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School Closures

Gillian Tuck Kutarna and Kate Genest

Agenda

“Lessons from the Past and the Impact of the Moratorium on the Future”

1. Impetus for school closures
2. Provincial Regulation: similarities and degree of prescription
3. Right of review
4. Case law: duty of fairness
5. Successful and unsuccessful processes
6. Is there a formula for success?

Why Close a School?

- Population shifts – declining enrolment
- Unused space
- funding
- Cost of transportation
- Environmental impact
- Programming considerations
- Extracurricular activities
- Physical Accessibility
- Cost to repair

Provincial School Closure Procedures: Common Features

- Ministerial regulations and board policy
- Committees – with stakeholder representation
- Duty of procedural fairness:
 - Openness and transparency
 - Disclosure of relevant information
 - Public consultation
 - Meetings
 - Presentations
 - Written submissions

Common Features (cont.)

- Notice to municipalities, parents, and community partners
- Consideration of other options, such as use as community hub or alternate use rentals
- Defined timelines
- Clear roles for all involved parties, including where the final decision lies
- Local decision-making (except NB and PEI, which require approval from government)

Hallmarks of highly regulated provinces eg. ON, N.C., N.B.

- Specific procedural requirements
 - Well-developed Ministerial guidelines
 - Specific legislative provisions
 - Multi-layer decision-making
 - Defined oversight mechanisms
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- **EXAMPLE:** per the Ministry's published guidelines, ON requires 2 public meetings, NS requires 3, and NB requires 3

Hallmarks of minimally regulated provinces eg. B.C., AB

- Limited legislative provisions
 - General procedural requirements
 - Guidelines are conceptual
 - Broad discretion to local board
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- **EXAMPLE:** BC Board policy requires Boards to consider community input, future enrollment, and possible alternatives.



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Ontario Ministry of Education

PAR Guideline, March 2015

Ontario PAR Guideline

- 2015 Guideline replaced 2009 Guideline
- Invoked if a school consolidation or closure is being considered
- Boards must develop their own policy and procedures
- Ministry Guideline provides minimum standard
- Must consult with local communities prior to adopting policy
- Must include clear timelines
- Must share relevant information
- Must give community a chance to be heard
- Final decision regarding closure must rest with Board of Trustees
- Must involve a transition plan, to be communicated to all affected communities, where closure approved

“Overhaul”

- June 2017: Plan to Strengthen Rural and Northern Education
- Ministry of Education announced “it must do more to engage communities and pursue shared use of space when making decisions about the future of schools.”
- PAR process will be reviewed and overhauled
- Will consider:
 - impact on communities and student well-being
 - longer timelines
 - more accommodation options
 - clearer roles for students as well as staff and elected officials from both school boards and municipal governments
- In the meantime, a moratorium on initiating any new PAR’s



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Right of Review

Review of Board of Trustee Decision

1. Administrative Review by Minister, limited to consideration compliance with Ministry Guidelines

2. Judicial Review of procedural fairness

Courts hesitant to interfere with elected bodies, but will consider:

- Did the Board follow the Provincial statute, regulation, guidelines?
 - Did the Board follow their own procedure?
 - Was fair consideration given to all options and submissions?
 - If there was a breach, was it material, did it have a prejudicial effect on the community's ability to be heard?
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- If the process is held to be materially unfair, the original decision will be “quashed”.

Ross v. Avon Maitland District School Board

2000 CanLII 22817 (ON SC)

Divisional Court held that the Board breached its duty of fairness on a number of grounds:

- Created a Seaforth committee mid-way through the process
- Acknowledged that recommendation to close Seaforth was based on a \$200,000. calculation error
- Committee refused reasonable request for relevant information
- Board did not grant the committee an extension, and therefore their report could not be fully developed
- Did not provide the community with a chance to consider alternatives

Ross (cont.)

Duty of fairness includes:

- Right to be heard
- Right to play a meaningful part in the decision-making process
- Right to explore and develop meaningful alternatives
- Right to reasonable disclosure – access to information necessary to participate in process
- Right to sufficient time to review, consider and develop analysis in order to make submissions
- *duty of fairness is proportionate to impact of the decision. When closing the only high school in the community – academic, economic and social consequences. Can be “fatal” to future prospects of community.



