**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Godsoe v. South Shore Regional School Board*, 2018 NSSC 28

**Date:** 20180213
**Docket:** Hfx No. 462930
**Registry:** Halifax

**Between:**

Stacey Godsoe and the Greater Petite Area Community Association

Applicants

v.

South Shore Regional School Board and the Attorney General of Nova Scotia

Respondents

and

Municipality of the District of Lunenburg

Intervenor

**JUDICIAL REVIEW**

| | |
|---|---|
| **Judge:** | The Honourable Justice Christa M. Brothers |
| **Heard:** | September 7, 2017, in Halifax, Nova Scotia |
| **Decision:** | February 13, 2018 |
| **Counsel:** | Brian P. Casey, Q.C., and Rilla Banks, for the applicants<br>John C. MacPherson, Q.C., and Katie Roebothan, for the respondent – South Shore Regional School Board<br>Alison W. Campbell, watching brief, for the Attorney General of Nova Scotia<br>James C. Reddy, for the Intervenor – Municipality of the District of Lunenburg |

**Brothers, J.:**

[1] Petite Rivière Elementary School ("Petite Rivière") is scheduled to close in July 2018. The South Shore Regional School Board (the "Board") passed a motion on March 22, 2017 (the "2017 motion"). The 2017 motion is the subject of this judicial review. The Board argues the 2017 motion simply set a date to close Petite Rivière and says the decision to permanently close Petite Rivière was made in 2013. The 2017 motion states:

> **MOTION SS014-17** by Board Member Simms, seconded by Board Member Garrison, that the board close Pentz Elementary School and Petite Riviere Elementary School, effective July 31, 2018.
>
> **Seven For / One Against / Motion Carried**

[2] In order to properly review the 2017 motion, I must consider an earlier motion approved by the Board in 2013.

## BACKGROUND

[3] On the evening of March 27, 2013, the Board made a decision concerning Petite Rivière. In a lengthy, two-part motion (the "2013 motion") a unanimous decision was made to close Petite Rivière. Was the closure decision conditional on a replacement school being built or was the 2013 motion an unconditional, permanent closure decision?

[4] Since that evening, the 2013 motion has been the center of significant controversy, discussion and the subject of legal opinion. A school board speaks through its motions. When a board requires legal advice to interpret its own motions, it is conceivable that confusion for community stakeholders will ensue.

[5] Did the 2013 motion permanently close Petite Rivière on March 27, 2013 with a date certain for closure provided in the 2017 motion? Was Petite Rivière only to close if a replacement school was built? If the latter is so, does this render the 2017 motion a nullity for lack of procedural fairness for the failure of the Board to engage or follow the school review process as set forth in the *Ministerial Education Act Regulations* N.S. Reg. 80/97, as amended N.S. Reg. 158/2014, made pursuant to the *Education Act*, S.N.S. 1995-96, c. 1, as amended S.N.S 2014, c. 14 (the "*Act*").

[6] The Notice for Judicial Review filed on April 26, 2017 sets forth the following grounds of review:

> Grounds for review
>
> The *Education Act*, S.N.S. 1995-1996 c. 1 and the regulations thereunder provided a particular process for a school board to permanently close a school. The Board followed that process in 2012 and determined March 27, 2013 to close the School "once a replacement building was constructed". No date was set for the closing.
>
> However, in October 2014, the *Education Act* was amended, to provide a new process for school closures, and the regulations under the Act were revised. The Act now provides, "Subject to the regulations, a school board may not permanently close a school except in accordance with the school review policy adopted by the Minister". The Board has not complied with the school review policy adopted by the Minister.
>
> The Minister of Education has proposed that instead of closing the school, the Board undertake a major renovation of it. At a meeting February 22, 2017, the Board determined it was not possible to reconsider its earlier closure motion.
>
> At a meeting on March 22, 2017, the Board purported to vary its earlier decision to provide that (although no replacement building has been constructed) the School would close effective July 31, 2018. The Board determined the date for doing so and varied its earlier motion without complying with the mandatory school closing process under the amended *Education Act* and regulations.
>
> The Applicants seek review on the following grounds:
>
> 1. The motion to permanently close the School is a breach of s. 89 of the Education Act;
> 2. The (wrong) determination that the Board could not reconsider its earlier closure decision fettered the Board's discretion and prevented it from deciding on the merits whether to accept money to renovate the School;
> 3. The Board owed parents affected by the closure decision a duty of fairness. The decision to vary the earlier closure decision (so it was no longer contingent on the building of a replacement school) and to set a date for closure was a breach of that duty of fairness.

[7] The applicants seek an order quashing the 2017 motion.

## ISSUES

1. What is the applicable standard of review?

2. Is the 2017 motion a decision merely setting a date for a school closure?

[8] In order to answer this question, I must consider the following questions:

a) Is the Board's conclusion that the 2013 motion is an unconditional decision to close Petite Rivière reasonable?

b) If the 2013 motion is conditional, was the duty of procedural fairness breached when the Board failed to follow the new school review process?

c) If the 2013 motion can reasonably be interpreted as an unconditional decision to permanently close the school, was the Board's interpretation that the *Act* prevented the Board from reconsidering the 2013 motion reasonable?

d) Do the 2014 *Education Act* and *Regulations* apply to the 2017 motion?

## STANDARD OF REVIEW

### Closure Decision

[9] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, instructs that the first step in determining the applicable standard of review is to ascertain whether there exists any jurisprudence that has determined the degree of deference to be afforded an administrative decision-maker.

[10] There is ample authority for the proposition that the standard of review applicable to a school closure decision is reasonableness. This was the conclusion in *Delorey v. Strait Regional School Board*, 2012 NSSC 450, 2012 CarswellNS 976, and in *Bridgewater (Town) v South Shore Regional School Board*, 2017 NSSC 73, 2017 CarswellNS 185.

[11] The factors to be weighed in determining the standard of review were discussed in *Dunsmuir, supra*:

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate. [Emphasis added.]

[12] In *Delorey, supra*, the court conducted the required analysis and concluded that apart from procedural fairness considerations, weighing all of the factors led to a conclusion that reasonableness is the appropriate standard of review for a school closure decision.

[13] Given the following:

- The Board's mandate under the *Act;*
- The Board has primary policy function and is accountable to the Minister to control and manage public schools within its jurisdiction;
- The partial privative clause in s. 20(3) of the *Regulations*; and
- The Board has the expertise in matters of school closures and interpreting its own statute.

I too conclude that the standard of review of a school board's decision to close a school is reasonableness.

[14] I accept the respondent Board's position that none of the issues, in this judicial review, fall within any of the four "correctness" categories outlined in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47:

> [24] The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more

> competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required . . .

[15] The matters at issue in this judicial review are clearly not constitutional issues or "true questions of jurisdiction or *vires*" or issues regarding jurisdictional lines between two or more competing specialized tribunals. Furthermore, albeit of critical importance to the applicants, this legal issue in not of central importance to the legal system.

