infringement of rights and freedoms. Treating this role as such an objective would lead society down a slippery slope and would risk watering down the scope of the *Charter*. I would add that, from a practical standpoint, the appropriateness of such an objective would be nearly impossible to verify.

[154] Given my conclusions on the existence of a pressing and substantial objective, it will not be necessary to consider the proportionality test, and in particular the rational connection and minimal impairment branches. However, I will offer some comments on proportionality between the effects of the measure that is responsible for limiting the right and the objective that has been identified as important.

[155] Regarding the proportionality stage, the trial judge did not consider the high rate of assimilation of French-speaking students to be a particularly strong deleterious factor. She justified this conclusion by stating that the evidence showed that the rate of assimilation of French speakers is high in the province and that the number of schools of the official language minority does not have a significant impact on this.

[156] Yet it is clearly recognized that one of the purposes of s. 23 is to counter the assimilation of official language minority communities. In light of this purpose, it defies logic to suggest that the high rate of assimilation of French speakers in British Columbia is a deleterious effect that is not particularly strong. On the contrary, it is my view that such evidence attests to that community's linguistic fragility, to its vulnerability. This means that it is necessary to be all the more careful in reviewing any infringement of s. 23 and to take assimilation fully into account as a deleterious effect when the right under that section is infringed.

[157] I am therefore of the opinion that the purpose of s. 23 is not only to ensure the sustainability of the country's linguistic communities, which is a concern focused on the future, but also to make it possible for those communities to develop in their own language and culture, a concern focused on the present. …The context in which the right to minority language instruction is exercised in that province may be a difficult one, but under no circumstances should this interfere with the exercise of that right.

[158] I would add that, in analyzing the justification for an infringement of the right guaranteed by s. 23 of the *Charter*, a court must bear in mind that while it is true that s. 23 has a collective dimension, it also has an individual dimension… It is difficult to assess the impact of minority language schools on the assimilation process at the collective level. However, these schools have a definite impact, at the individual level, on the life paths and likelihood of assimilation of French speakers who attend them. From an individual perspective, an infringement of s. 23 increases the likelihood of assimilation for those who are unable to attend a school of the official language minority.

[159] The trial judge found at the proportionality stage that the savings resulting from the infringements of s. 23 represented a salutary effect in the sense contemplated in *Oakes*. I cannot agree with that finding. Savings that result from an infringement of s. 23 cannot serve to justify the infringement. Such reasoning obscures the very purpose of s. 23, which is to protect the minority from effects deleterious to it that are caused by budgetary choices of the majority. Cost savings linked to an infringement of s. 23 cannot be considered a relevant factor in the balancing of the salutary and deleterious effects of the infringing measure.

[160] The application of these principles in this case leads me to conclude that the infringements of the appellants' s. 23 rights are not justified.

[The Chief Justice's discussion of the issue of damages can be found at pp. 1339-1340 of the 6th edition of this casebook.]

Brown and Rowe JJ. (dissenting in part) —

I. Introduction

[193] Despite our substantial agreement with the Chief Justice, this area of our law is fraught with questions on which reasonably held differences can and will arise. We stress that our positions are not far apart. While we agree with him on goals, we disagree on how they are best achieved. To our mind, there are important reasons for maintaining a more conventional approach in line with settled jurisprudence. As we will explain below, our differences stem principally from the Chief Justice's use of a province-wide presumption of pedagogical and cost appropriateness in

the "numbers warrant" analysis. This presumption affects key elements of the s. 23 analysis, leading to a compression of the middle of the scale and to a strained application of the substantive equivalence test. Indeed, our colleague's approach departs from the settled approach to the sliding scale, which has been foundational to s. 23 since *Mahe*. The new presumption leads to an application of the "numbers warrant" requirement that fails to give proper effect, in our respectful view, to s. 23's important internal limitation. While our colleague acknowledges this internal limit, he does not give effect to it in the manner that it has been given effect in our jurisprudence to date. We are not persuaded that such a departure from earlier jurisprudence is warranted.

[194] We are in full accord with the Chief Justice that *Charter* rights must be given a broad, liberal, and purposive interpretation. But, doing so includes giving proper effect to a key part of s. 23, specifically, the "numbers warrant" requirement. Care must be had to give to s. 23, as to any right, only that scope and content that its text can bear: *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC), [1996] 1 S.C.R. 571, at paras. 13 and 49-50. As this Court has said, "the *Charter* was not enacted in a vacuum", and its guarantees ought to be understood in their "proper linguistic, philosophic and historical contex[t]" so as not to "overshoot the actual purpose of the right or freedom in question": *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344.

...

[197] Finally, as grounds for revisiting *Mahe*, the Chief Justice raises concerns about access to justice and long delays: paras. 20 and 56. But the delay in this case resulted *not* from a lack of clarity in the law, but from the scope and magnitude of the claim. As we highlight below (at para. 200), the appellants effectively challenged the provision of minority language education throughout *the entire province* of British Columbia. Notwithstanding what can only be described as the remarkable efforts of the trial judge, the adjudication of such a claim would inevitably consume a substantial amount of time. More fundamentally, however, this appeal is concerned not with *access* to justice but with *the content* of that justice. It remains our view that while significant remedial measures have been shown to be warranted in British Columbia, that is not a sound basis to change the rules that will henceforth operate not only in that province but also in the other nine provinces and three territories. We are unpersuaded that circumstances requiring specific remedies in British Columbia constitute a sufficient basis to reframe the general operation of s. 23 for every jurisdiction in the country. Thus, as set out below, our differences rarely relate to what is needed on the facts of this case and ordinarily relate to whether a more general reframing of the rules is needed.

...

