SUPREME COURT OF NOVA SCOTIA
Citation: *Kings (County)* v *Berwick (Town)*, 2010 NSSC 128

Date: 20100412
Docket: Ken No 318509
Registry: Kentville

Between:

Municipality of the County of Kings

Applicant

v.

Town of Berwick, Town of Hantsport, Town of Kentville,
Town of Wolfville, Annapolis Valley Regional School Board and
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Judge: The Honourable Justice Gregory M. Warner

Heard: March 9 and 16, 2010, at Kentville, Nova Scotia

Counsel: **Peter M. Rogers, Q.C.** and **Daniel Wallace**, counsel for the Applicant, Municipality of the County of Kings ("Kings")

John T. Shanks and **Jessica White**, counsel for the Respondents, Town of Hantsport, Town of Kentville and Town of Wolfville ("Three Towns")

Stephen McGrath, counsel for the Respondent, Her Majesty the Queen in Right of the Province of Nova Scotia ("Province")

Peter McInroy, watching brief for the Respondent, Town of Berwick

By the Court:

A. An Outline of Issues

[1] For twenty-eight years, the four municipalities in Kings County have paid their share of public education to the Kings County District School Board (now Annapolis Valley Regional School Board) in proportion to their respective share of student enrolment ("per student") pursuant to a written agreement dated January 21, 1982. The agreement was amended on May 10, 1989, to permit the Town of Hantsport to join. The agreement, as amended, contains no clause respecting termination.

[2] The *Education Act ("Act")* states that each municipality will fund the school board by reference to its respective share of uniform assessment "unless an agreement made and approved pursuant to Section 42 [now Section 27] otherwise provides, ..." The 1982 agreement, as amended in 1989, was so approved.

[3] The Municipality of the County of Kings ("Kings") seeks a declaration that effective April 1, 2010, its funding of the school board is determined by reference to its share of uniform assessment, the default formula in the *Act*, and not its share of student enrolment. Granting such a declaration would reduce Kings' required annual funding to the School Board (now about 81%) by about nine hundred thousand dollars and add that amount to the contributions from the Towns of Kentville, Wolfville and Hantsport ("Three Towns") who presently pay about 15.5%. Berwick pays 3.5% and would benefit slightly from Kings' success.

[4] The role of this court is simply to apply the principles of contract law to a legal dispute. It is not to mediate, compromise, or impose unilaterally, a holistic resolution to a disagreement between neighbouring governments who have many other ongoing relationships that are adversely impacted by this dispute.

[5] To make the declaration, Kings asks the Court to answer seven questions:

i) Is the agreement perpetual, or unilaterally terminable on reasonable notice?

ii) If terminable on reasonable notice, what constitutes reasonable notice?

iii) What is the proper interpretation of the agreement? Kings submits that the agreement unambiguously does not provide for municipal funding to be on a per student basis. The Three Towns submit that it does so provide, or, alternatively, the agreement is ambiguous and admissible extrinsic evidence confirms that the agreed municipal funding contributions are on a per student basis.

iv) Is Kings estopped from asserting the interpretation issue? Kings admits that the true intent of all municipalities was to fund the school board on a per student basis.

v) Alternatively, should the agreement be rectified?

vi) If interpreted or rectified as requested by the Three Towns, is the agreement *ultra vires* municipal powers under provincial legislation? The Province of Nova Scotia takes the lead in contesting this submission by Kings.

vii) Has the agreement been frustrated?

I deal with the first two questions posed by Kings last.

[6] In this decision, reference to the agreement means the 1982 agreement as amended by the 1989 agreement, unless otherwise stated or necessarily implied.

B. Brief History of Education Funding in Nova Scotia

[7] In the 19th century, and first half of the 20th century, schools in Nova Scotia were governed by local elected school trustees and funded by compulsory assessments on real and personal property collected within each school section. There were upwards of 1,700 autonomous rural, village and urban school sections. Amendments to the *Act on Public Instruction* (later changed to *Education Act*) provided for provincial grants to school trustees to supplement their primary source of revenue, the assessment on real and personal property within each school section.

[8] By amendments to the *Act* in Chapter 21, SNS 1942, provision was made for the creation of municipality-wide school boards. They were mandated to assume financial responsibility for "a minimum program of education" prescribed by provincial regulation. By 1946, municipal school boards had been created in all Nova Scotia municipalities.

[9] Further amendments to the *Act* (SNS 1968, c.23) authorized amalgamated school boards (that is, boards incorporating schools of more than one municipal unit) funded by "section" charges, which appear to have been "so much on the dollar of the assessed value of real and personal property" in the area (called "school rates"). Any additional sums required by the municipal school board were paid from the general revenues raised through real and personal property taxes by the municipal council. The *Act* provided for annual provincial contributions to the municipal school boards based on formulae set out in the *Act*.

[10] The 1954 Report of the Pottier Royal Commission on Public School Finance established basic principles and a formula for public education funding. Its recommendations were based on the idea that all students, wherever they lived in the Province, should be able to access the same education opportunities. It recommended that each "area" in the Province contribute to school funding based on its ability to pay, calculated by the application of a rate to the equalized assessment in the area, with the residual costs provided by the Province. The Pottier Report estimated and recommended that this would require a 50/50 split of the total cost of education between the Province on one hand and municipal units (through property taxation) on the other.

[11] The Pottier Report funding recommendations were generally incorporated into legislation, and initially worked effectively. However, limitations on increases in municipal assessments as well as changes in government policy, which included freezes on provincial contributions to education, lead to the corruption of Pottier's basic principles and formula. This resulted in the deterioration of the envisioned education system.

[12] In 1970, three joint (or amalgamated) school boards were formed in Nova Scotia. One was the "Kings County Amalgamated School Board," consisting of Kings, Kentville, Wolfville and Berwick. The Amalgamation Agreement and corollary Property and Finance Agreement (Exhibit 6, Tab 21) provided that the financial requirements of the amalgamated school board, after deducting provincial grants and other revenues, were to be paid by the four municipalities "in proportion to their assessments."

[13] On August 1, 1980, the Province seconded George Walker, superintendent of the Kings County Amalgamated School Board, to act as chairman, with the Director of Finance for the Nova Scotia Department of Education and the Mayor of Dartmouth as members, of another provincial "Commission on Public Education Finance." The "Walker Report," dated March 31, 1981, led to: the creation of twenty-one "district" school boards by twenty-one agreements amongst participating municipal units and the Minister of Education, executed between December 1981 and January 31, 1982; and, major amendments to the *Act* that created a statutory framework for the creation, operation and financing of the district school boards.

[14] School boards became fully elected by amendments to the *School Boards Act* in 1991.

[15] In 1996, pursuant to amendments to the *Act*, the Province designated seven regional school boards to replace the twenty-one district school boards. The district school boards of Annapolis County, Kings County, and West Hants (West Hants and Windsor) were dissolved and their responsibilities transferred to the Annapolis Valley Regional School Board ("AVRSB").

C. First Issue: Interpretation of the Agreement

C.1 Interpretation within the context of the Agreement itself - without extrinsic evidence

[16] Kings' first submission is that the text of the amended agreement is unambiguous, and plainly does not provide for per student funding, except in the circumstance that the school board requests less funding than what would be raised through the "prescribed education tax rate"; that is, when the School Board would be in a surplus position.

[17] The relevant portions of the 1982 agreement read:

> SECTION 1: Definitions
> ...

(G) "Prescribed Education Tax Rate" means the rate per $100 of uniform assessment established by Cabinet from time to time as the municipal contribution towards expenditure levels covered by the funding formulas for district school boards;

(H) "Minimum Municipal Contribution" means the minimum contribution towards expenditure levels covered by the funding formulas, which may be calculated at a rate less than the prescribed education tax rate described in Section 1(G) above and explained in Schedule B.

...

SECTION 8: Finance

(A) The Minister agrees to make payments to the district school board on the basis of twelve equal monthly payments on or before the 15th day of each and every month during the fiscal year of the district school board, in accordance with the Education Assistance Act and the Recommendations of the Formula Review Committee which are approved by Cabinet.

(B) The municipal units agree to make payments to the district school board on the basis of twelve equal monthly payments on or before the 15th day of each and every month during the fiscal year of the district school board, according to the prescribed education tax rate determined by Cabinet or calculated according to the minimum municipal contribution described in Schedule B attached, and any other payment recommended by the district school board and agreed to by the municipal units from time to time for expenditure levels not covered by the funding formulas. Any additional municipal contributions toward expenditure levels not covered by the funding formulas, if agreed to by the municipal units, shall be collected from the municipal units in a manner to be determined by the municipal units.