[16] A narrow scope for the review of a school board decision to close a school was discussed in *Sydenham District Assn. v. Limestone District School Board*, 2014 ONSC 7199 (Ont. Div. Crt):

> 25 It is well-established that a court has a limited role when asked to judicially review the decision of a school board to close a school. Given that the decision involves policy and financial considerations, it is not the role of the court to determine the wisdom of the decision. Rather, it is the role of the elected trustees to weigh the competing considerations.
>
> 26 The court's role is a circumscribed one, as stated in *Ross v. Avon Maitland District School Board,* [2000] O.J. No. 5680 (Div. Ct.) ("Ross II") at para. 2:
>
> > 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.

[17] Applicants' counsel has shown no persuasive basis for applying anything but a reasonableness standard of review. On the first issue, the Board was interpreting its own enabling legislation and previous motion when it passed the 2017 motion. This court should review whether the administrative decision maker was reasonable not correct.

**2017 motion - Duty of Fairness**

[18] The applicants argue the 2017 motion, closing Petite Rivière in July 2018, is not an administrative decision to set a date, but the first permanent school closure motion made and passed. The applicants argue the 2017 motion was passed without the Board following the school review process adopted under the *Act*, effective October 17, 2014. The applicants argue this is a clear violation of the duty of fairness owed to them.

[19] Duty of fairness issues have been the predominant basis for challenges to school closure decisions.

[20] Courts have continued to prescribe a relatively limited role for reviewing a school board's closure decision even in the face of alleged violations of procedural fairness. *Halifax Regional School Board  Potter*, 2002 NSCA 88; *Sydenham, supra*, *Delorey, supra*, *Bridgewater (Town), supra*.

[21] However, the right to meaningful participation, including the opportunity for stakeholders to be heard was emphasized in *Fratia v. Toronto Catholic District School Board*, 2001 CarswellOnt 2741 (Ont. SCJ):

> 25 Justice Campbell then highlighted what the Divisional Court said about school closings in *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Div. Ct.) that "the right of meaningful participation by persons and groups affected by the decision must be jealously guarded". The consultation and the decision making process need not be perfect so long as they are basically fair. The duty of fairness includes the obligation to give persons affected by a decision such as this an opportunity to be heard. The legislation sets up a scheme that acknowledges the interest the public has in the education system. Public consultation is a condition of a valid decision to close a school. It goes without saying that a mere *pro forma* opportunity for the public to present views is not sufficient. There must be "meaningful participation in the actual decision-making": *Bezaire* (supra) at p. 753.
>
> 26 The importance of a fair process that provides a real opportunity for the stakeholders to influence the decision over a technically correct process was emphasized by Justice Eberle in the case of *Fisher Park Residents Association Inc. v. Ottawa Board of Education* (1986), 57 O.R. (2d) 468 (H.C.), when he said the following at p. 477 "... the substance of what is done is crucial rather than the technicalities. It must always be borne in mind that we are dealing with an administrative or management function and not with a judicial function, nor quasi-judicial function."

[22] In *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92, the court said:

> . . . no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. . . .

[23] It is for the reviewing judge to decide in light of all the circumstances if an administrative process was unfair.

[24] In *Burt v. Kelly*, 2006 NSCA 27, Cromwell J.A. (as he then was) commented on judicial review for procedural fairness:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.

[25] In *Citizens for Accountable and Responsible Education Niagara Inc. v. District School Board on Niagara*, 2015 ONSC 2058, the court summarizes the principles emerging from the caselaw.

> 51 By way of summary, the following principles emerge from the case law defining procedural fairness owed to members of the community when a school may be closed:
>
> - Closure of a school is a policy-driven management decision made by elected officials, charged with balancing complex, competing community interests. So often, there is no right or wrong answer.
> - It is not the role of this Court to second guess the financial and political decisions of elected officials acting within their legal jurisdiction. The merits of the decision to close a school are not reviewable.
> - The Court's mandate is limited to inquiring whether the school closing was authorized by law, whether there was adequate public consultation as required by law, and whether the decision has been taken through a process that is procedurally fair.
> - Deference is owed to the choice of procedures made by the decision maker. In this case, deference is owed to what has been stipulated as required in the Board Policy.

- In assessing whether the duty of fairness has been met, members of the public have the legitimate expectation that there will be substantial compliance with the consultation process prescribed by the Board Policy. The Board Policy in turn respects the minimum requirements of the *Education Act*.
- Members of the community have the right to participate in a meaningful way in the decision making process by making submissions to the elected officials and to the senior board staff that is not *pro forma* before a school in their community is closed. This is a substantive right that must be jealously guarded.
- Further, members of the public have the right to reasonable disclosure and documentation to be able to meaningfully participate in the public consultation process.
- As these are policy-driven administrative decisions, substance trumps form or technicalities in assessing whether the public participation in the process was meaningful.
- In assessing the content of procedural fairness, the process need not be perfect, but must be objectively fair.

[26] When reviewing whether the Board breached its duty of fairness to the applicants when it decided the 2017 motion, I must first defer to the Board's discretion in procedure and secondly assess whether the Board met the standard of fairness.

**Interpretation of s. 20(3) of the regulations to the *Education Act* Reconsideration Decision**

[27] The applicants submit that various issues, distinct from the closure decision, require the court to review for correctness. The applicants say the Board is owed no deference in determining whether it can "change its mind" regarding a school closure, since interpretation of the *Act* and *Regulations* is not within the Board's expertise. The applicants also argue the issue is "of general importance to the legal system as a whole", being relevant to any decision-maker whose home legislation does not indicate whether it can change its mind or make a new decision.

[28] The Board denies that the issues involve a legal issue "of central importance to the legal system." Moreover, the Board says, the issue is not whether the Board could "change its mind" as the applicants describe it. Rather, this judicial review relates to the 2017 motion setting a date for the school closures. Even if the issue were as described by the applicants, the Board says, it still does not rise to the level of "central importance." The Board says the timing of a school closure is a matter

"squarely within the policy making authority of an elected school board . . .". The applicants offer no authority for the proposition that the Board's decision is owed no deference because the Board was not sitting in an "adjudicative capacity."

[29] In deciding to review the Board's decision that it could not reconsider the 2013 motion based on reasonableness, I follow *Edmonton (City), supra*. The court held that where an issue:

> . . . involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. . . . the standard of review is presumed to be reasonableness. . . .

[30] The Board is interpreting its own enabling statute and regulations. In doing so, the Board does not have to be correct, it just has to be reasonable.

**Application of the 2014 Amendments to the Education Act and Regulations**

[31] The applicants say the 2014 amendments to the *Act* and *Regulations* providing a new school review process must apply to the 2013 motion given the fact that Petite Rivière is still operational. Given my decision, I do not need to address this issue. However, if I had to I would apply the reasonableness standard to this question.