[219] The legal presumption proposed by the Chief Justice, however, has the effect of displacing the "numbers warrant" analysis. Considerations of pedagogy and cost are effectively withdrawn at the moment a school with comparable numbers can be found anywhere in the province, regardless of the particular context that may explain the continued existence of such a school. A right to a homogeneous school — the highest level of entitlement on the scale — is immediately presumed, thereby shifting the claimant's burden to the province essentially from the outset. How a province could successfully rebut this presumption is unclear. Our colleague views minority language schools as somewhat akin to majority language schools that serve

geographically isolated communities. The rebuttal of his presumption appears to be limited to "genuinely exceptional" cases such as when the school can be reached only by plane or ferry or otherwise requires significant travel to service a remote area: paras. 78-79. Thus, the presumption is, effectively, a rule: there will *always* be a homogeneous school, rather than one that shares facilities. And this will apply irrespective of why a small majority language school is maintained — including the fact that it may be the only way to provide students with instruction, indeed the only way for the community to continue to exist. While we are not in a position to make any calculation, one can safely assume that the cost implications of this will be quite considerable across ten provinces and three territories.

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Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment), 2023 SCC 31 (CanLII) arose from a claim by parents in the Northwest Territories who were not s. 23 rights holders. The parents wanted their children, all of whom had substantial ties with the Francophone community of the Northwest Territories, admitted to French first language education programs.

The Minister of Education in the Northwest Territories had the discretion to admit the children to the French first language education programs, despite the fact that their parents did not have a right to such education under s. 23. However, in each of the five cases at issue, the Minister declined to do so. The Minister claimed that admitting the children would create a precedent requiring the admission of other children whose parents did not have s. 23 rights, thus creating budget unpredictability for the government.

The Supreme Court of Canada unanimously found that the Minister had failed to properly take into account the values underlying s. 23 when making her decision, contrary to the framework established in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 ["*Doré*"] for the review of administrative decisions engaging the values underlying *Charter* rights. The discussion about the standard of review and the application of the *Doré* framework is largely omitted from the excerpt of the reasons below, which focuses on the s. 23 issues. For a discussion of *Doré* see pp. 770-773 of the 2022 edition of this textbook.

The Court emphasized that it was not holding that the Minister must always admit the children of parents without s. 23 rights to French first language education programs, but instead that the Minister must demonstrate she proportionately balanced the values underlying s. 23 of the *Charter* with the government's interests. The Court noted that the framers of the *Charter* had rejected a framework that allowed for freedom of choice in the language of instruction.