For the purposes of this subsection and Schedule B agreement of the municipal units for other payment or for additional municipal contribution and for the manner of collection and payment shall be deemed to have been made when approved by three or more Councils of the municipal units that represent more than fifty per cent of the population of Kings County.

...

SCHEDULED B
MINIMUM MUNICIPAL CONTRIBUTION

(1) In some instances, the combination of the grant from the Department of Education and the municipal contribution calculated at the prescribed education tax rate, can provide more funds than the district school board and supporting municipal units agree are required for district school board operations. In these instances, the contribution from the supporting municipal units may be calculated at an amount which would be less than the amount which would be raised by the application of the prescribed education tax rate.

(2) If the supporting municipal units, with the agreement of the district school board, revert to the minimum municipal contributions as outlined in this section and defined in Section 1 (H), there shall be a reduction in the operating grant from the Department of Education equivalent to the reduction in the municipal contribution below the amount that would have been provided by the municipal units by the prescribed education tax rate.

(3) The total municipal contribution shall be collected from the supporting municipal units based upon the number of students from each municipal unit as contained in the school census of September 30th of the prior year of the district school board, and for the year 1982 upon the records of the Amalgamated School Board for September 30, 1981.

[18] The relevant section of the 1989 "Amending Agreement" reads:

> 9. Schedule B is amended by adding the following subsections (4), (5), (6), (7) and (8) immediately after subsection (3):
>
> (4) Notwithstanding section (3), the Municipal contribution paid to the District School Board for the fiscal years 1989, 1990, 1991 and 1992 by the supporting municipal units shall be as follows:
>
> (A) the municipal contributions of the Municipality, Kentville, Wolfville and Berwick shall be based upon the number of students from each respective municipal unit as contained in the school census of September 30th of the prior year of the district school board;
>
> (B) the municipal contribution fo the Hantsport in each of four calendar years 1989 to 1992 shall be based upon the uniform assessment for the town.
>
> (5) The municipal contribution paid to the District School Board by all of the supporting municipal units commencing in 1993 and thereafter shall be based upon the number of students from each respective municipal units as contained in the school census of September 30th of the prior year of the district school board.
>
> (6) Notwithstanding subsection (4), if the municipal units agree to pay more than the proceeds from the uniform tax rate the additional amount shall be calculated in accordance with subsection (B) of SECTION 8 of the agreement.
>
> (7) <u>The Minister shall pay to the District School Board for each of the years 1989, 1990 and 1991 a grant equal to the difference between Hantsport's contribution pursuant to subsection (B) of Section (4) and the amount Hantsport's municipal contribution would be if based upon the number of students from Hantsport. The grant shall reduce the municipal contribution of the Municipality, Kentville, Wolfville and Berwick, according to the relative percentage of students from these municipal units.</u>
>
> (8) [Not relevant for this decision]
>
> [Underlining added by the court.]

[19] There are two aspects to Kings' submission that the provision of municipal contributions in the agreement is clear and unambiguous within the agreement, and therefore no evidence extrinsic to the agreement is admissible.

[20] First, a plain reading of Section 8(B) demonstrates that the municipal units agree to fund the school board as follows:

i) according to the prescribed education tax rate, defined in Section 1(G) as "the rate per $100 of uniform assessment established by Cabinet ... as the municipal contribution towards expenditures levels covered by the funding formulas for district school boards," [sometimes called "mandatory", "foundation" or "core" funding];

ii) "<u>or</u> calculated according to the minimum municipal contribution [defined in Section 1(H) as: "the minimum contribution towards expenditure levels covered by the funding formulas (again, the "core" or "foundation" program), which may be calculated at a rate less than the prescribed education tax rate"] described in Schedule B attached,"

iii) "<u>and</u> any other payment recommended by the Board and agreed to by the parties for expenditures not covered by the funding formulas" (that is, what the parties variously called "extra" or "supplemental" funding for programs above and beyond the core or foundation program), which supplemental funding "shall be collected . . . in a manner to be determined by the municipal units."

[21] Said differently, for core funding, the municipal units are required to pay the prescribed education tax rate (based on uniform assessment) unless the school board requires less funding to run the core program than the prescribed education tax rate would produce. On this interpretation of Section 8(B), the only time when municipal contributions under Schedule B apply is when the school board requires a lesser contribution from the municipal units than would be generated by the prescribed education tax rate. Kings describes this circumstance as "a circumstance of impending budget surplus."

[22] The only reference in the 1982 agreement, as well as the 1989 amending agreement, to the per student funding formula is in Schedule B. Kings submits that since Schedule B applies only in circumstances where the school board requires a lesser contribution from municipalities than the prescribed education tax rate, the agreement plainly and unambiguously requires the core program to be funded on the basis of the prescribed education tax rate (based on uniform assessment), not on the number of students from each municipal unit. Per student funding applies only in a circumstance of an impending surplus, which, apparently, has not arisen and is unlikely to arise.

[23] The second aspect of Kings' argument, as it relates to interpreting the words of the agreement without extrinsic context, is that, absent an express term making "all Schedules part of the Agreement as if set out herein" or words to that effect, Schedule B is not part of the agreement except for the express limited purpose for which it is incorporated. According to Kings' interpretation, Schedule B applies only when the school board has an impending budget surplus and does not require municipal contributions on the basis of the prescribed education tax rate (uniform assessment).

[24] Kings cites: *Tufenkjian* v *1078385 Ontario Ltd*. (1999), 102 O.T.C. 161 (OSCJ) at ¶¶ 47 and 48 as demonstrating a circumstance where an agreement contained proper terminology to incorporate a schedule. It also cites: *Key Equipment Finance Canada Ltd.* v. *Jacques Whitford Limited*, 2006 NSSC 68 at ¶¶ 135 to 140; *Van Enterprises Inc*. v. *Avemco Insurance Company*; *HCC Benefits Incorporation*, 231 F. Supp. 2d 1071 (2002) at pp. 21 and 22 (U.S. District Court for Kansas) and *Morse/Diesel Inc.* v. *Fidelity and Deposit Company of Maryland*, 1990 U.S. Dist. LEXIS 6548, at pp. 10 and 11 (U. S. District Court for Southern New York).

[25] The Three Towns argue that, assuming the Court looks only at the words of the agreement itself, it is not clear that per student funding applies only when the Board is a position of an "impending budget surplus." They make two principal arguments.

[26] The Three Towns direct the Court to the opening phrase in Schedule B (3): "The total municipal contribution ..." as supportive of an interpretation that the **total** municipal contribution is to be based on the number of students from each municipal unit.

[27] The Three Towns also direct the Court's attention to the last sentence in Section 8(B) of the 1982 agreement, which they say clearly provides that: "For the purposes of this subsection [which sets out all three possible municipal contribution matrices] and Schedule B agreement of the municipal units for other payment or for additional municipal contribution [the latter referring to

supplemental funding] and for the manner of collection and payment shall be deemed to have been made when approved by three or more Councils ... that represent more than fifty per cent of the population of Kings County." (Underlining added).

[28] The Three Towns submit that the proper interpretation of the last sentence in Section 8(B) is that payments, not just additional payments for supplemental programs or their manner of collection and payment, are a matter for agreement between the parties, which agreed method of collection ("per student") was set out in Schedule B(3).

Analysis

[29] I have difficulty with the submission that extrinsic evidence is only admissible when interpretation of the written agreement within its four corners can support "two reasonable alternative interpretations." This view appears to have devolved from Justice Iacobucci's analysis in *Eli Lilly & Co.* v *Novapharm Ltd.*, [1998] 2 S.C.R. 129, at ¶¶ 52 to 66, especially his quote at ¶ 55 from *Lampson* v. *City of Quebec*, a 1920 Privy Council decision, and his finding at ¶ 60 that the trial judge erred when considering the evidence of the subjective intention of one of the parties at the time that the contract was made.

[30] I incorporate in this decision my analysis of the interpretative process set out in three recent decisions: *Gates* v. *Croft*, 2009 NSSC 184 at ¶¶ 21 to 41; *BC Rail Partnership* v. *Standard Car Truck Co*., 2009 NSSC 240 and *Geophysical Services Inc.* v. *Sable Mary Seismic Inc.*, 2009 NSSC 404 at ¶¶ 79 and 80.