**Reasonableness**

[32] The concept of reasonableness was described in the often-cited passage from *Dunsmuir v. New Brunswick, supra*:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[33] The court articulated the concept of deference central to judicial review in the context of the reasonableness standard:

> 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L'Heureux-Dubé J.; Ryan, at para. 49).
>
> 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[34] In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 (SCC), the court instructed reviewing courts on the application of reasonableness.

> [31] . . . The modern approach to judicial review recognizes that courts “may not be as well qualified as a given agency to provide interpretations of that agency’s constitutive statute that make sense given the broad policy context within which that agency must work” [citation omitted]
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable*

> interpretations… The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. . . .
>
> . . .
>
> [40] The bottom line here, then, is that the Commission holds the interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. …
>
> [Justice Moldaver's italics]

[35] There is no question that the Board has the authority, pursuant to the *Act*, to permanently close any of the schools within its jurisdiction. The Board is a fully elected board. When reviewing the motions made and decisions reached, except for procedural fairness questions, I am not to review on a correctness standard and substitute my own interpretation. I am to give deference and determine if the Board's decisions and interpretations are within the range of reasonable.

## ANALYSIS

### Is the Board's conclusion that the 2013 motion is an unconditional decision to close Petite Rivière reasonable?

[36] On March 17, 2013, the Board unanimously passed the following motion:

> MOTION SS038-13 by Board Member Payzant, seconded by Board Member Fougere, that Petite Riviere Elementary School permanently close and that a new school be requested to replace Petite Riviere Elementary School and Pentz Elementary School.

[37] Was the Board reasonable when it followed legal advice and concluded the 2013 motion is an unconditional school closure? If the Board's interpretation is unreasonable and the 2013 motion is conditional, then, the condition not having been satisfied, the 2013 motion does not authorize closure of Petite Rivière.

[38] The decisions under review are made by an administrative decision maker with expertise in dealing with difficult decisions, balancing all the factors and needs of the community.

[39] The Board commenced a school review process for eleven schools in February 2011. Staff were to prepare identification reports for 11 schools. This was the first step in the process to close a school under the *Education Act*, S.N.S. 1995-96, c. 1 and s. 16 of the *Ministerial Education Act Regulations,* N.S. Reg. 80/97 in place at the time. The Board discontinued that review process by vote on March 30, 2011. A new review process began in 2012.

[40] On March 27, 2013, a special board meeting was held. The meeting was to vote on nine different motions involving school closures and grade reconfigurations. Aside from the 2013 motion regarding Petite Rivière and Pentz Elementary School ("Pentz"), all other motions voted on that evening specifically addressed what schools students would attend once the closure or grade reconfiguration occurred. If the Board's interpretation is reasonable, the 2013 motion is the only exception.

[41] The omission in the 2013 motion created an ambiguity which is readily resolved by the approved Minutes. The 2013 motion was preceded by a statement from the moving Board Member, Vice Chair Payzant. This statement, properly characterized as a clarification, was made before any vote was called in relation to Petite Rivière or Pentz.

[42] Vice Chair Payzant clarified that Petite Rivière and Pentz would remain open until a new school was built to replace both Petite Rivière and Pentz. This clarification speaks to a significant aspect of any school closure, which is of vital importance to stakeholders.

[43] I accept the applicant's argument that the use of the clarification to interpret the 2013 motion is analogous to using parliamentary speeches or debates to determine the intent of legislation.

[44] By considering the clarification, the court is not looking at why the Board voted as it did, but seeking an answer to an ambiguity in the 2013 motion. Here, the mover of the motion explained that both Petite Rivière and Pentz would remain open until after a replacement school was built. This statement is relevant to interpret the 2013 motion. (*Németh v. Canada (Justice)*, 2010 SCC 56 [2010] 3 S.C.R. 281.)

[45] The clarification was made before the Board voted to close Petite Rivière and Pentz. There are no other recorded clarifications in the Board minutes before

the Board voted on the 2013 motion. For context, both motions are reproduced below:

> **MOTION SS037-13** by Board Member Payzant, seconded by Board Member Simms, that Pentz Elementary School permanently close and that a new school be requested to replace Pentz Elementary School and Petite Riviere Elementary School.
>
> Vice Chair Payzant clarified that Pentz Elementary School and Petite Riviere Elementary School would remain open until a new school has been completed to replace both Pentz Elementary School and Petite Riviere Elementary School.
>
> Board Member Griffin called for a recorded vote.

| Board Member | For | Against |
|---|---|---|
| Board Member Crossland | X | |
| Board Member Fougere | X | |
| Board Member Garber | X | |
| Board Member Griffin | X | |
| Board Member Naugler | X | |
| Board Member Payzant | X | |
| Board Member Simms | X | |
| Board Member Stevens | X | |

> **Motion SSO28-13** by Board Member Payzant, seconded by Board Member Fougere, that Petite Riviere Elementary School permanently close and that a new school be requested to replace Petite Riviere Elementary School and Pentz Elementary School.
>
> Board Member Garber called for a recorded vote.

| Board Member | For | Against |
|---|---|---|
| Board Member Crossland | X | |
| Board Member Fougere | X | |
| Board Member Garber | X | |
| Board Member Griffin | X | |
| Board Member Naugler | X | |
| Board Member Payzant | X | |
| Board Member Simms | X | |
| Board Member Stevens | X | |

**Motion Carried Unanimously**

. . .

Board Chair Naugler stated that the decisions made tonight did not come easily, and only after extensive public discussions. The Board considered the information presented to us by all involved parties and greatly appreciate your work. As a governing board we have to make difficult decisions and these are among the most difficult. The Board will have the senior staff work with the

> schools and SACs to develop transition plans to ensure students and families transition in the smoothest way possible.

[46] On April 10, 2013, the very next Board meeting, the transition plan for the students at Petite Rivière and Pentz was discussed further. The discussion was solely focused on a new school built to receive students from both Petite Rivière and Pentz. The following minutes of the April 10, 2013 Board meeting were approved (p. 5):

> In addition to this, a business case for a new school to replace Pentz Elementary School and Petite Riviere Elementary School is being prepared and will be ready for April 30, 2013. The concept of a new school with enhancements that provides multiple services as a community hub for a variety of programs such as early years projects, after-school daycare, outreach services, conferencing, Schools Plus, etc. will be built in to the model. This proposal would include bringing two strong communities together with stronger links to flexible, innovation programs for educating the whole child and would provide the school community and Board with opportunities to provide a leadership role to help address rural education in Nova Scotia in new ways.

[47] After that discussion MOTION SS046-13 was moved, seconded and carried unanimously.

> **MOTION SS046-13** by Board Member Garber, seconded by Board Member Fougere, that the Board approve the TCA New School priority in Pentz Elementary School and Petite Riviere Elementary School.
>
> **Motion Carried Unanimously**

[48] On April 11, 2013, the new school and plan for the students at both Petite Rivière and Pentz was addressed again.