When reading this decision, consider whether, despite its statement that it was not endorsing a framework that allows for freedom of choice in the language of instruction, the Court has effectively expanded the scope of s. 23 of the *Charter* to encompass some children of parents without rights under s. 23. Do you think this is consistent with the intent of s. 23? What were some of the circumstances in which the Court suggested a refusal to enroll the children of parents without s. 23 rights could actually advance the values underlying s. 23?
~~~

Note that neither Justice Brown nor Justice Rowe took part in this case. How do you think they would have ruled considering their dissenting reasons in *Conseil scolaire francophone de la Colombie-Britannique* v. British Columbia, 2020 SCC 13 (CanLII), [2020] 1 SCR 678, excerpted above?

***Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 (CanLII)**

Present: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal and O'Bonsawin JJ.

...

English version of the judgment of the Court delivered by

Côté J. —

...

[5] There has been a Francophone presence in the Northwest Territories since the 18th century, but instruction in French has been offered only since 1989 in Yellowknife and since 1998 in Hay River. This appeal is about whether the refusal to admit children of non-rights holder parents to minority language schools in the Northwest Territories gave due consideration to the protections conferred by s. 23 of the *Charter*, having regard to the three purposes of this section, which is at once preventive, remedial and unifying in nature.

[6] Five non-rights holder parents asked the then Minister of Education, Culture and Employment ("Minister") to exercise her discretion to admit their children to a French first language education program. In each case, the Commission scolaire francophone des Territoires du Nord-Ouest ("CSFTNO") recommended admission, essentially because it would promote the development of the Francophone community of the Northwest Territories. It is important to note that the CSFTNO represents the interests of the holders of s. 23 rights, including in their collective aspect. Nevertheless, in spite of the CSFTNO's recommendations, the Minister denied each of the applications for admission.

[7] The parents and the CSFTNO applied for judicial review. They were successful in the Supreme Court of the Northwest Territories.... However, on appeals by the Minister, the Court of Appeal for the Northwest Territories restored the decisions that had been set aside. ... The children of the appellant parents have since been admitted or have ceased residing in the Northwest Territories. However, it remains important for this Court to determine what role, if any, s. 23 had to play in the Minister's decision-making process. ....

II. Background

[10] Two public schools offer a French first language education program in the Northwest Territories. The first, École Allain St-Cyr, was built in 1999 and is located in Yellowknife. The second, École Boréale, was built in 2005 and is located in Hay River.

...

[16] On August 11, 2016, the then Minister of Education, Culture and Employment adopted the *Ministerial Directive — Enrolment of Students in French First Language Education Programs (2016)* ("2016 Directive") (reproduced in A.R., vol. III, at p. 34). The 2016 Directive stated that the Government of the Northwest Territories is "committed to supporting language and culture revitalization", an "inherent part" of which is supporting "population growth". To this end, the 2016 Directive provided for the admission of children of "eligible non-rights holder parents".

[17] To be eligible under the 2016 Directive, non-rights holder parents had to meet the conditions for one of the following streams:

> Reacquisition — The parent would have been a rights holder but for his or her lack of opportunity to attend a French first language school or his or her parent's lack of opportunity to attend a French first language school (i.e. the child's grandparent);
>
> Non-citizen francophone — The parent meets the criteria of section 23 of the *Canadian Charter of Rights and Freedoms* except for the fact that he or she is not a Canadian citizen; or
>
> New immigrant — The parent is an immigrant to Canada, whose child upon arrival, does not speak English or French and is enrolling in a Canadian school for the first time.

[18] An eligible non-rights holder parent could therefore apply for their child's admission to a French first language education program managed by the CSFTNO, except where enrolment at the school in question exceeded 85 percent capacity, as per the Schools Capital Standards and Criteria. In such a situation, the 2016 Directive provided that new enrolment was limited to children of rights holder parents until such time as the enrolment numbers dropped below 85 percent capacity.

[19] An eligible non-rights holder parent wishing to enrol their child in a French first language education program had to provide the school administration with an enrolment form, a statement of eligibility for non-rights holder parents and official documents in support of the statement. …Following [an] assessment, the CSFTNO made a recommendation to the minister.

[20] If the CSFTNO recommended denying the application, the unsuccessful parent could submit a written appeal to the minister, who then made a final decision that could not be appealed. If, on the other hand, the CSFTNO recommended that the child be admitted, the minister in turn assessed the admissions file. Approval of enrolment in such a case was based on "whether the correct documentation has been provided in full, the assessment of CSFTNO with respect to language skills, the current capacity of the school and any other relevant considerations" (2016 Directive). The decision was final and could not be appealed.

[21] Also on August 11, 2016, the then Minister of Education, Culture and Employment adopted the *French First Language School Non-Rights Holder Admission Policy* (online). The *Policy* specified how applications for admission were to be transmitted and how the minister's decisions under the 2016 Directive were to be communicated. It also set out the time within which the minister's decision had to be communicated and the time limit for appealing a negative recommendation by the CSFTNO.

...

[The Court's discussion of how each of the plaintiffs' children were denied admission is omitted.]

...

IV. Issues

[58] This appeal raises the following issues:

(1) Did the Minister have to consider the purpose of s. 23 of the *Charter* in exercising her discretion with respect to the admission of children of non-rights holder parents to French first language education programs?

(2) Are the Minister's decisions reasonable?

...

V. Analysis

[59] In oral argument before this Court, counsel for the appellants, before turning to the approach established in *Doré*, first submitted that the Minister's decisions were contrary to the requirements of s. 23 of the *Charter* as set out in this Court's jurisprudence. It is through the lens of *Doré*, which governs the judicial review of administrative decisions that engage the *Charter*, that the Minister's decisions must be considered. This case is a straightforward application of that precedent.

...

[61] Under the *Doré* approach, a reviewing court must begin by determining whether the administrative decision at issue "engages the *Charter* by limiting *Charter* protections — both rights and values" [citations omitted].

[62] Here is where the essence of the parties' disagreement lies: the appellants submit that the impugned decisions engage the values underlying s. 23 of the *Charter*, whereas the respondent takes the opposite view. The respondent maintains that the protections afforded by s. 23 are not engaged because the appellant parents are not rights holders under this provision; as non-rights holders, they are unable to show that the right guaranteed by s. 23 was infringed by the Minister's decisions. In other words, the respondent argues that the *Doré* framework applies only in cases where an administrative decision *directly* infringes a *right* (R.F., at para. 57). According to the respondent, *Charter* values serve only to interpret the scope of the rights that reflect them (*Loyola*, at paras. 4 and 36).