[31] I agree with Geoff Hall's analysis, summarized in nine precepts, in *Canadian Contractual Interpretation Law*, (Markham: LexisNexis, 2007), Chapter 2. Interpretation involves consideration of the words in the contract in the context of the contract as a whole and the factual matrix of the agreement. As Lord Wilberforce stated in *Prenn* v. *Simmonds* [1971] 3 All E.R. 237 (H.L.), and *Reardon Smith Line Ltd. v. Hansen-Tangen* [1976] 3 All E.R. 570 (H.L.), contracts are not made in a vacuum, and cannot be properly interpreted without knowledge of the genesis and aim of the transaction. This approach does not negate the parol evidence rule, but rather describes circumstances in which the rule does not apply (Hall, section 2.8.2). The approach has been expressly endorsed and applied in *Gallen* v. *Nunweiler* 1984 CarswellBC 104 (BCCA), ¶¶ 33-38, and *Kentucky Fried Chicken v. Scott's Food Services* 1998 CarswellOnt 4170 (ONCA).

[32] In this case, both counsel argued that the interpretative issue, based on *Eli Lilly*, requires that nothing outside the four corners of the agreement can be resorted to, in the interpretative process, unless an ambiguity arises from interpretation of the words within the four corners of the contract.

[33] My first analysis is therefore based on counsels' submission as to the law.

[34] I do not agree with Kings' submission that the Court cannot consider Schedule B to be part of the agreement. According to its submission, I cannot consider the contents of Schedule B except

for the limited purpose of the second scenario - where the Board is in an "impending budget surplus" position.

[35] In *Key Equipment Finance*, *Van Enterprises* and *Morse/Diesel Inc.*, the collateral documents, external to the agreement being interpreted, were incorporated by reference but not attached to the agreements in dispute. In this case, the schedule was attached to the agreement. To the extent that any language in these decisions suggests, expressly or impliedly, that schedules should not be considered to be part of the agreement unless the schedule is actually attached to the agreement, I disagree. The Court is obligated to interpret all of the words of the agreement in the context of the agreement as a whole, inclusive of attached schedules.

[36] I agree with the second aspect of Kings' submission that the 1982 agreement, without the amendment to Section 8(B) made in 1989, and without extrinsic context or other evidence, appears to provide that each municipal unit will make their contribution to the district school board as follows:

> a) in respect of the "funding formula" (the mandatory, core or foundation program) either:
>
> i) at the prescribed education tax rate (based on uniform assessment); or,
>
> ii) only in the event that (i) would create a surplus, the minimum municipal contribution, described in Schedule B(3) collected on a per student basis;
>
> b) and, in respect of any additional funding (for supplemental or extra requirements beyond the funding formula) "in a manner to be determined by the municipal units."

[37] The word "total" in Schedule B(3) and the wording of the last sentence of Section 8(B) does not create an obvious ambiguity.

[38] This does not end the analysis.

[39] The 1989 agreement amended the 1982 agreement. To interpret the 1982 agreement, I am obligated to interpret it as amended. Section 9 of the 1989 agreement adds five subsections to Schedule B. These five new subsections appear to provide that all municipal contributions are made on a per student basis. This is inconsistent with the interpretation advanced by Kings.

[40] The five new subsections, which gave Hantsport a four-year window during which it would contribute based on uniform assessment, after which it would contribute on a per student basis, makes no sense if applied only in circumstances of "an impending budget surplus." At a minimum, the 1989 amendment creates an ambiguity.

[41] Based on the parties' interpretation of *Eli Lilly*, which prohibits consideration of factual context as part of the interpretative process unless an ambiguity is found in the words themselves, I find that such an ambiguity exists.

C. 2 Interpretation of the Agreement with Extrinsic Evidence

[42] The factual context or matrix overwhelmingly demonstrates that the clear intent of all of the parties to the 1982 agreement and the 1989 amendment was that all municipal contributions to the School Board for the funding formula were to be on a per student basis and not on the basis of uniform assessment.

[43] The parties filed an Agreed Statement of Facts that included the following:

> 1. The intention of the parties to the 1982 Kings County District School Board Agreement ... was to include in that Agreement a student-population based funding formula as between the municipal units that was generally applicable, and not just applicable in years when the School Board was projected to have a surplus if it received a municipal contribution calculated at the prescribed education tax rate.
>
> 2. The intention of the parties to the 1989 Kings County District School Board Amending Agreement ... was to include in the amended Agreement a student-population based funding formula as between the municipal units that, subject to transitional provisions outlined in subsections (4) - (7) of Schedule "B" as amended, was generally applicable, and not just applicable in years when the School Board would have a surplus if it received a municipal contribution calculated at the prescribed education tax rate.

[44] This admitted intention is clearly confirmed in the seven volumes of municipal records and documents, admitted by consent by the parties. These documents include council minutes, reports, correspondence, presentations, debates and resolutions confirming the agreement of all parties to make their respective municipal contributions to the district school board on a per student basis.

[45] The municipal records make reference to the parties' lawyers:

a) participating in the various council meetings and joint (inter-municipal) meetings respecting the revision of the funding formula in the Property and Finance Agreement in 1980-1981, the negotiation of the 1982 agreement creating the district school board, and the 1989 amending agreement;

b) in the case of Kings' lawyer, attending the joint (inter-municipal) meetings and preparing the draft agreements and revisions in 1980, 1981, 1982 and 1989;

c) in the case of all municipal lawyers, reviewing the 1982 agreements "clause by clause" with their respective councils (and in at least one case, giving a written legal opinion with recommendations for changes); and,

d) all of them confirming that the agreements carried out the intent of the parties - which intent was clearly recorded in council minutes and correspondence to be that all municipal contributions under the funding formula would be on a per student basis.

[46] As previously noted, in 1970, the original four municipal units (excluding Hantsport) joined together in the Kings County Amalgamated School Board. Section 11(d) of the Property and

Finance Agreement stated that education funding would be paid in proportion to their assessments as determined by Section 62 of the *Education Act* (residential assessment).

[47] At a joint meeting of the four municipalities held on September 3, 1980, representatives of the four municipal units reviewed a detailed analysis of six possible alternate education sharing formulas prepared by Kentville's Director of Finance Gary Morse. In particular, they discussed the per student formula (Option 6). Further, they discussed these formulas with their respective councils. It was proposed that the per student formula replace the assessment formula; part of the negotiations involved a five-year phase in of the proposed change to the funding formula. At another joint meeting on September 29, 1980, the municipalities reviewed a revised presentation by Mr. Morse and in the next two months each of the municipal units agreed to change the school funding formula from one based on residential assessment to one based on student enrolment.

[48] The municipal records are clear that the proposal was reviewed by the four municipal units, including Kings' Municipal Council. The per student funding formula was approved and the municipal lawyer for Kings drafted the amendments to the Property and Finance Agreement. The Wolfville Council minutes of March 16, 1981, report that the official signing of the revision providing for a new sharing formula took place on March 12, 1981. Kings' council minutes of June 1981 confirm Kings' approval of the amended Property and Finance Agreement. Kings' lawyer wrote to the other municipalities that he believed that the Minister of Education had to sign the agreement. Before that happened, the Walker Report was released and the provincial government entered into negotiations with all municipal units to implement the Walker Report's recommendations.

[49] The municipal records establish that all four municipal units continued to meet together to discuss the consequences of the Walker Report. It is equally clear that the parties agreed and intended that their respective municipal contributions to the district school board would be based upon the per student basis and not on the basis of uniform assessment.

[50] The factual matrix, and negotiations amongst the four municipal units, leads clearly to the conclusion that all four councils intended to share education costs on a per student basis and received advice from their respective lawyers that the 1982 agreement so provided.

[51] The Town of Hantsport was one of the few municipal units in Nova Scotia which did not, in 1982, join with other municipalities in a district school board. By late 1987, discussions were initiated between Hantsport and the Kings County District School Board ("KCDSB") for Hantsport to join. The records tendered clearly show correspondence amongst all the parties that the 1982 agreement provided for municipal contributions on a per student basis and not on the basis of uniform assessment.