> . . . A new school will be requested for Pentz Elementary and Petite Riviere Elementary School to consolidate the two schools and close the existing schools.

[49] The replacement school is again discussed in relation to a motion passed on April 9, 2014. The following discussion took place and the following motions passed concerning a request for a new school to replace Petite Rivière and Pentz as the first priority.

> **TCA Business Cases**
>
> Brian Smith, Director of Operations, briefly review each business case up for submission to the Department of Education and Early Childhood Development.
>
> Senior staff is recommending three business cases for approval.

1. A request for a new school to replace Petite Riviere Elementary School and Pentz Elementary School.
2. An Addition and Alteration project for New Ross Consolidated School that would address the deteriorating condition of the building systems.
3. An Addition and Alteration for Forest Heights Community School, which would address both facility upgrades to the boilers and oil tank as well as program upgrades to teaching spaces.

Three Major TCA Projects are presented and prioritized as follows;
**1st priority** – Replacement School for Pentz Elementary School and Petite Riviere Elementary School ($10,055.572)
**2nd priority** – Addition and Alteration request for New Ross Consolidated School ($3,253.180)
**3rd priority** – Addition and Alteration request for Forest Heights Community School ($629,000)

**MOTION SS006-14** by Board Member Stevens, seconded by Board Member Garber, that the Board accept the 2014 prioritized TCA Major Projects Business Cases to be submitted to the Department of Education and Early Childhood Development, as presented.

**Five For/One Opposed/Motion Carried**

[50] Despite the wording used in the 2013 motion, the clarification and all the subsequent discussions, the Board sought a legal opinion to interpret the meaning of its 2013 motion. The legal opinion, provided to the Board, concluded the 2013 motion was an unconditional, permanent school closure. Simply put, the closure of Petite Rivière was not conditional on a new school being built. The Board followed this legal advice and adopted this interpretation of its 2013 motion.

[51] It is not the court's role, on judicial review, to decide if Petite Rivière should close. That is a decision which ultimately rests with the Board. The court's function is to review the decision(s) and determine whether or not the Board was reasonable when it decided the 2013 motion was an unconditional, permanent school closure.

[52] The 2013 motion is absolutely silent as to where the students from Petite Rivière and Pentz will be educated if the court accepts, as reasonable, the Board's interpretation. While the 2013 motion has two elements; one, the school closure, and two, the request for replacement school; what it does not have and what all the other motions that evening have is a plan for the students. If interpreted, as decided by the Board, the 2013 motion is ambiguous. There is no transfer plan articulated for the students, aside from the transfer plan to place them all in a new school.

[53] When one considers this aspect of the 2013 motion and reviews the clarification to answer the ambiguity in the 2013 motion, it is clear that it is unreasonable to interpret the 2013 motion as unconditional.

[54] When one reviews the clarification, preceding the 2013 motion, the silence, the omission, the ambiguity surrounding those students is explained. It is clear where those students were to go and it is clear that Petite Rivière and Pentz were not to close until a replacement school was built.

[55] The Board has argued that the clarification, made before the closure motions, should be ignored. The Board characterizes the clarification as merely a statement from a member and argues it should not be considered when interpreting the 2013 motion.

[56] While a person's motive for voting for a resolution is irrelevant (*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3), this case is distinguishable. In *Consortium, supra* a developer believed counsel members had an ulterior motive for voting as they did. The court held the developer could not subpoena counsel members to find out why they voted as they did.

[57] This is not what the applicant is seeking with regards to the clarification.

[58] In *Bird v. Ontario (Ministry of Municipal Affairs & Housing),* 2003 CarswellOnt 7790, in the course of challenging a planning decision, one of the parties sought to have members of the decision-making body appear at the hearing to give evidence as to the basis for their decision. The Board has suggested that this decision supports the proposition that one cannot look to the clarification statement to interpret the 2013 motion.

[59] *Bird, supra*, is distinguishable. There is no request for the members of the Board to appear and give evidence on this judicial review.

[60] The failure of the Board to consider the clarification was unreasonable, unjustifiable and arbitrary.

[61] The ambiguity in the 2013 motion can be resolved through consideration of the clarification. Furthermore, the clarification should be used to interpret the 2013 motion in any event. To ignore the clarification, as the Board did by following legal advice, is unreasonable.

[62] The clarification discloses the intent of the Board. The Board explicitly included the clarification explaining the meaning of the 2013 motion before calling the vote. Furthermore, the Board approved those minutes which included the clarification.

[63] When the decision was made to conditionally close Petite Rivière and Pentz, the reason for the conditional closure was due to the chosen plan for the students. The Board decided that students from Petite Rivière and Pentz would be sent to a central location within the school boundaries at a newly constructed school.

[64] The wording of the 2013 motion, the Board's intent as evidenced by those words and the effect of the vote has been discussed at the Board level and has been the subject of legal opinion. The elected Board composed an ambiguous motion, without the benefit of legal advice. The result of the ambiguity was years of discussion, debate, legal advice and complete uncertainty for all involved.

[65] Once the 2013 motion, which includes the clarification, is reviewed, I find the Board's acceptance of the legal opinion, dissecting and scrutinizing the 2013 motion, unreasonable. In relying on the legal advice, the Board arguably fettered its discretion (although I need not decide this issue) and clearly reached an unreasonable interpretation.

[66] The Board is responsible for managing resources, including properties. The Board made a decision in 2013 and then asked legal counsel what the Board meant by its own motion. The Board should not have abdicated its duty to interpret its own motion. The Board went further than seeking legal advice, it relied exclusively on that advice. The elected Board is tasked with overseeing and making decisions with respect to school infrastructure. The Board must make decisions. It is unfathomable that a board would pass a motion so unclear that it required legal advice to interpret the affect of the motion. How were stakeholders to know what was decided if the board did not know? It is confounding that the Board would so poorly compose a motion that it required legal advice to interpreting its own words.

[67] The 2013 motion can only reasonably be interpreted as the applicants argue. There is no other reasonable interpretation. Other interpretations are neither transparent nor justifiable.

[68] Given the replacement school was neither approved nor built, the precondition to permanently closing the school was not met. Consequently, the

2017 motion to close the school in July 2018 was not simply an administrative action setting a date, but a whole new school closure without regard to the new school closure process enacted in 2014.

**If the 2013 motion is conditional, was the duty of procedural fairness breached when the Board failed to follow the new school review process?**

[69] For ease of reference, the 2017 motion reads as follows:

> **MOTION SS014-17** by Board Member Simms, seconded by Board Member Garrison, that the board close Pentz Elementary School and Petite Riviere Elementary School, effective July 31, 2018.
>
> **Seven For / One Against / Motion Carried**

[70] The Board denies that it breached any duty of fairness it owed to the parents or students affected by the closure decision when it passed the 2017 motion. The Board says the 2017 motion, not being a decision to permanently close a school, but only to set a date for doing so, did not attract a duty of fairness. The Board offers no basis for this argument if the 2013 motion is found to be conditional.