[63] I note that it is not in dispute that no infringement of s. 23 can be established with respect to the appellant parents, as non-rights holders. The CSFTNO does, of course, represent the interests of rights holders and plays a fundamental role in managing and controlling minority language schools and in expressing their special needs (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 86; *Arsenault-Cameron*, at para. 44; *Mahe*, at pp. 373-80). However, it is not necessary to determine whether the CSFTNO, as a representative of rights holders, might itself enjoy the benefit of the s. 23 rights for the purposes of this case.

[64] Indeed, it has consistently been held that the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights (*Doré*, at paras. 35 et seq.; *Loyola*, at para. 4; *Trinity Western University*, at para. 57).

...

[74] While no infringement of the right guaranteed by s. 23 of the *Charter* can be established with respect to the appellant parents in this case, the *Doré* framework is still applicable in reviewing the Minister's decisions if the relevant values underlying this right were limited by those decisions. I therefore turn now to the preliminary question of whether the Minister's decisions engage the protections afforded by s. 23.

B. *The Decisions Engage the Protections of Section 23*

(1) The Values Underlying Section 23 Are Relevant to the Exercise of the Minister's Discretion

...

[77] ...[A]dministrative decision makers must always consider the values relevant to the exercise of their discretion. ...In this sense, these values engage the *Doré* framework, even in the absence of any infringement of a right. Where a *Charter* right is infringed, the values "help determine the extent of any . . . infringement" of that right "and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (*Trinity Western University*, at para. 57, quoting *Loyola*, at para. 36).

[78] Here, there is a clear link between s. 23 of the *Charter* and the Minister's decisions, because the decisions were likely to have an impact on a minority language educational environment. Moreover, on judicial review of the two decisions made by the Minister in 2018, the chambers judge ordered the Minister to take into account the purpose of s. 23 when reconsidering A.B.'s application for admission. The Minister herself acknowledged, in the decisions she made following the 2019 judgment, that she had to consider the purpose of s. 23, particularly its remedial nature, in exercising her discretion (A.R., vol. IV, at p. 151). ...

[79] Section 23(3)(a) of the *Charter* guarantees certain categories of citizens the right to instruction in the minority official language where "the number of children of citizens who have such a right is sufficient". This Court has interpreted this constitutional provision as having three purposes: the right is "at once preventive, remedial and unifying" in nature (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 15). ...

[80] In practical terms, this means that the preservation and development of minority language communities are among the values underlying s. 23. Protection of the right to instruction in the minority official language, explicitly entrenched in the Constitution, is a reflection of these values, insofar as education is a *means* of realizing the societal ideal that they embody. These values require preserving and developing the vitality not only of the minority language, but also of the minority culture. ...Since *Mahe*, this Court has repeatedly reiterated that education is an essential means of ensuring the preservation and development of minority language communities [citations omitted]. Schools also play this role as a "setting for socialization where students can

converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture" (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 1).

[81] The admission of children of parents who are not rights holders under s. 23 of the *Charter* can have an impact on the preservation and development of minority language communities. In *Gosselin*, this Court pointed out that minority language schools must not become "centres of assimilation" by allowing the presence of children from the majority language community to end up swamping the children from the minority language community (para. 31). A few years later, in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, this Court noted that, although the Yukon Francophone School Board had no authority to set admission criteria for children of non-rights holders because such authority had not been delegated to it, "nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose" (para. 74).

[82] It goes without saying that population growth in the minority language community helps to ensure its development and prevent its decline, including by reducing the likelihood of assimilation and cultural erosion (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 156). Population growth in the minority language community also contributes to fulfilling the promise of s. 23, which is to give effect to "the equal partnership of Canada's two official language groups in the context of education" (*Rose-des-vents*, at para. 27).

[83] Thus, the decisions rendered by provincial and territorial governments regarding the admission of children of non-rights holder parents to minority language schools, even when they do not directly infringe the right guaranteed by s. 23, can nevertheless have a significant impact on the preservation and development of minority language communities. It follows that these values are always relevant when the government exercises such a discretion and that they must therefore be taken into account. For the purposes of this appeal, this means that the Minister was required to consider the values of preservation and development of minority language communities in exercising her discretion to decide whether to admit children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories.

(2) The Minister's Decisions Have the Effect of Limiting the Values Underlying Section 23

[84] It is not in dispute that the appellant parents have no constitutional right to have their children receive instruction in French. That being said, viewing the protections of s. 23 of the *Charter* as being engaged only in cases where an infringement of this section has been shown is contrary to the approach set out in *Doré*. As I explained above, the *Doré* framework applies when limitations are imposed on *Charter* values. I add that taking such a strict view would also be contrary to the remedial purpose of s. 23, which is aimed at "promoting the development of official language minority communities and changing the status quo" (*Conseil scolaire francophone de la Colombie-Britannique*, at paras. 3 and 16; see also *Doucet-Boudreau*, at para. 29), as well as contrary to its preventive purpose.

[85] A contextual approach must be adopted to determine whether the values of preservation and development of minority language communities were limited by the Minister's decisions against admitting the children of the appellant parents to the schools of the Francophone

minority in the Northwest Territories. Because of their collective dimension, the protections conferred by s. 23 of the *Charter* must be assessed in light of the unique language dynamics of a province or territory (*Reference re Public Schools Act (Man.)*, at p. 851; *Solski*, at paras. 34 and 44). This requires an analysis of the relationship between the minority and majority language groups in order to understand "the historical and social context of the situation to be redressed" (*Arsenault-Cameron*, at para. 27).

[86] The evidence shows that, within the specific language dynamics of the Northwest Territories at the time, the preservation and development of the Francophone community were supported through, among other things, the admission of a certain number of children of non-rights holder parents. Such admissions contributed to the growth of the Francophone community of the Northwest Territories and promoted its development, in such a way as to reduce the likelihood of assimilation and prevent cultural erosion. It must therefore be concluded that, at the time the Minister made her decisions, there was a link between the admission of children of non-rights holder parents to French-language schools in the Northwest Territories and the preservation and development of the Francophone community there.