[52] One of the key elements of the negotiation was a provision whereby Hantsport would pay for an interim period on the basis of uniform assessment as opposed to paying on a per student basis. The amendment provides for a phase-in of Hantsport's contribution, from the uniform assessment basis to the per student basis, over four years. Kings negotiated for a five-year phase-in period and

Hantsport sought a three-year phase in period. The Province of Nova Scotia agreed to make up to KCDSB the short fall resulting from the phase-in agreement. The records tendered showed that Kings' Finance Director (Guptill) prepared an analysis of the proposal for, and discussed it with, Kings' Municipal Council. In early 1989, their lawyer and Chief Administrator corresponded with the Province respecting the conditions of Kings' agreement to Hantsport joining KCDSB. In April, Kings' Chief Administrator requested wording changes (on the advice of Kings' lawyer) to the amending agreement (that were made by the Province's lawyer). On May 2, 1989, Kings' Municipal Council approved the 1989 amending agreement

[53] To the extent that a literal interpretation of the 1982 agreement, as amended in 1989, gives rise to an ambiguity as to whether the municipal units agreed to contribute to school board funding on a per student basis, the correspondence and meetings amongst the parties and the records of their deliberations leading up to the execution of the agreements removes any doubt as to the proper interpretation of the 1982 agreement, as amended in 1989. I find that the proper interpretation of the agreement is that all municipal funding contributions were payable to the school board on a per student basis.

D. Second Issue: Estoppel

[54] Hantsport argues that the parties to the 1982 agreement (including Kings) are estopped from maintaining that the 1982 agreement did not provide for municipal education sharing on a per student basis.

[55] For the law on estoppel, Hantsport cites *Dunn* v. *Vicars*, 2009 BCCA 477. In *Dunn*, the court relied upon earlier BCCA and English decisions for the modern approach to equitable estoppel. These cases include: *Erickson* v. *Jones*, 2008 BCCA 379; *Trethewey-Edge Dyking District* v. *Coniagas Ranches Ltd*., 2003 BCCA197; *Crabb* v. *Arun District Council* [1975] 3 All E.R. 865 (CA), and, *Amalgamated Investment* v. *Texas Commerce* [1981] 3 All E.R. 577 (CA).

[56] Kings cites *Ford* v. *Kennie*, 2002 NSCA140, at ¶¶ 37 to 40, respecting the law on estoppel by representation, which estoppel is limited to representations of a present, existing fact, not an intention with respect to the future. Kings argues that no evidence exists that Kings itself represented anything to Hantsport or, alternatively, that any such representation was about an existing fact as opposed to an intention as to the future.

[57] In oral argument, Kings argues, relying on Chapter 14 in the text by **Sir Alexander Turner** (the original text by George Spencer Bower), *The Law Relating to Estoppel by Representation*, 3rd Edition (London: Butterworths, 1977) that no contractual relationship existed between Kings and Hantsport at the time of negotiations, and no evidence exists that Hantsport altered its position in reliance upon any assurance from Kings.

[58] In response to this oral submission, Hantsport produced the Fourth Edition of the Spencer Bower text, published in 2004. In this edition, the writers note the effect of *Amalgamated*

Investment v. *Texas Commerce* in merging all forms of estoppel "into one general principle shorn of limitations" (p. 448) and further that a promise or assurance may be implied from conduct, and from a failure to object to others' performance under a contract or by its own continued performance without any reservation of rights (p. 455).

[59] In rebuttal, Kings directs the Court to further passages in the 2004 Fourth Edition wherein the writers state that any such promise or representation can be withdrawn on reasonable notice "provided that the promisee can be restored to his or her former position" (p. 489) or "unless the promisee has changed his position permanently in reliance upon it" (p. 491).

Analysis

[60] The proper approach to the estoppel issue is that explained by Chiasson, J.A. for the British Columbia Court of Appeal in *Dunn* v. *Vicars*. He adopts the broad approach consistent with the English case law, primarily enunciated by Lord Denning. Lord Denning's conclusion in *Amalgamated Investment* v. *Texas Commerce* at p. 584 is the modern law of equitable estoppel. He wrote:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. ... It has evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: ... All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands.

[61] While John Levangie, the Director of Finance for the Department of Education, appears to have been a central figure in the negotiations leading to Hantsport joining KCDSB, representatives of all of the parties to the 1982 agreement, including Kings, met with and communicated with Hantsport in the negotiations leading up to the May 10, 1989, agreement amending the 1982 agreement.

[62] Between early 1988 and May 1989, Kings, through its representatives, its administrator and its lawyer, made proposals respecting the contents of the amending agreement which make no sense unless those proposals were founded on the basis that the municipal contributions to the district school board were on a per student basis and would continue on that basis. See, for example, Mr. Guptill's memo (Exhibit 6, Tab 12), Mr. Levangie's memo regarding a joint meeting, and records of the municipal council meetings of Wolfville and Hantsport respecting Kings submissions (Tabs 114 and 181), the memo from Kings' lawyer to Mr. Levangie (Tab 40), the memo from Kings' administrator to Mr. Levangie (Tab 41), the press release by Kings (Tab 116), and other memoranda from Kings' administrator (Tabs 44, 45, and 116).

[63] It is not necessary for Hantsport to produce a written letter from Kings with the express words: "Municipal contributions to the District School Board under the 1982 agreement that you are invited to join into are on a per student basis" in order to establish a representation by Kings sufficient to establish a basis for equitable estoppel.

[64] Kings' receipt of the reports on the negotiations from other participants, and its participation in the negotiations based on those reports, were enough to establish its part in the representation/ assurance to Hantsport that what Hantsport was getting into in deciding to end its own separate school board status and join KCDSB was an obligation for education funding on a per student basis.

[65] Kings did make a more direct representation. Kings requested that there be a five-year phase-in period before Hantsport's contribution became a per student contribution. This stance in negotiating Hantsport's funding contribution is inconsistent with anything other than a representation that the existing agreement called for municipal contributions on a per student basis.

[66] In a press release issued by Kings in support of its request for greater representation on the district school board, found in Tab 116, the Warden of Kings states:

> ... approximately 83% of the students of the Board reside in the County, and Council wants to ensure that County representation on the Board reflects those numbers.
>
> ...
>
> Presently the County is represented by 9 persons on the 15 member Board, which is far below the 83% student enrolment statistic. "If we pay for 83% of the municipal share of education then we should have a higher level then our present 60% representation on the Board - simple representation by student population", said the Warden.

[67] This press release, issued during negotiations with Hantsport, is a clear and unequivocal representation and assurance to Hantsport of the funding arrangement.

[68] Kings carried out its financial obligations under the 1982 agreement, as amended in 1989, on the basis that the proper interpretation of the agreement was municipal contribution on a per student basis. The fact that, from 1982 until at least 2007, Kings continued to pay on a per student basis without questioning the interpretation of the agreement and without any reservation of rights constitutes further conduct from which a promise or assurance can be implied.

[69] Finally, estoppel requires either that Hantsport permanently altered its position or that, by reasons of Kings' recent change in its position with regards to its financial obligations under the agreement, Hantsport could be put back in its former position. Hantsport cannot be put back in the position it was in when it joined the district school board. It had its own school board, and because of subsequent legislation, it can no longer revert to its former status. It is permanently a part of an inter-municipal school board, in 1989 a district board, and by amendments to the *Education Act* in 1996, a regional school board.

[70] If I had not interpreted the agreement as providing for municipal contributions on a per student basis, I would find that Kings was estopped from withdrawing its representation, promise or assurance. This finding however does not impede Kings from seeking prospective termination of the agreement on the basis of frustration or an implied term for termination on reasonable notice. These issues are the fifth and sixth in this decision. (See Spencer Bower, Fourth Edition, pp. 487-497.)

E. Third Issue: Rectification

[71] The Three Towns submit that if the Court finds that the proper interpretation of the 1982 agreement does not provide for per student funding, the Court should alter, vary or rectify the agreement to accord with the terms that the parties expressly settled upon but which were incorrectly written down.

[72] All parties agree that the respective municipal contributions for public education were to be made on a per student basis and not the basis of uniform assessment. They further agree that extrinsic evidence is admissible in support of a claim for rectification (*Gallen* v. *Nunweiler*, ¶35(c)).

[73] Kings argues that the doctrine of rectification was thoroughly reviewed in *Sylvan Lake Golf and Tennis Club* v. *Performance Industries*, 2002 SCC19. In that decision, Justice Binnie enumerated the four hurdles to rectification as:

i) A prior agreement;
ii) Fraud or equivalent conduct;
iii) Precisely curable;
iv) Provable beyond a reasonable doubt.