[71] The applicants argue if the 2013 motion is conditional then the 2017 motion does not comply with the 2014 *Act* and associated *Regulations,* having been reached without following the school review process under either the previous *Act* or the 2014 *Act* and *Regulations.*

[72] What was required prior to a vote on the 2017 motion is specific to the *Act* and *Regulations* and school review policy. However, the following commentary in *Sydenham District Assn. v. Limestone District School Board*, 2014 ONSC 7199, 2014 CarswellOnt 17382, is instructive:

> 49 As mentioned earlier in these reasons, a school closing decision is policy-driven. It requires the school board to consider competing concerns with respect to educational objectives, finances, and community needs and concerns. Significantly, the decision is not akin to a judicial or quasi-judicial process, where procedures will more closely resemble a trial process.
>
> 50 The statutory scheme requires an Ontario school board to make a closure decision in accordance with a policy established in accordance with the Ministry Guideline. The Guideline and the Policy are aimed at ensuring effective public consultation before the Board makes a school closure decision…
>
> 51 The decision to close a school has been recognized as a very important one, given the significance of schools to the students, their families and the local

> communities affected by a school closure. Accordingly, the case law on school closure has emphasized that the right to procedural fairness must be jealously guarded - that is, the affected parties must be given an opportunity for meaningful consultation before a decision is made.
>
> 52 With respect to legitimate expectations, affected individuals have the right to expect substantial compliance with the consultation process prescribed by the Policy of the Board.

[73] In *Potter, supra,* the court determined that the duty of procedural of fairness owed when closing a school includes providing a meaningful opportunity for parents of children attending a school to present their case for the board's consideration. In all of the circumstances, this opportunity was not given to the parents, the community or any other stakeholders.

[74] Statutory amendments setting out a new school review process became effective on October 17, 2014: *Education Act*, SNS 2014, c 13, ss. 2-3 and *Ministerial Education Act Regulations*. The school review process set forth in the *Regulations* were replaced by a new Ministerial policy adopted under s. 89 of the *Act*. The Board has neither followed nor engaged in the new school review procedures prior to the 2017 motion.

[75] In deciding a duty of procedural fairness was owed when closing a school, the court in *Potter, supra*, considered three factors:

1. The nature of decision to be made by the administrative body;
2. The relationship existing between that body and the individual; and
3. The effect of that decision on the individual's rights.

[76] In *Potter, supra,* the court considered the second factor in the context of the applicable legislation providing for public participation. The new school review process focuses on public participation.

[77] In considering the third factor, the court in *Potter, supra*, said the closure of a school affected privileges and interests. In *Pytka v. Halifax District School Board*, [1993] N.S.J. No. 323, 124 N.S.R. (2d) 1 (SC), the court found parents' choice of residence often depended upon access to a particular school.

[78] A board's decision to close a school clearly affects privileges and interests. In *Pytka, supra,* the court in considering this factor made the following comments:

> [50] The education, development, and safety of their children are of critical importance to parents. Parents know with bone-deep certainty that the schools their child attends will shape him or her in many ways. Many chose their child's schools with care and make major decisions around those choices. A school's programs, its facilities and their condition, its teachers and other staff, its class sizes, its distance from home, and its sense of community are but some of the factors that will influence a child's learning and personal development, and often even the day to day routine of that child's family. The closure of a school means reassignment of its students to another or other schools which will likely be disruptive in many ways and require adjustment. When such circumstances are considered, it cannot be doubted that parents have an interest which is seriously affected by a decision by the Board to close the school their child is attending.

[79] The court in *Potter, supra,* concluded that when a board makes a decision to close a school it must do so having regard to procedural fairness. The court stated:

> [51] . . .Of all its functions, a decision to close a school must surely be one of the most significant with which the Board is entrusted. . . .

[80] In *Comox Valley Citizens for Better Education Society v. Comox Valley School District No. 71*, 2008 BCSC 1071, 2008 CarswellBC 1661, the court stated:

> 74 While I have a discretion to, in effect, excuse the respondent's failure to provide procedural fairness, in my view I should not exercise that discretion in this case. The breach was serious, and those interested and affected by the decision to close Cape Lazo were not only denied a fair opportunity to influence the closure decision, they were presented with a process that appeared to be a sham.

[81] Similarly, here, the breach is serious. The Board failed to follow, in any respect, the school review process prior to its 2017 motion. I cannot and will not excuse this abject failure to observe the duty of procedural fairness.

[82] A school board can close a school without following the school review process as prescribed in s. 14 of the *Ministerial Education Act Regulations*, NS Reg 80/97. None of the circumstances contained in s. 14 of the *Regulations* exist here.

[83] The Board essentially sprung these school closures on a whole community when the 2017 motion was passed. There was no attempt to follow the school review policy. The 2017 motion breached duties of procedural fairness owed to the applicants. It was not that there was some imperfect adherence to process. There was a complete and utter lack of engagement with the process.

**If the 2013 motion can only reasonably be interpreted as an unconditional decision to permanently close the school, was the Board's interpretation that the *Act* prevented the Board from reconsidering the 2013 motion reasonable?**

[84] If I am wrong and the 2013 motion is an unconditional school closure, I conclude the Board was unreasonable in deciding the *Act* and *Regulations* did not permit reconsideration of the 2013 motion.

[85] I will review the history of the Board's decisions and discussions leading to the reconsideration decision.

[86] Following the 2013 motion, the Board submitted capital requests to the Department of Education and Early Childhood Development in 2013, 2014, and 2016 seeking approval for a new replacement school. The province did not seek submissions in 2015. None of these requests were granted and no funding was secured for a new school.

[87] During the ensuing years, the Board received various correspondence with respect to Petite Rivière and Pentz from the Honourable Mark Furey, the local MLA and Cabinet Minister, and the Honourable Karen Casey, Minister of Education and Early Childhood Development.

[88] At the November 25, 2015 meeting, the Board received a letter from the Minister of Education advising:

> Subject to Cabinet approval, the government will approve a Major Addition and Alteration to upgrade either Petite Riviere or Pentz Elementary Schools.

[89] While the Board is correct that no addition and alteration has ever been approved by Cabinet for either Petite Rivière or Pentz, no request was put to Cabinet, given the Board's ultimate decision under review.

[90] Interestingly, at the same time these issues were being dealt with by the Board, the Minister of Education requested a property condition assessment report be prepared by Stantec Consulting Ltd. for both Petite Rivière and Pentz. This request was made on February 23, 2016.

[91] An overview of the Physical Accommodation of the Public School Programs for Petite Rivière and Pentz was prepared on February 24, 2016.

[92] Throughout the years after the 2013 motion, the Board continued to receive input concerning Petite Rivière and Pentz from the School Advisory Council and from parents of students attending both schools.