[87] In fact, at the time the impugned decisions were made, the Minister acknowledged that the assimilation rate and exogamous marriages were challenges to be overcome for the transmission of the French language within the Francophone community of the Northwest Territories. As the 2016 Directive recognized, the admission of a certain number of children of non-rights holder parents to French first language schools in the Northwest Territories supported the growth of the rights holders population, which was an "inherent part" of the revitalization of the French language.

[88] The *Report* reviewing the 2008 Directive was to the same effect. After noting that natural growth of the rights holder population and the migration of rights holders "may not be sufficient to maintain a level of population sufficient for supporting French first language schools, particularly in Hay River" (p. 20), this report recommended the admission of certain children of non-rights holder parents, particularly to allow for the sustainment and growth of the Francophone community of the Northwest Territories (p. 21).

[89] Depending on the circumstances, the admission of children of non-rights holder parents may have a positive or a negative impact on the minority language community. This means that the government's refusal to admit a child of non-rights holder parents will not have the effect of limiting the preservation and development of minority language communities in every case. On the contrary, in some cases, the values underlying s. 23 of the *Charter* will militate against the admission of children of non-rights holder parents. As I mentioned above, minority language schools may become centres of assimilation if the admission of children of non-rights holder parents undermines the linguistic and cultural vitality of the linguistic minority in the schools. Here, however, several factors showed that the children's admission would not have such consequences, including the CSFTNO's support for their admission and the individual characteristics of each application.

...

C. *The Minister Did Not Proportionately Balance the Values Underlying Section 23 With the Government's Interests*

[92] The balancing exercise called for by *Doré* requires an administrative decision maker to "giv[e] effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Here, this exercise required, at a minimum, that the Minister truly take into account the constitutional values of preservation and development of official language minority communities, in other words, that she meaningfully address the considerations arising therefrom (*Vavilov*, at para. 128). The reasons for the Minister's decisions do not show that she did so. I conclude that those decisions are unreasonable.

[93] The two decisions rendered concerning [the child] W. in 2018 did not refer to s. 23 of the *Charter* or the values underlying it. Yet there is no doubt that the Minister had to consider the preservation and development of the Francophone community of the Northwest Territories in exercising her residual discretion. Failure to take the relevant values into account necessarily leads to a disproportionate balancing. Moreover, I agree with Rouleau J. that the Minister fettered the exercise of her residual discretion by refusing to admit W. solely on the basis of his ineligibility in one of the three streams of the 2016 Directive. The streams of the 2016 Directive could not bind the Minister to the point of preventing her from exercising her discretion in every case. The chambers judge was therefore correct in finding that those decisions were unreasonable.

[94] The reasons for the decisions rendered following the 2019 judgment do not show that the Minister truly considered s. 23 by meaningfully addressing this provision so as to reflect the significant impact that the decisions might have on the Francophone community of the Northwest Territories. The Minister did mention the provision, but, with respect, she did not give the proper weight to the relevant values.

[95] In those decisions, the Minister indicated that she had to admit the children in question only if their admission was "required" to protect the Francophone community of the Northwest Territories and to meet its needs. She added that, given the government's scarce resources, the 2016 Directive "proportionally balance[d] the needs of the linguistic minority with the necessity for the Government to control and predict its investments in minority education", which was why it was important that she exercise her residual discretion in a fair and consistent manner (A.R., vol. IV, at p. 157; A.R., vol. V, at p. 119; A.R., vol. VI, at pp. 47 and 122; A.R., vol. VII, at p. 24). In her opinion, considerations related to the cost of services were "very important" in the exercise of that discretion. However, since there was, in her view, no threat to the continued viability of the French first language education programs at École Boréale and École Allain St-Cyr, she found that "[a] refusal of admission . . ., outside the 2016 Directive, therefore does not breach the object and purpose of s. 23 of the *Charter*" (A.R., vol. IV, at p. 155; A.R., vol. V, at p. 116; A.R., vol. VI, at pp. 45 and 120; A.R., vol. VII, at p. 22).

[96] However, the existence of the 2016 Directive did not in itself discharge the Minister's obligations under *Doré*. … Although the general purposes of the 2016 Directive were in line with the values embodied in s. 23 of the *Charter*, it should not be presumed that each decision made under that directive — including by virtue of the residual discretion derived from it — was the result of a proportionate balancing of the relevant values and the government's interests in a given case.

[97] Furthermore, in this case, *Doré* required the Minister to consider how the admission of the children for whom the applications for admission had been made would promote the development of the Francophone community of the Northwest Territories. ...[C]onsidering s. 23 only when it has been shown that the community is threatened is inconsistent with such a purpose.

[98] Several factors showed, however, that the children's admission was beneficial for the development of the Francophone community of the Northwest Territories. First, the fact that the Minister did not duly consider the CSFTNO's support for the applications for admission made by the appellant parents is of particular importance. This Court has recognized the expertise of bodies like school boards in assessing the educational needs of the linguistic minority (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 86).

[99] Second, the Minister also did not duly consider the individual characteristics of the various applications in relation to the benefits that could result from a decision to grant them. ....

...

[101] The decisions rendered by the Minister following the 2019 judgment thus had a significant impact on the values enshrined in s. 23 of the *Charter*, since the admission of the children of the appellant parents would have had considerable benefits for the preservation and development of the language and culture of the minority language community.

[102] It follows from the *Doré* requirements that those decisions were unreasonable. The Minister attached too much importance to her duty to make consistent decisions and, in doing so, gave disproportionate weight to the cost of the contemplated services in the exercise of her discretion. The Minister was clearly entitled to take costs into account in her decision. "Obviously, however, given the remedial nature of s. 23, pedagogical requirements will have more weight than cost" (*Conseil scolaire francophone de la Colombie-Britannique*, at para. 52; see also *Mahe*, at pp. 384-85; *Rose-des-vents*, at para. 30). The Minister has not shown that, in her decisions, she meaningfully addressed the values of preservation and development of the Francophone community of the Northwest Territories so as to reflect the significant impact that the decisions might have on it.