[74] Kings submits that fraud or equivalent conduct, the second hurdle, do not exist in this case. It relies upon the analysis of *Geoff Hall*, Chapter 6.1.3:

> The second condition is that the plaintiff must show not only that the written document does not correspond with the prior oral agreement but that the defendant knew or ought to have known of the mistake in reducing the oral terms to writing. In other words, rectification is only available where permitting the defendant to take advantage of the error would amount to fraud or the equivalent to fraud. This requirement precludes use of the doctrine by unhappy contracting parties who have simply made a mistake.

[75] Kings submits that in this case all the parties made a mistake and that it neither knew nor ought to have known of the error in the recording of the parties' intentions.

[76] In effect, Kings argues that rectification is only available where a unilateral mistake has occurred.

[77] Kings further notes that rectification is an equitable remedy. Courts should order rectification only when an injustice would arise from enforcing the mistaken words. It argues that the agreement should only be rectified if the agreement is simultaneously rectified to allow for what it says is or should be an implied term - unilateral termination of the agreement on reasonable notice.

[78] The Three Towns refer the Court to **G.H.L.Fridman**, *The Law of Contract in Canada*, 5th Edition(Toronto: Carswell, 2006), pp. 825 to 840, and *Sylvan Lake*. They note that *Sylvan Lake* was a case about unilateral mistake and decided in that context.

[79] While it is not clear that Justice Binnie intended to restrict the second hurdle or condition to cases of unilateral mistake, the Three Towns rely upon the analysis in *Royal Bank* v. *El-Bris Ltd.*, 2008 ONCA 601, at ¶¶ 13 to 17, where Laskin J.A. effectively held that the second prerequisite in *Sylvan Lake* does not apply in cases of common or mutual mistake.

Analysis

[80] If I am in error in the first and second issues, I would grant the remedy of rectification.

[81] I agree without reservation with the observations and analysis of Justice Laskin in *Royal Bank* v. *El-Bris*.

[82] The case law is replete with scenarios of mutual mistake wherein rectification was granted. Texts are uniform in recognizing the availability of rectification in cases of common or mutual mistake. If anything, the text writers note the reluctance of courts to grant rectification in cases of unilateral mistake. It is that historic reluctance that was likely the focus and concern of Justice Binnie. I conclude that Justice Binnie wanted to make clear that rectification was available for unilateral mistake and, at the same time, set out the preconditions or hurdles for granting rectification in such circumstances.

[83] No logical or equitable reason exists for precluding circumstances of mutual mistake from the rectification analysis and remedy.

[84] If Justice Binnie intended to undo the evolution of this equitable remedy by restricting it to cases of unilateral mistake (the only scenario in which fraud or equivalent conduct would be relevant), he would surely have done so more clearly.

[85] I agree with Laskin, J.A.'s observation:

> 17 The prerequisites in Sylvan do not apply to cases of common or mutual mistake. The following statement by Binnie J. para. 31 of Sylvan clarifies the scope of the application of the prerequisites: "The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met." Sylvan, in effect, broadened the circumstances in which courts could rectify a unilateral mistake, allowing rectification subject to the "demanding preconditions" outlined above. It left untouched the

> circumstances, under the "traditional rule," in which courts could rectify a mutual or common mistake. See also John D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005), at 555-62; Wasauking First Nation v. Wasausink Lands Inc., [2004] O.J. No. 810 at paras. 76-85 (C.A.) (discussing Sylvan but not applying the Sylvan preconditions to a case of mutual mistake).

[86] Kings argues that it would be inequitable to grant rectification without simultaneously inserting a clause for termination of the agreement on reasonable notice.

[87] The purpose of rectification is to correct a mistake in the reduction of the parties' expressly agreed upon intentions into the written document, not to convert terms that might be implied but were not expressly agreed upon into express terms.

F. Fourth Issue - *Ultra Vires*

Submissions

[88] Kings submits that the parties did not have legal authority to enter agreements that provided an education funding formula other than the default formula legislated in the *Act* (uniform assessment) unless the alternate formula was authorized in the *Act*. It argues that the *Act* does not provide for the formula contained in the 1982 agreement as amended.

[89] Municipalities have no inherent powers, only those given by statute. *R* v. *Greenbaum*, [1973] 1 S.C.R. 674, at ¶ 22, and **Ian M. Rogers**, *The Law of Canadian Municipal Corporations*, Second Edition (Toronto: Carswell, looseleaf) at ¶ 64.1. The *Municipal Government Act*, which replaced the *Towns Act* and *Municipal Act* in 1998, granted to municipal units broad powers approaching those of a natural person.

[90] The importance of reading together statutes dealing with the same subject matter - in this case, the *Act*, the *Towns Act* and the *Municipal Act*, arise from the obligation to interpret the words of the legislation in a larger context. For this proposition, Kings cites: *Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42, at ¶¶ 26 and 27; *R.* v. *Ulybel Enterprises*, 2002 SCC 56, at ¶ 30; *Vancouver Oral Centre for Deaf Children* v. *Vancouver Assessor*, 2002 BCCA 667 at ¶ 17.

[91] Kings submits that the change to a broad and purposive approach to the granting of power to municipalities arose only with passage of the *Municipal Government Act* of 1998, as noted by Cromwell, J.A. (as he then was) in *Halifax* v. *Ed Dewolfe*, 2007 NSCA 89, at ¶ 88. The 1998 legislation replaced "an older style of drafting that defined municipal powers narrowly and specifically." Kings submits that the Court should apply the older style, not the broad and purposive approach following passage of the *Municipal Government Act*, to the powers of municipal units under the former legislation.

[92] In the event that the Court proposed to adopt the "modern" approach, Kings notes that, in *Pacific National Investments* v. *Victoria*, 2000 SCC 64, at ¶¶ 33 to 36, the court held that the city

did not have the capacity to make and be bound by an implied contractual term. In that case, if there was an implied term, it was held to be *ultra vires*.

[93] Finally, Kings submits that even a broad and purposive approach does not equate to an unlimited grant of power (*Montreal* v. *2952-1366 Quebec Inc.*, 2005 SCC 62, at ¶¶ 51 to 54).

[94] Counsel for the Province took issue with Kings' position on the *ultra vires* issue. The starting point for interpreting legislation is Driedger's statement at ¶ 87 in **The Construction of Statutes**, Second Edition (1983), that today there is only one principle or approach - that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[95] This approach has been frequently approved by the Supreme Court of Canada (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at ¶¶ 20 to 22) and the Nova Scotia Court of Appeal (*Myers* v. *Windsor*, 2003 NSCA 64, at ¶ 24). The Province refers the Court to Section 9(5) of the *Interpretation Act*, which deems every enactment to be remedial and to be interpreted to ensure attainment of its objects.

[96] The Province argues that the crux of the *ultra vires* issue arises from the interplay of two sections of the *Act*.

[97] In 1982, the *Act*, the *Towns Act* and *Municipal Act* were amended to implement the Walker Report recommendations.

[98] Section 42(4) of the *Act* as amended in 1982 (Section 27(4) in the 1989 Consolidation), reads:

> (4) The council of each municipality within or partly within a school district and the Minister may enter into one or more agreements, either before or after the Governor in Council designates a school district, respecting matters relating to the designation and the establishment and operation of the district school board.

Related subsections read:

> (6) An agreement approved by the Governor in Council shall have force and effect and be binding upon every person affected by it on, from, and after the date of the agreement or another date specified in the agreement or by the Governor in Counsel, and, without limiting the generality of the foregoing, every contract, act and proceeding entered into, done or taken pursuant to the agreement before the approval shall be deemed to be valid and have force and effect to be binding upon every person affected by it to the same extent as if this section had been in force and effect at the time the contract, act, or proceeding was entered into, done or taken.
>
> (7) The Governor in Council
>
> (a) with approval of the parties to the agreement, may amend an agreement made and approved pursuant to this Section; and
>
> (b) on the advice and recommendation of the Minister of Education, may terminate an agreement made and approved pursuant to this Section.

[99] Section 62(2) of the *Act*, as amended in 1982 (Section 46(2) of the 1989 Consolidation) reads:

> 62(2) Unless an agreement made and approved pursuant to Section 42 otherwise provides, each municipality shall pay to the school board
>
> (a) the minimum municipal contribution which is required to be paid by each municipality to the school board; and
>
> (b) the municipality's proportion of the amount which is requested by the school board to provide for the estimated expenditures of the board, after deducting
>
> (i) the amount of the Minister's contribution as set out in the Minister's statement pursuant to Section 60, and
>
> (ii) the sum of the minimum municipal contributions to be made by the participating municipalities pursuant to clause (a),
>
> to the extent that the amount has been approved by the municipalities.