Cook v Board of School Trustees of School District No. 43 (Coquitlam) 2007 BCSC

- Applicants alleged material procedural unfairness in decision to close K – 5 school with 130 students.
- The Board did not disclose a feasibility report on the planned upgrades, or take into account the presence of asbestos, at neighbouring school
- Board developed a process in accordance with its school closure policy
- Applicants had a legitimate opportunity to influence the decision, including as it related to the upgrade, even without reviewing the contents of the report.
- No health and safety risks at new school.
- Decision was based on funding, declining enrollment, and enrollment forecasting, and district resources.
- No breach of duty of procedural fairness

Civitarese et al v. The Board of Trustees of School District No. 20 (Kootenay-Columbia) 2003 BCSC

- Under the School Act, the Board had right to meet *in camera* where, in Board's opinion, it was in the public interest. An *in camera* meeting did not undermine public nature of process.
- Board had the authority to design its own process, provided it included public consultation. 60 days and 6 public meetings, with general notice of purpose, were sufficient.
- The Board communicated using information packages, public meetings, website postings, and newspaper articles. Could have been more specific, but public had a genuine opportunity to make their views known.
- Petition for injunction dismissed.

Potter v. Halifax Regional School Board 2002 NSCA

- A person has the right to an education, but not have the right to attend a particular school in the district where he or she resides.
- School board decisions are subject to judicial review in only limited circumstances.
- Decision to close a school is not a general policy or legislative function, but rather administrative, and so not exempt from duty of procedural fairness or judicial review. Parents have a specific interest in outcome.
- Chambers Judge quashed 7 to 6 decision of Board to close school, on basis that one Trustee who voted in favour was absent for all 7 public meetings, and therefore lacked the benefit of **oral** submissions. Board should not have permitted him to vote. “He/she who decides must hear”
- CA overturned. Statutory and common law requirements of procedural fairness in this case required a public **meeting**, but did not require a public **hearing**.
- Distinction between mandatory procedural requirement and procedural direction. “Shall” v. “May”

Bridgewater (Town) v. South Shore Regional School Board 2017 NSSC

- Moving secondary students from 3 grades to another school, 3 km away, is not just a grade reconfiguration. This involved the **potential** closure of a school, and so procedure was engaged.
- For the people involved, it is specific administrative decision in which they have a keen interest.
- Therefore, decision attracts a duty of fairness.
- Renovations began before decision was made. Was there reasonable apprehension of bias ie. decision-maker has a closed mind, and representations would be futile? Evidence that due consideration was made of submissions.
- Delay for an independent review did not invalidate decision. Timeline was directory.
- Composition and mandate of committee not relevant, as committee made recommendations, not decision.
- Trustees not obligated to attend committee meetings, and arguably should not.



Summary of Key Principles

Civitarese:

“The court does not have jurisdiction to review policy decisions.”

Ross v. Avon Maitland:

“It is not within our power to second-guess the financial and political decisions of elected officials to act with their legal jurisdiction....

The narrow mandate of the court is to inquire whether the school closing is authorized by law, whether there was adequate public consultation as required by law, and whether the decision is taken through a process that is procedurally fair.”

Cook v. Coquitlam:

“The context of the duty of procedural fairness is flexible and depends on the specific context within which a statutory decision is made.”

“This does not mean that the prevailing standard is one of perfection.”

Summary of Key Principles (cont.)

Cook v. Coquitlam:

“A petitioner seeking to set aside a school closure decision on an application for judicial review based on procedural fairness bears a heavy burden. To succeed he or she must establish not only that there was a procedural defect in the consultation process, but also that any such defect was so fundamental that it affects the very basis of the board’s decision.”

Elliot v. Burin Peninsula School District No. 7 (NFLD CA 1988)

“...reasonable disclosure...may not necessarily require full disclosure of all background information and every scrap of relevant paper...”

Key Principles (cont.)

Baker v. Minister of Citizenship and Immigration (SCC 1999):

“... the purpose of participatory rights contained within the duty of procedural fairness is to ensure that the administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

Potter

“Parents know with bone-deep certainty that the schools their child attends will shape him or her in many ways.”

What happens when a process is unsuccessful?

- Communities are divided
- Confidence in Board is eroded
- Messages get distorted
- Personal attacks on social media
- Elected officials are not re-elected
- Savings deferred or reduced
- Delays due to court challenges – matter can get “sent back”
- Students are caught in the middle
- Administrators are focused on the conflict, and lose valuable opportunity for aspirational thinking

Post –Moratorium: Features of a Defensible Process

- Effective communication of the rationale
- Development of defensible parameters, based on sound analysis
- Statutory and Ministry compliance
- Adherence to Board process
- Publicly accessible data
- Process can't be rushed
- Justice must be seen to be done
- Create ample opportunity for public input – meetings, website, Trustees, delegations, FAQ's – more than one public meeting

- Right to engage with decision-makers does not mean the right to be a decision-maker.

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