[103] I pause here to make two important clarifications. Stating that the Minister did not proportionately balance the values underlying s. 23 of the *Charter* with the government's interests in this case does not amount to imposing an obligation on decision makers in her position to admit all children of non-rights holder parents. A refusal does not always mean that there was a disproportionate balancing of the relevant values and the government's interests. Nor does this amount to endorsing freedom of choice of the language of instruction, a model expressly rejected by the framers under s. 23 (*Solski*, at para. 8; *Nguyen*, at paras. 35-36). On the contrary, the freedom of choice model would imply the systematic admission of children of non-rights holder parents without a proportionate balancing of *Charter* values. In each case, the decision maker must consider the relevant values in light of the particular circumstances of the application in order to decide whether to admit children of non-rights holder parents.

VI. Disposition

[114] For the reasons given above, I would allow the appeal and set aside the orders made by the Court of Appeal for the Northwest Territories...

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The chapter in the 2022 edition of this casebook on language rights ended with a brief discussion of Quebec's controversial *Act respecting the laicity of the State*, CQLR c L-0.3 ["Act"] (p.24-36). As explained in that discussion, the Act "bans the wearing of religious dress or symbols by persons performing certain public service functions where they are deemed to occupy a position of authority, such as police officers, government lawyers, and public school teachers" (p. 24-36). The Quebec legislature used s. 33 of the *Charter*, the notwithstanding clause, to try and insulate the Act from constitutional challenges.

The discussion in the 2022 edition also briefly refers to *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII) ["*Hak*"], in which a judge of the Quebec Superior Court found, in addition to several unrelated determinations, that the application of the Act to Quebec's English school boards violated s. 23 of the *Charter*. (p. 24-36) The trial judge in *Hak* found that s. 23 of the *Charter* provided autonomy to the English school boards over hiring decisions. Therefore, the trial judge reasoned, the ban in the Act on public school teachers wearing religious dress or symbols violated s. 23 of the *Charter* since it interfered with the English school boards control over hiring teachers. The trial judge found that the violation could not be saved by s. 1. Remember also that the notwithstanding clause does not apply to s. 23 of the *Charter*.

Hak was appealed and cross-appealed to the Quebec Court of Appeal. The case involves several constitutional issues, but this excerpt focuses solely on the s. 23 issues. The Quebec Court of Appeal disagreed with the trial judge and ruled that the Act did not violate s. 23 of the *Charter*. The Quebec Court of Appeal found that the Act did nothing to restrict the rights of Quebec's English minority and that "what is at stake here is a restriction on recruitment practices, which in no way pertains to linguistic considerations" (para 605). The Quebec Court of Appeal also found that the trial judge had put too much weight on the alleged existence of a culture of "diversity and, in particular, religious diversity" in Quebec's English schools (para 607). The Quebec Court of Appeal stated that this alleged "culture" was unrelated, and therefore not protected, by the language rights in s. 23 (para 614).

When reviewing the Quebec Court of Appeal's reasons, consider whether you agree that the trial judge incorrectly expanded the scope of the rights protected by s. 23 of the *Charter*.

The Quebec Court of Appeal acknowledged that Quebec's English language minority is at the high end of the sliding scale described by the Supreme Court of Canada in *Mahe* and *Conseil scolaire francophone de la Colombie-Britannique* for minority language educational rights (para 552). Do you think the Quebec Court of Appeal's reasons are consistent with the "upper level of management and control" over education provided to official language minority groups at the high end of the sliding scale?

On 23 January 2025 the Supreme Court of Canada granted leave to appeal the judgement of the Quebec Court of Appeal. What arguments would you make before the Supreme Court of Canada to
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both uphold and strike down the Act, solely on the issue of the language rights protected by s. 23 of the *Charter*?

***Organisation mondiale sikhe du Canada c. Procureur General du Québec*, 2024 QCCA 254 (CanLII) [English Translation of the Judgment of the Court], leave to appeal granted *Commission scolaire English-Montréal, et al. c. Procureur General du Québec, et al.*, 2025 CanLII 2818 (CSC)**

[Note that "ESMB" in the reasons refers to the English Montreal School Board.]

3. Chapters II and III: Prohibition on Wearing Religious Symbols (s. 6) and Services With Face Uncovered (ss. 7 to 10)

...

[27] Thus, s. 6 of the *Act* prohibits certain state representatives, officials or mandataries from wearing religious symbols when they exercise their functions. Moreover, baring exceptions (s. 9), ss. 7 and 8 of the *Act* require the personnel of government departments and of public and parapublic government bodies, as well as members of the National Assembly and other persons who work in the public or parapublic sector, to act with their face uncovered (even where wearing religious symbols is otherwise permitted). In certain specific cases,[41] this obligation may be extended to persons or partnerships that enter into a contract with the state or receive financial assistance from it (s. 10). The *Act* also requires persons who seek a public service to uncover their face if doing so is necessary to allow their identity to be verified or for security reasons (s. 8 para. 2).

...

[56] After a detailed analysis of the grounds and arguments of the various parties, the Trial Judgment, as we saw at the outset,[68] largely rejected the challenge mounted by the parties opposed to the *Act*, except on two important points:

- it found that s. 8 para. 1 of the *Act*, insofar as it applies to members of the National Assembly (mentioned in para. 1 of Schedule III), violates s. 3 of the *Canadian Charter* (which provision protects the democratic rights of citizens), and does so in a manner that is not justified under s. 1 thereof; and

- it further found that s. 4 para. 1, ss. 6, 7, 8 and 10, s. 12 paras. 1 and 2, and ss. 13, 14, and 16, read in conjunction with para. 7 of Schedule I, para. 10 of Schedule II and para. 4 of Schedule III, are contrary to s. 23 of the *Canadian Charter* (which provision protects minority language education rights).

Consequently, the provisions in question were declared of no force or effect.

...

D. Constitutionally protected language rights

...

3. Brief review of the reasons in first instance

[520] The trial judge began by considering the scope of s. 23. First, he accepted the EMSB's position to the effect that s. 23 of the *Canadian Charter* must be interpreted broadly and liberally. He emphasized the vital role of education in preserving and fostering linguistic minorities. This gives rise to the right of minorities to exercise a measure of management and control over public education facilities and their educational programs. Such right includes the exclusive authority to make decisions in respect of all matters pertaining to the instruction provided in the language of the minority and to the facilities providing that instruction.

[521] This extends to decisions on the recruitment and assignment of teachers. In the trial judge's view, such authority is vital if the language and culture of the linguistic minority is to flourish. He found that s. 23 is designed to preserve these two elements — language and culture. And in the case at bar, one component of this culture stems from the [translation] "specific importance English school boards and their teachers or principals place on recognizing and celebrating ethnic and religious diversity" — at least those are the words the judge used in paragraph 983 of his reasons to summarize what, in his opinion, was uncontradicted evidence presented at trial. And, in the judge's view, the restrictions the *Act* establishes regarding the recruitment of personnel impair this power of management and control over the minority's educational facilities.