[100] Section 1(ea) of the *Act*, as amended in 1982 (Section 2(h) in the 1989 consolidation) defines "minimum municipal contribution" as follows:

> "minimum municipal contribution" means the amount which would be raised in a municipality if tax was levied at the prescribed tax rate on the uniform assessment of the municipality determined pursuant to the *Municipal Grants Act*, or such lesser amount as determined by the regulations;

[101] Kings submits that by Section 42(4) of the *Act* municipal authority is limited to bilateral agreements between a municipality and the Minister respecting the designation, establishment and operation of the district school board, and do not extend to agreements among municipalities that are intended or have the effect of avoiding application of the legislative default funding formula (uniform assessment) for basic or core education services.

[102] Kings argues that Section 42(4) does not extend to education funding but only to the designation, establishment and operation of the new district school boards. It notes that on the same day that the *Act* was amended, the authority in the *Towns Act* (Sections 135 and 136) for towns to enter into inter-municipal agreements on education was repealed, and new provisions in the *Towns Act* (Section 138(2) and (3)) and *Municipal Act* (Section 226) directed a council, in preparing its estimates and setting its annual tax rates, to provide for the minimum municipal contribution as defined in the *Act* together with any additional amount requested by the school board and approved by the council. The new provisions in the *Towns Act* and *Municipal Act* did not authorize inter-municipal agreements, and the definition of "minimum municipal contribution" only authorizes municipal contributions based on the default formula, or a <u>lesser</u> amount than the default formula - not a greater amount.

[103] Kings argues that Section 62(2) was designed for situations where a municipality is relieved from the default formula by reason of an agreement with the Minister, such as the relief granted to Hantsport in the 1989 agreement, by which the Minister subsidized Hantsport's transition into the Kings County District School Board by making up the difference between what Hantsport paid during the phase-in period and what it would have otherwise paid.

[104] The Province's reply follows the analytical approach described by Ruth Sullivan in her 1994 Third Edition of **Driedger on Construction of Statutes**, adopted by the Nova Scotia Court of Appeal in *Myers* at ¶ 14. A similar approach is endorsed in the Fourth Edition of Professor Sullivan's text (Markham: Butterworths, 2002) where she writes:

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) if its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is just and reasonable.

Plausibility: compliance with legislative text

[105] The Province submits that Kings' argument that Section 42(4) does not extend to education funding is without logic or merit. It argues that the education funding must come within the language of 42(4); it is inherent to school board operations.

[106] Section 62(2) deals only with municipal funding of school boards; hence, the opening phrase in Section 62(2) that "unless an agreement made and approved pursuant to Section 42 otherwise provides," only makes sense if the legislation is read as intending that an agreement under Section 42 could alter funding arrangements between municipal units and the school board. Said differently, the opening phrase in Section 62(2) is meaningless unless Section 42(4) extends to the question of education funding by municipal units. I agree.

[107] As to Kings argument that the amendments to the *Act*, *Towns Act* and *Municipal Act* removed the statutory authority for municipal units to make inter-municipal agreements "*per se*", the Province submits that the 1982 agreement, as amended, is precisely what Section 42(4) requires - an agreement or agreements between municipal units and the Minister of Education. I agree.

[108] The Province responds to Kings' argument that the *Towns Act* and *Municipal Act*, as amended in 1982, require councils to prepare estimates for the minimum municipal contribution with the argument that these provisions do not mandate the amount to be paid each year. Rather, funding is determined by the *Act*, not by the *Towns Act* and *Municipal Act*. Read together, the *Towns Act* and *Municipal Act* should be interpreted as allowing for an agreement under Section 42(2) of the *Act*.

[109] The Province noted that Section 65 of the *Act*, as amended in 1982, permitted the Minister to reduce the Province's financial assistance to a school board if a municipality fails to pay its minimum municipal contribution. This has survived the 1995-6 amendments to the *Act* in Section 76(1), which subsection recognized both agreements made and approved under Section 27 (formerly Section 42) and agreement made, post-January 16, 1996, between a municipality and a regional school board pursuant to subsection 76(2). Subsection 76(2) authorizes agreements for municipal cost sharing like the agreement made between these municipalities and the Minister in 1982 and 1989.

Efficacy: promotion of legislative intent

[110] The Province makes three points in its analysis of efficacy.

[111] First, before 1982, the legislation authorized the municipality to contribute to education funding in a manner that varied from the default formula in the *Act*, like the way that Kings Amalgamated School Board was in the process of amending their Property and Finance Agreement to a per student basis in 1980/81. The January 16, 1996, legislation continues to provide for local variability in municipal contributions to school boards (s.76(2)) and there is no evidence that the legislature intended to eliminate local variations in municipal contributions between 1982 and 1996.

[112] Second, the 1981 to 1982 negotiations between the Province and the municipal units that flowed from the Walker Report recommendations lead to twenty-one new district school boards, that included most of the municipal units of Nova Scotia. The twenty-one district school board agreements have a remarkable degree of similarity in content and style, and are clearly based upon a single provincial template. All the agreements contained a section like Section 8 of the 1982 agreement in dispute in this proceeding. The template appears to have allowed for local variability in many provisions, including those for municipal funding contributions, and for termination and amendment.

[113] While part of the ambiguity of the 1982 agreement may have arisen from attempts to adapt the provincial template, which appears to have been drafted on the basis of the default formula, to the 1982 agreement, a review of all of the agreements demonstrates that the drafters of the provincial template contemplated the possibility of local variability in municipal education funding, and some of the agreements contain such variations.

[114] Thirdly, the twenty-one district school board agreements, including the agreement in dispute in this proceeding, were intended by the parties to be authorized under Section 42 of the *Act* and were so approved by the Governor in Council.

Acceptability: outcome complies with legal norms

[115] Applying the third aspect of Sullivan's approach, the Province argues that Kings' interpretation would make all payments made for school board funding for more than twenty-eight years under those of the twenty-one district school board agreements that did not apply the legislative default formula unauthorized and illegal. Such is not, it argues, a just or reasonable outcome.

Analysis

[116] I agree with the Province's analysis that Section 42(4) of the *Act* extends to education funding; that is, the operation of a district school board implicitly incorporates its funding. To hold otherwise would make subsection 62(2) of the *Act* meaningless. The 1982 agreement, as amended in 1989, between the Minister of Education and the four (later five) municipal units, is exactly the

kind of agreement between the Province and municipal units (not simply amongst municipal units *per se*) that was contemplated and authorized by Section 42(4) and Section 62(2) of the *Act*.

[117] I conclude that those district school board agreements that incorporated municipal funding formulas that varied from the default formula, including the agreement in dispute in this proceeding, were *intra vires* the statutory authority of the Minister and municipalities at the time they were entered into, and continue to be so authorized, pursuant to section 76 of the *Act*, SNS 1995-96, c.1.

G. Termination

[118] Kings seeks termination of the agreement by two alternative means: discharge by frustration ("frustration analysis"), or, alternatively by inferring or implying a term in the agreement, absent an express termination provision, that the agreement is unilaterally terminable by a party on reasonable notice ("implied termination clause analysis").

[119] Kings made the implied termination clause analysis first and the frustration analysis last.

[120] The implied termination clause analysis involves an interpretative process with a significant contextual component. This contextual analysis is broader than, but incorporates some factors relevant to, the frustration analysis. In my view, the concepts and principles in the frustration analysis assist in framing the other analysis. It is therefore appropriate to conduct the frustration analysis first.

G.1 Fifth Issue: Discharge by frustration

[121] For the analytical framework, Kings refers the Court to:

(a) **Angela Swan**, *Canadian Contract Law*, Second Edition (Markham: LexisNexis, 2009) at Chapter 8, §§ 8.298 to 8.336, and, in particular, to §§ 8.297 to 8.300;

(b) **S.M. Waddams**, *The Law of Contract*, Fifth Edition (Toronto: Canada Law Book, 2005) at ¶¶ 360 to 380, and, in particular, to ¶ 363; and

(c) Lord Denning's judgment (speaking for himself only) in *Staffordshire Area Health Authority* v. *South Staffordshire Water Works*, [1978] 3 All E.R. 769 (CA).