[93] As a result of a letter sent to the Minister of Transportation and Infrastructure Renewal ("TIR"), Minister Geoff MacLellan responded to the Board on December 8, 2015, and noted approval of their request for the building and land assessments to be carried out on Petite Rivière and Pentz. The property condition assessments were performed by Stantec and a final report was provided on February 23, 2016.

[94] Opinions were provided concerning the properties' overall condition and recommended upgrades in the short term and long term. One wonders why the Board would have this property condition assessment undertaken given their ultimate interpretation regarding the 2013 motion and the reconsideration motion?

[95] An additional report dated February 24, 2016 was prepared by Education Facility Project Services. The introduction of that report sets forth the purpose of the report and the request by the Board.

> **INTRODUCTION**
>
> The South Shore Regional School Board (SSRSB) has requested that the Department of Education and Early Childhood Development (EECD) and the Department of Transportation and Infrastructure Renewal (TIR) work with SSRSB to perform reviews of each of the Pentz Elementary School (PES) and the Petite Riviere Elementary School (PRES) facilities with the intent of determining:
>
> 1. if the physical condition of the buildings is such that they have value for continued use for another fifteen to twenty years
> 2. what would be required to bring the buildings to an acceptable physical standard, allowing them to continue in use for the above mentioned period. This is to include estimates of the costs that would be involved.
> 3. from an education delivery point of view, what would be required to allow the buildings to effectively accommodate the Nova Scotia Public School Programs and the changing nature of education delivery for the 21st century for another fifteen to twenty years.
> 4. what the costs would be to add to and/or modify the existing buildings(s) to achieve #3 above

[96] In February 26, 2016, the Board Chair Ms. Jennifer Naugler wrote to Mr. Joe MacEachern, the Executive Director of Finance and Facilities Management

submitting the Board's request for capital plan submissions for 2017-2020. On the list was a new building to replace Petite Rivière and Pentz.

[97] After all of these discussions, letters and assessments, the Board sought advice as to whether they could reconsider the 2013 motion. The Board was advised by its legal counsel, at a meeting on February 22, 2017, that the 2013 motion was final and could not be reversed. On January 31, 2015, the Board discussed reconsidering its motion, once there was no prospect of the government approving a new school. Minutes from that Board meeting indicate legal counsel had already been consulted and provided an opinion that Petite Rivière and Pentz were to be closed regardless of whether a replacement school was built. In particular, the following questions and responses were given:

- SAC Member – Can the Board counter the decision?
- Geoff Cainen – No, you can't change the decision that has been made.
- SAC Member – The motion had closure connected with a new school build.
- Geoff Cainen – The motion has been clarified with legal counsel. There was no relevant data that is different than what is already on file.
- Lief Helmer – There needs to be solid legal advice when making huge decisions. Did the Board think that they would get another chance if they didn't get a new school? We are the victim of an error.
- Geoff Cainen – Legal counsel has been consulted. Their opinion is very clear – the Board had the facts and made the decision.

[98] The Board continued to be affected by the legal advice concerning the interpretation of the 2013 motion as well as by the advice that the decision was final and could not changed.

[99] The following discussion concerning the legal advice provided and the Board's decision to rely on it occurred at a board meeting on March 31, 2015:

> John MacPherson explained the role of Legal Counsel to the SSRSB Corporate Board.
>
> - In 2013, a Judicial Review Application was not made to have the motion overturned.
> - Accordingly to the regulations at that time: "A decision of the School Board made in accordance with these regulations is final and shall not be altered by the Minister." Once a decision is made it is final.
>  - Any Board Policy (or By-Law) stating that a motion may be altered is subordinate to the regulations.
>  - Any regulations that were put in place after March 27, 2013, are irrelevant.

> Legal Counsel John MacPherson read motion SSO37-13 from March 27, 2013 "… that Pentz Elementary School permanently close and that a new school be requested to replace Pentz Elementary School and Petite Riviere Elementary." This motion was passed unanimously by the Board. The Board speaks to its motions and both parts of this motion have been made. Anyone who objects to a motion has 30 days to make a Judicial Review Application to request that a motion be overturned. No application was made.
>
> SAC Member Jennifer Stead asked if the elected Board was aware that the wording of the motion would cause Pentz and Petite Schools to close regardless of whether or not a new school was approved? Did they receive legal counsel before the motion was made?
>
> John MacPherson stated that the Board speaks to its motions. The motion states that the school will close and a request would be put forward to have a new school built.
>
> Board Chair Garber stated that it was the board's intention to have a new school built to replace PES and PRES. We have two requests through with no success.

[100] The Board faced a decision to accept this offer; however, the Board was given legal advice, that this was not an offer that they could accept.

[101] In particular, the Board was tasked with interpreting and applying s. 20 of the now amended *Ministerial Education Act Regulations*. Section 20 (which has been repealed) of the *Regulations* provide:

> Decision by school board
>
> 20 (1) After a public hearing under Section 19, and no later than March 31, the members of a school board shall make a decision with respect to the outcome of the school review process at a public meeting.
>
> Subsection 20(1) amended: N.S. Reg. 164/2010.
>
> (2) No later than 15 days after the day the members of a school board make their decision, the school board shall give public notice of the decision by posting it on the school board website.
>
> Subsection 20(2) replaced: N.S. Reg. 164/2010.
>
> (3) A decision of a school board made in accordance with these regulations is final and shall not be altered by the Minister.
>
> (4) If a school board decides to permanently close a public school, the school board must permanently close the public school no later than 5 years after the date the decision is made.
>
> Subsection 20(4) replaced: N.S. Reg. 199/2009.

(5) For greater certainty, a school board may decide to discontinue the school review process in respect of a public school at any time after identifying the public school for review under Section 16.

[102] The Board decided it could not reconsider the 2013 motion and entertain the government's proposal of an addition and alteration to Petite Rivière. The Board sought and was provided with a legal opinion on the interpretation of s. 20 of the *Ministerial Education Act Regulations*. The Board was given an opinion that s. 20(3) of the *Regulations* resulted in the 2013 motion being a final decision. The Board accepted that it neither had the authority nor discretion to reconsider a decision.

[103] On February 22, 2017, there was a motion by board member Naugler to rescind the 2013 motion. The following discussion was held and the minutes of these discussion were approved. The following minutes are a background to board member Naugler's notice of motion to rescind the 2013 motion.

**Q. Do we have the option to apply for a new school again this year?**

A. Scott Milner, Superintendent of Schools, state that the last capital submission was in January, 2016 for a three year planning period. The board has not received a request from the Department for a submission of capital. That's not to say that the board couldn't write a letter at any time to the Department requesting a capital budget.

**Q. Has the Board Chair reached out to Minister Casey with regards to her letter suggesting there was money for an A&A atone of the schools?**

A. Board Chair Payzant said that he has had two conversations with Minister Casey. On both occasions, the indication from the Minister was that there would be money available for an A&A if the board asked for it. Board Chair Payzant said that it wouldn't make much sense to request an A&A when there is a motion to close the schools. The A&A is subject to cabinet approval.