[522] By focusing his analysis in this way, the trial judge dismissed, from the outset, the AGQ's main argument regarding s. 23. Indeed, the AGQ had submitted that [translation] "the culture s. 23 strives to promote is intrinsically linked to the language of the minority, and nothing more".[526]

[523] Relying on an expert opinion, the judge continued his analysis, noting that the absence of diversity among teachers, and in particular the absence of a visual marker of a certain ethnic or religious identity, will have harmful effects because diversity in the educational setting contributes positively and in various ways to the students' development. This line of reasoning led him to the conclusions set out in the three declarations reproduced above,[527] which, as previously mentioned, are set out in paragraphs 1138, 1139 and 1140 of the Trial Judgment.

[524] As, in the trial judge's view, an infringement had been demonstrated, he next considered whether the infringement of the rights guaranteed by s. 23 was a reasonable limit within the meaning of s. 1 of the *Canadian Charter*. Examining this issue was not without its risks since, as previously mentioned, at trial the AGQ did not present any evidence whatsoever on this point, nor did he submit any arguments pertaining to this provision of the *Canadian Charter*. The judge's reasons addressing s. 1 are, however, very thorough and systematic in their examination of the criteria that emerged in *Oakes*,[528] especially since, as he observed, the rights arising under s. 23 are shielded from the s. 33 notwithstanding clause.

[525] For the judge, it was clear from the outset, that in adopting the *Act*, the legislature was tackling a pressing and substantial objective. He found, however, that the deleterious effects of the infringement were disproportionate to its salutary effects, such that the measure could not be shown to be justified under s. 1 of the *Canadian Charter*.

[526] This finding regarding s. 1 of the *Canadian Charter*, together with the earlier finding that the *Act* violates s. 23 of that *Charter*, provided the basis for the declaratory conclusions reproduced above that had the effect of rendering several provisions of the *Act* of no force or effect.

...

c. Genesis of the rights guaranteed in s. 23 of the *Canadian Charter*

...

[552] Since *Mahe*, it is well established that s. 23 sets out a "sliding scale" of requirements / "*exigence 'variable'*"[561] — the current French terminology having adopted the notion of scale as well, "*échelle variable*" — which provides a basis for a "range of educational services".[562] These services are intended to give full effect to the right of certain citizens of Canada to, in the precise words of s. 23(3), "have their children receive primary and secondary school instruction in the language of the [...] linguistic minority population / *faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité*". The low end of the sliding scale corresponds to this right only to instruction (s. 23(3)(*a*)). The high end also includes the right to "minority language educational facilities / *établissements d'enseignement de la minorité*" (s. 23(3)(*b*)), which translates into an "upper level of management and control" over these facilities and the instruction provided there.[563] Referring to these elements in 2020, the Supreme Court made the following observations:

> [24] ...at the low end, s. 23 rights holders are entitled to have their children receive instruction in the language of the official language minority, but the extent to which the minority exercises control over the provision of instruction rises with the number of children of rights holders. At the low end of the scale, the minority is entitled only to instruction in its language. In the middle, it might have control over one or more classrooms in a school of the majority or over one part of a school it shares with the majority. It might also have control over the hiring of teaching staff and over certain expenditures. At the high end, the minority has control over separate educational facilities, that is, over a homogeneous school. The number of children of rights holders might also entitle the minority to the management and control of a separate school board. In short, once the minimum threshold of s. 23(3)(*a*) is crossed, the sliding scale applies to determine the level of services that corresponds to the extent to which the minority will have control over the provision of educational services.[564]

In the case at bar, no one disputes that the number of English-speaking children in Quebec places them at the high end of the scale.

...

b. Effect of s. 23 in the case at bar

[603] If we summarize the guidelines provided in the foregoing cases, we first note that, of all the various remedial measures considered mandatory by the courts in the enforcement of s. 23, every one of them without exception attaches to the core characteristics of minority language rights in an educational context. In particular, such measures pertain to:

> i. the physical, pedagogical and administrative conditions under which minority language instruction is offered (the right to minority language instruction, the right to separate classes where such instruction is offered, the right to proportional representation

of the minority on the linguistic majority's school councils and school boards, the right to "homogenous" minority language schools, the right to separate school councils and school boards to administer one or more homogenous schools, the right to manage these facilities and to exercise exclusive control over them);

ii. the arrangements for school-related support activities (such as transportation to and from school, or extracurricular sporting and cultural activities); and

iii. the potentially deterrent effects on right holders of certain measures taken under s. 23, measures that might hasten the assimilation or cultural erosion of the linguistic minority due to the impact of various pedagogical choices (a limited number of hours of minority language instruction, or the teaching of that language in immersion classes where it is taught as a second language rather than as a first language in a minority language school).

[604] For linguistic and cultural minorities in Canada, whether anglophone or francophone, s. 23 serves as a bulwark against their own decline. The desire to avoid assimilation caused by the delays often associated with government inaction in this field is therefore an important aspect frequently taken into account by the courts. This particular factor, however, is entirely absent in the case now before this Court.

[605] When interpreting and applying s. 23, the first concern must be the rights of the persons contemplated by the provision (rights holders), followed by a consideration of the impact that an infringement of these rights may have on the situation of other beneficiaries of the regime, such as the primary and secondary school students and the "educational facilities", as s. 23 refers to them, intended to provide instruction to those students. The *Canadian Charter*, after all, introduces s. 23 with the title "Minority Language Educational Rights / *Droits à l'instruction dans la langue de la minorité*". No such rights holder, however, is prejudicially affected here. Nothing in the *Act* has any impact whatsoever on the use of the English language in schools. Nor does anything curtail its unrestricted use in a schooling context, whether it be by students, in the offices of the linguistic minority's school boards, or in the schools where members of the linguistic minority perform their professional duties as teachers, pedagogical support personnel, school administrators or otherwise. Rather, what is at stake here is a restriction on recruitment practices, which in no way pertains to linguistic considerations.