[122] **Swan** and **Waddams** treat frustration as a risk allocation analysis; that is, an analysis of where the parties would have placed the risk of an unforeseen event that occurred after the agreement was formed, if the parties had considered that risk at the time of making the agreement.

[123] **Waddams** describes the fundamental reason for Court intervention as the occurrence of an unexpected event so outside the range of risks that the agreement allocates that the values favouring enforcement of the agreement are outweighed (¶ 363).

[124] **Swan** puts it more broadly. It is unnecessary to find a radical difference or fundamental change in circumstances. An allocation of the risk can be found in either the parties' agreement or what can be described as the background or default allocation to the purchaser. Where it is in neither, the doctrine of frustration becomes relevant. The consequence for the party seeking relief needs to be serious enough so as to exclude the courts' natural concern about becoming swamped by claims made by mistaken plaintiffs (§8.320).

[125] The Three Towns frame the legal analysis by quoting from **Waddams** and **Fridman**.

[126] **Waddams** asks the fundamental question of why a court intervenes and answers the question: The occurrence of an unexpected event is so outside the range of risks allocated in the agreement that the values favouring enforcement are outweighed; no mechanical rule of thumb determines when the balance tilts (¶ 363).

[127] To which **Fridman** adds, at pp. 646 to 648: Frustration will not be evoked where the change in circumstances, no matter how unexpected, simply means that the agreement will be more expensive or onerous to perform or that it will cease to be advantageous to one party or uneconomic. What is required is that the contract be impossible to perform in one of two senses: a) it becomes impossible, either physically or legally, to perform, or b) even where physically and legally possible to perform, it would be totally different from what the parties intended by reason of the unexpected event.

Analysis

[128] Having argued first that the agreement is unilaterally terminable on reasonable notice, Kings restricted its argument for discharge by frustration to two events that have occurred subsequently to the agreement.

[129] The first is the statutory dissolution of the twenty-one district school boards, including KCDSB, and their replacement with seven regional school boards, one of which was the Annapolis Valley Regional School Board, resulted in "radically divergent municipal funding formulas" as amongst the municipal units that formed the new regional board.

[130] The second is the change to a fully elected school board resulted in the loss to Kings of input into public education, and converted the obligation of Kings under the agreement to "something radically different" from that contemplated in the agreement.

[131] The Three Towns respond that the amalgamation of the three district school boards into one regional board has had very little impact on the percentage contribution paid by Kings for public education. Further, the conversion from appointed, to partially appointed and elected, then to fully elected school boards, and the percentage of school board members who are residents of Kings was a central part of the negotiations leading to the 1982 and 1989 agreements, dealt within the agreements, and a "foreseeable potential alteration or change [that would] subsequently restrict that party from successfully claiming frustration."

Analysis
Change from District to Regional School Board

[132] The 1995-96 amendments to the *Act* replaced district school boards with seven regional school boards. The three district school boards (Kings County, Annapolis County and West Hants/Windsor) became the AVRSB.

[133] The municipal units in the three dissolved district school boards had all executed agreements with the Minister using the same provincial template, similar to the one in dispute. Each of the three district school boards operated under different municipal funding formulas.

[134] As noted, all municipal contributions in the Kings school district were made on the basis of student enrolment.

[135] All municipal contributions for the two municipal units in the West Hants school district were made on the basis of uniform assessment.

[136] All municipal contributions by the four municipalities in Annapolis County were made 50% on the basis of student enrolment and 50% on the basis of uniform assessment.

[137] Interestingly, the same interpretation issue that is advanced by Kings respecting the KCDSB agreement, could be raised in respect of the Annapolis agreement. Section 8(B) of that agreement reads:

> (B) ANNAPOLIS, ANNAPOLIS ROYAL, BRIDGETOWN and MIDDLETON agree to make payments to the ANNAPOLIS DISTRICT SCHOOL BOARD, according to the prescribed education tax rate determined by Cabinet or calculated according to the minimum contribution described in Schedule D attached, and any other payments recommended by the district school board and agreed to by ANNAPOLIS, ANNAPOLIS ROYAL, BRIDGETOWN and MIDDLETON from time to time for expenditure levels not covered by the funding formulas. Any additional municipal contribution toward expenditure levels not covered by the funding formulas, shall be collected from ANNAPOLIS, ANNAPOLIS ROYAL, BRIDGETOWN and MIDDLETON in a manner described in Schedule F.

[138] Schedule D(4) states that the municipal contribution may be collected in a manner to be determined by the units. Schedule F, which by Section 8(B) applies only to "additional municipal contributions", that is, supplemental or extra funding beyond the core or funding formula, contains the formula applied among the Annapolis municipal units for all municipal contributions of 50% by uniform assessment and 50% per student.

[139] The municipal contributions to the AVRSB are as follows:

a) as among the three former school districts, the percentage of uniform assessment of all municipalities within that former school district is in relation to total uniform assessment within the region;

b) as among or between the municipal units within each of the former school districts, in accordance with their 1982 agreements. That is, for the four municipal units in Annapolis County, 50% by student enrolment and 50% by uniform assessment; the five municipal units in Kings County on the basis of student enrolment; and the two municipal units in West Hants/Windsor on the basis of uniform assessment. The total required municipal contribution from all municipal units is allocated amongst the three former districts on the basis of uniform assessment.

[140] While Kings argued orally that the possibility exists that the percentage of uniform assessment of the former KCDSB may increase in proportion to that of the other two former school districts, thereby adversely affecting by increasing the required contribution by Kings, no evidence was provided that this had ever occurred in the past or the likelihood that it would occur in the future. Such a possibility is speculative at the present time.

[141] The consolidation of the three school districts (and boards) into one, is a change in the landscape. However, it has not made the performance of the agreement either physically or legally impossible, nor totally different from what the parties contemplated and intended in 1982 and 1989.

[142] With respect to the subject matter of the dispute - municipal contributions to public education, there has been no change, or, at least, no evidence of any change by reason of the change from a district to a regional school board.

[143] The fact that each of the three former school districts had “divergent municipal funding formulas” (I disagree with Kings’ characterization of them as “radically divergent”), does not affect Kings ability to perform its obligation.

[144] The fact of the merger of the three school districts into one is not “the equivalent of the destruction of the subject matter or ... the conversion of the obligations in the contract to something radically different than was contemplated.”

[145] The obligation of Kings has always been and remains the same - to pay its proportionate share of public education costs.

[146] Historically, at least since 1826, the obligation of the municipal government was to collect an area or school rate and pay it to each school section within the municipality. From 1942, the obligation of each municipality was to collect on personal and property tax sufficient monies to ensure the municipal school board’s budget was met. From 1970, in the case of Kings, the obligation of Kings was to collect from property tax sufficient money to pay its share of public education to the amalgamated school board. From 1982, the obligation was the same in respect of the district school board. Since 1996, nothing has changed except the receiver of Kings proportionate share of the costs of public education is a regional school board.

[147] The only significant change is that the total municipal contribution to public education from property taxation has declined from 100% in the 19th century, to about 50% after the Pottier Report in the 1950s, to about 15% at the present time.

[148] While the total municipal contribution to public education has increased in terms of dollars, as noted later in this decision, it has not increased at a greater rate than the increase in municipal property assessment, or (apparently) inflation.

Loss of Control - Elected School Boards

[149] Before 1978 (SNS, c.13), local rural school boards consisted of three trustees elected by the residents of the school section. Urban school boards, at least in respect of towns, consisted of five persons: Two were appointed by the Province; three were appointed by the town council with not more than two of whom could be town councillors. In 1978 the *School Boards' Membership Act* provided that one-third of the school board members were to be elected, one-third appointed by municipal councils and one-third appointed by the Province. For amalgamated school boards, one-half were elected and the other half were appointed by the participating municipal councils. Membership on the school boards was apportioned on the population.

[150] The Walker Report notes that historically education was a local responsibility and that in 1954 the Pottier Royal Commission into Public Education Financing recommended, and the Province agreed and implemented, a shift in the burden of education from its substantial reliance on property taxation (which Justice Pottier found was too great a burden on municipalities) to about 50% by property tax and 50% by the Province.

[151] In 1974, the Graham Royal Commission strongly recommended that the Province assume full financial responsibility for education and administration of education through the creation of eleven regional boards of education. The Walker Commission disagreed with that recommendation. While supporting a reduction in the burden of education on property taxation, the Walker Report states: "The views of this Commission are in support of some local financial input, in part because school boards and local councils have, in general, indicated during public hearings that they wish to continue to make an "affordable" contribution to ensure local influence in the education decision-making process."