**Q. If the Minister is suggesting that the money would be there. What steps would we have to take as a board to request the A&A money? Would it require us to rescind the motion and then start a new school review process?**

A. Scott Milner, Superintendent of Schools, stated that the board would have to make a written request to the Minister's office. The board would be contradicting the advice of the board solicitor if it is rescinded it is rescinded the school closure motions. The board would then have a decide where the money would be spent: a School Options Comttee [sic] would be struck; go through the process of consultation; recommendations

will be provided back to the board; then a decision would be made as to where the A&A money would be spent.

**Q. Can the board rescind the motion if we had a 2/3 majority? If the notice of motion was filed now, could we rescind the motion at next month's meeting?**

A. Board Chair Payzant stated that the board's legal counsel has informed the board that the motion is final and it cannot be changed. According to legal advice, rescinding the motion is not something we could do legally.

Board Member Naugler read from section 13.02 Notice of Motion from the SSRSB By-Laws.

Board Chair Payzant said that the board is bound by the Regulations and the finality of the original motion to close the schools. The board cannot rescind the motion according to the Regulations made under the Education Act.

**Q. Without legal representation at the time of making the decision in March, 2013, do we, as a board have to follow our current legal opinion when we didn't have legal advice when we presented those motions?**

A. Board Chair Payzant said that in his opinion, it was a big mistake to not have legal representation there at the March 2013 meeting. The board should learn from this less and follow the legal advice that the board now has.

Board Member Naugler stated that if the board could just recognize that we are human and make mistakes. She believes that within the By-Laws there is ability to rescind the motion with 2/3 majority.

Board Chair Payzant reiterated that according to the solicitor the motion is not rescindable.

Board Member Simms stated that there was no mistake made. It was clear to the board that the schools would close if a new school was not built. Mr. Simms said that he does not see any significant changes relating to student enrollment, cost pressures or any of the other factors behind the decision to close the schools.

Board Vice Chair Griffin stated that this a very complex situation. The board needs to look at its values and vision. It's a partnership between the parents and the community. Ms. Griffin stated that she finds it difficult to give up on smaller schools in rural Nova Scotia. When this motion was made in March, 2013 it was made to create a new model for elementary schools in rural Nova Scotia.

Board Member Simms stated that the board should talk to the NSSBA regarding the legal opinion. The board would be going against the legal opinion and the

Education Act. The board by-laws do not override the Education Act. The board needs to understand the provincial impact before we make a decision.

Board Member Naugler stated that she would like to hear from the Minister regarding her letter suggesting that there is money for an A&A when she was aware that the board had made a motion to close the schools upon request of a new school.

Board Vice Chair Griffin stated that the motion didn't reflect the intent of many board members around the table. A mistake has been made and the board should make midcourse corrections.

Scott Milner, Superintendent of Schools, stated that the board is in a legal conundrum. The board has to figure out how to unwind and get out of the legal conundrum.

Board Member Naugler stated that she is filing a notice of motion to rescind the two motions from the March 27, 2013 Special Board Meeting.

. . .

**MOTION SS037-13** by Board Member Payzant, seconded by Board Members Simms, that Pentz Elementary School permanently close and that a new school be requested to replace Pentz Elementary School and Petite Riviere Elementary School.

**MOTION SS038-13** by Board Member Payzant, seconded by Board Member Fougere, that Petite Riviere Elementary School permanently close and that a new school be requested to replace Petite Riviere Elementary School and Pentz Elementary School.

Board Chair Payzant stated that due to the legal advice the board has been given in regard to these motions, the board does not have the ability to rescind them. Board Chair Payzant called a recess for an in-camera session to meet with board solicitor, John MacPherson, to review the board's legal obligations.

Board Chair Payzant called a recess at 8:42 p.m.

**MOTION** by Board Chair Payzant, seconded by Board Member Griffin, that the Board recess from the public meeting for an in-camera session with solicitor John MacPherson (8:48 pm).

**Motion Carried Unanimously**

**MOTION** by Board Member Naugler, seconded by Board Chair Payzant, that the Board return to the regular board meeting. (9:10 pm)

**Motion Carried Unanimously**

**MOTION** by Board Member Simms, seconded by Board Member Stewart, that the meeting be extended. (9:11pm)

**Motion Carried Unanimously**

Board Chair Payzant stated that after meeting in-camera and obtaining legal advice from the board solicitor, he is declaring the Notice of Motion to Rescind MOTION SS037-13 & MOTION SS038-13 Out of Order.

Board Member Naugler put forward an appeal to the ruling of Board Chair Payzant, according to By-Law 14.04 Appeal of School Board Chair Ruling.

The Chair was turned over to Board Vice Chair Griffin.

Board Vice Chair Griffin asked Board Chair Payzant for a brief explanation of his ruling.

Board Chair Payzant stated that the board has been given a legal opinion; the board is aware of what was said at the time the motions were made; the Regulation was that a motion of closure was final and may not be overturned by the Minister. The board voted to close the schools. The board needs to follow the Education Act and Regulations that were in place at the time the motions were made and passed.

Board Vice Chair Griffin asked the board members present to indicate by a show of hands whether or not they wish to overturn Board Chair Payzant's ruling that the Notice of Motion is Out of Order. If the ruling is overturned by the majority of board members then the Notice of Motion put forward by Board Member Naugler will stand and be brought forward at the next school board meeting.

Three board members agreed to overturn Board Chair Payzant's ruling; three board members were opposed to the ruling to overturn. Due to the tie vote, Board Chair Payzant's ruling that the Notice of Motion was out of order stands. (As per SSRSB By-Laws 14.04)

## Was the interpretation of s. 20(3) of the Regulation reasonable?

[104] In making my decision, I am guided by *Sullivan on the Construction of Statutes*, Sixth Edition by Ruth Sullivan at s. 3(6) as follows:

> §3.6 As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:
>
> 1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
> 2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual consideration including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislature intent, absurdities to be avoided and the like.

> 3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the . . .

[105] In making this decision, the court must consider the principles of statutory interpretation. (*Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 and *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62.) I find the Board's interpretation of s. 20(3) to be unreasonable. First, while s. 20(3) acts as a partial privative clause indicating that the Board's decision is final, the section specifically expresses that a Minister cannot alter the decision. The section does not go further to say that the Board itself cannot reconsider its decision.

[106] It would be absurd if the Board could not change a decision, if it was faced with new circumstances making its decision untenable. For example, if a school, scheduled to receive students from a closing school, suffered a fire or some structural damage and could not house the students, would the Board be unable to reconsider its decision and be required to close a school? Would there be no option for the Board to deal with unexpected circumstances? It is antithetical to the Board's overriding authority to deal with resources to then interpret the *Act* and *Regulations* as disallowing or preventing a Board from having the power to reconsider.