[606] Furthermore, none of the cases analysed in the preceding pages approximates in any way the situation on which the trial judge had to rule. It goes without saying that the principles the Supreme Court infers from s. 23 must be interpreted in a flexible manner. That said, the words set out in provisions of the Constitution may impose clear restrictions on its scope, as was pointed out earlier. Interpreting the case law dealing with the *Canadian Charter* also requires that due regard be paid to existing constraints. Here too, context matters, and it is necessary to take fully into account the circumstances that informed developments in the case law. Precedent depends on this factor — a precedent is much more than mere words one can quote out of context, as it comes with its surrounding context. And this context assists the interpreter in understanding the meaning and intent of the words in which, on a case-by-case basis, jurisprudence expresses itself.

[607] If accepted in its current form, the argument of the parties opposed to the *Act* would artificially constitutionalize a practice, one that emerged only recently, at that, and has absolutely nothing to do with the English language as it is taught and used by Quebec's linguistic minority in the primary and secondary schools. The justification so offered amounts at best to an extrapolation from well-settled rules: it is premised on the alleged possibility for educational facilities governed by s. 23 to protect and promote the distinct "culture" which is said to prevail in the English schooling system, a culture that, it is claimed, fosters diversity and, in particular, religious diversity.

[608] "Culture", understood as an ethnological or sociological concept, takes many different forms, and the concept certainly extends well beyond the notion of "language of the minority". It can stretch in many directions and apply to all sorts of concepts that have little or nothing to do with language as such. For example, one speaks of general, ancient or modern culture, political, legal, Indigenous, religious, literary, musical or gastronomic culture, or Mediterranean or Asian culture. These various heterogeneous or homogenous entities may evolve and prosper without being tied to and dependent upon one language only, be it the language of the minority or the majority. Moreover, such entities often coexist in parallel in many languages, which they all transcend. In that sense, one thing cannot be doubted — language and culture are not merged into one and the same thing.

[609] More specifically, however, what is valued here, according to this argument, is a culture of openness, of diversity, and of the Canadian heritage of multiculturalism and pluralism, particularly as regards religion. With respect to multiculturalism and cultural diversity, it is true that s. 27 of the *Canadian Charter* explicitly makes room in the Constitution for "the multicultural heritage of Canadians / *patrimoine multiculturel des Canadiens*". But s. 27 must be read and reconciled with s. 23, which does not refer to cultural minorities other than the English linguistic minority and the French linguistic minority, such minorities being the sole rights holders under this provision. As for pluralism, an open conception thereof, which also has its place here, suggests that there are distinctions to be drawn between different aspects of diversity. Along these lines, one might observe that it is difficult to associate the values of pluralism or tolerance with certain extreme forms of orthopraxy (some of which come under s. 8 of the *Act*). What some regard as immutable dogmas resulting from a divine revelation may, in the eyes of others who enjoy the same freedom of thought and freedom of conscience, amount to an aggregate of exogenous beliefs based on superstition if not on sectarianism. Many societal divisions may also arise in a number of other ways, for example, for reasons of ideological intransigence, fundamentalism or the pursuit of a distinct identity. The page, it seems, has not yet been turned on this kind of friction, made possible by diversity and, in a sense, born of it. And it may not be desirable to entirely turn this page, especially if these divisions and frictions are the necessary price to pay for the establishment of a more diverse society. But these considerations are far removed from the issue of language, and, plainly, s. 23 of the *Canadian Charter* does not address any of them.

[610] This is not to say that no rational link can exist between the language of a linguistic minority contemplated by s. 23 and, in the full sense of the word, the culture of this minority, suffused as it is with its language and supported by it.

[611] Provincial governments fairly frequently change the pedagogical regime or the content of programs offered within the school system. No one disputes that, as a general proposition, they

have the authority to do so. They sometimes even specify the precise content of courses that teachers are required to give. At times, these actions elicit reservations and may even meet with strong and hostile reactions from users of the school system, as clearly evidenced in *S.L. v. Commission scolaire des Chênes*[649] and *Loyola High School v. Quebec (Attorney General)*[650] with respect to a field other than language teaching.

[612] It is not difficult to imagine a Department of Education taking steps to determine what will be taught as part of existing programs and taking an initiative, perhaps ill-advised, which could have a direct, perceptible and prejudicial impact in a school setting on the quality and growth of a minority language. For example, where English is the language of the minority, such could be the case with a curriculum reform advocating or, even more so, imposing the exclusive use of local literature in the teaching of English, thereby excluding several well-known English international authors. A policy of this sort would undoubtedly cause harm to the language of the minority and to the culture associated with that language. It would give rise to government action whose effect — whether deliberate or not — would manifestly weaken them, reduce them to the level of a language and a culture regional in scope, all of which would detrimentally affect their ascendency and reach.

[613] With a modified scenario, a parallel and equally damaging result becomes apparent with French as the language of the minority and with a different array of famous names from international French literature. The fact remains that this kind of government action, detrimental as it would be to the dissemination and the flourishing of a language, and thus to the culture that is inseparable from it, might well, if it were challenged, as it probably would, amount to an infringement of the right to control and manage the minority language educational facilities. And it certainly would not suffice to answer that, in any event, where possible, francophone students will have the opportunity to study the great French authors in their English translations when being taught English. Here again, however, what is at stake is the close, even interwoven, relationship between a minority language protected by s. 23 and the culture it disseminates where the use of this language is widespread enough.

[614] Such is not the case here. Instead, the argument of the parties opposed to the *Act* attempts to take elements that are unrelated to language, sharing no characteristics with it, and glue them together around the notion of “culture”. At best, according to this argument, such elements are entirely peripheral to the notion of culture, and even this remains to be shown. Under this guise, applications have been presented to the Court which, in light of the relevant jurisprudence, have nothing in common with claims that, in the last 35- or 40 years, were successfully argued under s. 23 of the *Canadian Charter*. In other words, the Trial Judgment gives s. 23 a scope it does not have. In so doing, it erroneously concludes that the *Act* infringes this provision of the *Canadian Charter*. It therefore follows that the Court must reverse the Trial Judgment on that point.

[615] In light of this result, it is not necessary to further consider the effect of s. 1 of the *Canadian Charter*, nor is it necessary to address the parties’ arguments on the remedial orders made by the trial judge.