[107] An example provided by the applicant is apropos. If the Board decided to close Petite Rivière and send students to Hebbville Academy and Hebbville Academy is destroyed in a flood, is the Board still obliged to send the children to Hebbville Academy? Of course not; such an interpretation is unreasonable and is not in keeping with the objects of the *Act*.

[108] In response to a letter from the President of the Student Advisory Council the then Board Chair Mr. Payzant wrote on January 16, 2017, that in order for the Board to reconsider a school closure motion, they would need a change to either the *Act* or the *Regulations*. Reference was made to the Board's legal counsel explaining the final nature of the Board's decision. Again, this is evidence of heavy reliance on a legal opinion to interpret the Board's own motion and their own home statute and regulations.

[109] The Board continued to struggle with the 2013 motion, the impending school closure and the ability to reconsider and accept an addition and alteration to Petite Rivière.

[110] Minister Casey identified the possibility of rescinding the previous motion.

[111] Correspondence from Minister Casey was received by the Board at the November 25, 2015, Board meeting. The substance of the letter is reproduced as follows**:**

> Cheryl Fougere, Acting Chair
> South Shore Regional School Board
> 69 Wentzell Drive
> Bridgewater, NS B4V 0A2
>
> Dear Ms. ~~Fougere:~~ *Cheryl*
>
> As a follow-up to our meeting on November 17, regarding Pentz Elementary School and Petite Riviere Elementary School I can confirm the following:
>
> 1. The School Board will continue with the School Review Process for the Park View and Bridgewater families of schools, with the understanding that the school boundaries will stay the same for Pentz Elementary School and Petite Riviere Elementary School.
> 2. Subject to Cabinet approval, the government will approve a Major Addition and Alteration to upgrade either Petite Riviere or Pentz Elementary Schools. This will be a P-6 school.
> 3. The closure dates for Pentz Elementary School and Petite Riviere Elementary School will need to be revisited by the Board.
>
> Yours truly,
> *(signature)*
> Karen Casey
> Minister, Education and Early Childhood Development
>
> c: Hon. Mark Furey, MLA, Lunenburg West
> Geoff Cainen, Superintendent, SSRSB

[112] When s. 20(3) is read in conjunction with s. 20(5), it is unreasonable to conclude there is no ability for a Board to stop a school closure before it occurs by reconsidering the matter.

[113] The plain language of s. 20(5) permits a school board to discontinue a school review process at any time after identifying the public school for review. It does not say that a school board may discontinue the school review process up until but not after a decision to close a school is made.

[114] In order to remove all discretion and power from a school board once a school closure decision is made, the legislature would need to be more express and specific.

[115] The only reasonable interpretation of s. 20(3) is that the board is always permitted to revisit a decision.

[116] The purpose of s. 20(3) of the *Regulations* is to establish the division of responsibilities for a school closure between the school board and the Minister. The Minister establishes the policy which the board must follow and the board makes the decisions. Any decision is only final in the sense that the Minister cannot supplant or override a board decision.

[117] The following statement in *Delorey, supra*, must be addressed.

> [214] The closure of one (1) or both schools was certainly one (1) of the possible outcomes. As the *Regulations* state, once a Board decides to close a school it is closed, unless a Court concludes it did not follow the *Regulations* and prejudice resulted, so as to invalidate that decision.

[118] The respondent argues this is a declaration by the court that a school board decision to permanently close a school is final and cannot be revisited by the board. With respect, this is an interpretive stretch. The court in *Delorey, supra* was not tasked with deciding whether a school board could revisit a school closure motion – whether it be conditional or not. The court was simply asked to review on the following basis:

1. The Board failed to follow a mandatory process in the regulations for school. Closure and validating the decision.

2. The Board violated the duty of procedural fairness to follow its own process contrary to the applicants' legitimate expectations.

3. The Board violated the duty of procedural fairness in making its decision to close a particular school by denying the applicants a meaningful opportunity to present their case fully and fairly.

[119] The court was not asked to interpret s. 20(3) and was not tasked with deciding whether a school board could revisit a decision.

[120] Consequently, the statement in *Delorey, supra,* cannot reasonably be interpreted as meaning a school board can never revisit a decision.

[121] Furthermore, if the interpretation suggested by the Board is reasonable, then the 2011 Board decision not to close Petite Rivière would have been final and any decision made, even a contingent closure in 2013, would itself be contrary to s.

20(3). This provides even more evidence of the unreasonable interpretation accorded to s. 20(3) by the Board.

[122] In *Delorey, supra,* the board commented upon s. 20(3) in so far as stating it is a partial privative clause, Of interest is the following comment:

> [51] To its credit, the Respondent notes that this closure is a "partial" privative clause. I agree. The part suggesting it is final and should not be altered suggests a good deal of deference. The part that the decision be made in accordance with "the *Regulations*", suggests however the decision is only final, if there has been compliance with the *Regulations*. It does not use the words strict compliance, nor does it provide a penalty for non-compliance, expressly. The strong implication is that the penalty for non-compliance would be an invalid decision. This part suggests less deference if the *Regulations* have not been complied with.

## CONCLUSION

[123] In reaching this decision, I am cognizant of the caution in *Potter, supra*, that courts should show restraint when asked to interfere with the decisions of school boards, which are elected bodies. I am also mindful of the comments of Nunn J. in *Blore v. Halifax (District) School Board*, [1991] N.S.J. No. 325, wherein he stated:

> While undoubtedly there are cases which have discussed or decided on issues such as these, one has to consider the whole context of administrative functioning and judicial review. It is not the function or intention of the courts to put administrative functioning into a straight jacket. Administrative bodies must be as free to function as they possibly can within, of course, the bounds of statutory provisions applicable to them, and within the bounds of any duty of fairness that might exist.
>
> . . .
>
> It is not a perfect world and perhaps it never will be but administrative boards such as the Board here must be permitted to manage the affairs assigned to them with as little intrusion of the courts as possible and only where necessary to protect or assure other rights which must be considered.

[124] While courts in our province have been loath to interfere with a Board's decision to close a school, this is a unique situation where the Board itself did not afford a school community the procedural fairness required. Furthermore, the Board's confusion and lack of clarity produced unreasonable interpretations. This was not just a matter of some procedural missteps. The decisions resulted in unreasonable, interpretive errors and breaches of fairness. This is not a case of the

Board managing resources. This is a case of the Board not knowing what it decided. The Board cannot insulate itself from judicial review by drafting and passing motions so incomprehensible the Board itself is unsure what they mean.

[125] The Board decisions lack clarity, and reasonableness. Not only was the Board confused, seeking legal advice to interpret their own motions, but there was a wider, significant effect on the community. The Board created unnecessary uncertainty.

[126] The 2017 motion closing Petite Rivière is set aside as a violation of the duty of procedural fairness.

[127] If an agreement on costs can not be reached, I will hear from the parties.

Justice Christa M. Brothers