[152] The Walker Commission was not mandated and did not make formal recommendations regarding school board membership, but the Report, at p. 19, summarizes the submissions made to it about school membership: "The majority of submissions suggested that a board membership which was one-half elected and one-half appointed by council would guarantee that board decisions could be made with local needs, both fiscal and educational, carefully considered."

[153] The 1982 agreement was negotiated by Kings in the context of this history.

[154] Kings and the other participating municipalities negotiated vigorously, both at the time of the 1982 and 1989 agreements, respecting the composition of the school board. Already "control" of amalgamated school boards was out of the hands of municipal councils, since 50% were elected. Schedule C to the 1982 agreement provided for a 15-member board: Five appointed by the Province; five appointed by the councils (two by Kings, one each by Berwick, Kentville and Wolfville); five elected by five electoral districts (one consisting of Kentville, one consisting of Wolfville, two consisting of portions of Kings County and one consisting of Berwick and a remaining portion of Kings County). Nine of the fifteen were to be residents of Kings, and two to be residents of each of the Three Towns.

[155] The 1989 agreement added a 16th member to the board, who was to be appointed by Hantsport.

[156] During these negotiations, Kings recognized and was vigorous in its unsuccessful attempts to have its proportion of school board members match as closely as possible its proportion of municipal education funding contributions.

[157] The 1991 amendments to the *School Boards Act* eliminated the appointment of members by the Province and municipality in favour of a fully elected board. This effectively doubled the number of members elected from each of the electoral districts under the district school board system. Municipal councils ceased to have any direct input into education decisions, except to the extent of being asked to agree to supplemental or extra funding beyond the Province's funding formula.

[158] At the time that Kings entered the 1982 and 1989 agreements, only one-third of the appointments were under its control.

[159] Both before and during the times that the 1982 and 1989 agreements were negotiated, there were considerable public discussion, and several reports recommending that school boards be fully elected, and that the only role of municipal units would be to collect the property taxes for the municipal contribution, which contribution decreased as a percentage of the total cost of education.

[160] I conclude that the move to a fully elected school board in 1991 did not constitute an unexpected event so outside the range of foreseeable risks as to tilt the scales of fairness toward the discharge of Kings from its obligations under the agreement by reason of the principles of frustration.

G.2 **Sixth Issue - Perpetual or Terminable on Reasonable Notice**

Submissions

[161] Kings submits that whether a contract without a defined duration and without express unilateral termination rights is terminable on reasonable notice is a question of law. It is sometimes

treated as a question of whether to imply a term into a contract that it is perpetual or subject to a unilateral right of termination.

[162] Kings appears to rely heavily upon the analysis in **Geoff Hall's** text, at Chapter 3.17, for its submissions that:

a) the modern view is that no presumption of perpetuity exists, but rather the issue involves contractual interpretation and regard for the "entire context of the contract and parties' relationship in order to ascertain objectively and accurately the intentions of the parties", in respect of which extrinsic evidence is admissible (pp. 115 and 120).

b) this modern approach is supported by the following decisions: the majority decision in *Staffordshire* (Lord Denning's decision was made on the basis of frustration); *A & K Lick-A-Chick Franchise* v. *Cordiv Enterprises*, 1981 CarswellNS 113 (NSSC), which in turn relied upon *Martin-Baker Aircraft* v. *Canadian Flight Equipment*, [1955] 2 QB 556; *Rapatex (1987)* v. *Cantex* (1997), 145 DLR (4d) 419 (ABCA); and, *Imperial Oil* v. *Young*, 1998 Carswell NFLD 224 (NCA).

c) this case is distinguishable from *Credit Security Insurance Agency* v. *CIBC Mortgages*, 2006 CarswellOnt 2441 (OSCJ), affirmed on appeal, because in that case other provisions for termination of the contract did exist.

[163] Kings argues, by analogy with the *Imperial Oil* matrix and reasoning, that this agreement "was either terminable on reasonable notice from inception or, more probably, became terminable on reasonable notice once the subject matter of the agreement had ceased to exist except through a deemed successorship imposed by statute, or had been radically transformed through abolition of municipally appointed school members and merger of the school board into a larger area ..." (This submission comes close to an analysis based on the frustration doctrine without reference to the limits applicable to that doctrine.)

[164] Kings notes that:

(a) from its inception, the funding arrangement was detrimental to Kings, and known by it to be so (Kings described it as a windfall for the Towns); Kings' only protection was control through "favourable Board membership," now lost through an elected regional board;

(b) nothing is left of the agreement, except for the municipal funding arrangement; the rest has been superceded by legislation;

(c) the agreement did not contemplate that its terms would be perpetually frozen since Section 11 provided for a review; and

(d) unlike scenarios in, for example, *Fort Francis* v. *Boise Cascade*, [1983] 1 SCR 171, Kings did not receive a one-time capital benefit at the beginning of the contract.

[165] Kings cites the Minister of Education's letter of May 14, 2009, which appears to be a response to Kings' notice of termination of the agreement of November 28, 2008, as well as Kentville's request of the Province that it does not assist Kings' legislatively to become discharged from the agreement. The Minster wrote that a legislative fix was unnecessary, but stated, presumably based on the report attached to Kings' November 28, 2008, letter: "it would appear, however, that over the past 27 years circumstances have changed ... the original agreement does not contain an expiry date; however, there is ample precedent in contract law to resolve termination of agreements where no expiry date exists."

[166] In anticipation of the Three Towns' arguments for not terminating the contract, Kings notes:

(a) The amendment clause (section 12 of the 1982 agreement) does not deal with termination. Some of the 1982 district school board agreements do contain a clause whereby the agreement can be amended or terminated.

(b) Section 42(7) in the 1982 amendment to the *Act* gave the Governor in Council, on advice of the Minister, the authority to terminate a Section 42(4) agreement (or to amend it with approval of the parties). Kings argues that this is not relevant: "It simply reflects a common place advantage" the Province can give itself that municipalities cannot give themselves.

(c) While giving Kings the common-law right of termination on reasonable notice may appear to have drastic consequences, the fact that legislation in 1982 and later years mandates that inter-municipal school boards operate the schools and obtain municipal funding at the prescribed education tax rate under the *Act* based on uniform assessment means that little will actually change.

[167] The Three Towns submit that the agreement may not be unilaterally terminated by one of the parties, but may be terminated by the Minister of Education.

[168] They note that the agreement contains no provision respecting duration or termination, but does contain a provision for amendment (Section 12). By the Three Towns' interpretation of the agreement, it also contains a provision by which the manner of collection of municipal contributions can be selected or, presumably, altered, with the consent of three or more municipal counsels representing 50% of the County's population (Section 8(B)).

[169] The Three Towns argue that seeking a change to the municipal funding formula involves amendment, not termination, of the agreement. While legislation since the agreement has superceded other aspects of the agreement, it cannot be said that the agreement, at the time it was entered into, made no provision for the parties to alter the funding formula if they chose.

[170] Like Kings, the Three Towns relies heavily on the **Geoff Hall** analysis. They acknowledge the issue as one of contract interpretation; that is, whether to imply a right of unilateral termination on reasonable notice. The answer depends in part on whether the terms respecting termination already exist.

[171] The Three Towns cite Hall's analysis at the top of p. 118 respecting *Shaw Cable Systems (Manitoba)* v. *Canadian Legion Memorial Foundation*, [1997] M.J. 65 (MBCA) (in which decision the Court declined to imply a right of unilateral termination on reasonable notice) to the effect that cases go both ways and each case turns on its own particular provisions and facts. Applying *Shaw*, they argue that the fact that the parties turned their minds to switching from uniform assessment (the default legislative formula) to per student funding, and that they provided in the agreement a means to alter the method of funding (in Section 8(B) and/or Section 12), constitutes an expression of intent not to provide a right of unilateral termination on reasonable notice. The Three Towns argue that to allow Kings to unilaterally terminate the contract would permit it to "end run" the amending formula it agreed to.

[172] The Three Towns cite *Cooke* v. *CKOY*, [1963] O.J. 719 (OHCJ), referred to in Geoff Hall's text at pp. 119 - 120, for the proposition that where an agreement contains some circumstances permitting termination, it should not imply other termination provisions. In the case at bar, the Three Towns say that the parties provided a means to change the funding formula.

[173] On a second and different tack, the Three Towns note that the vast majority of cases relating to perpetual contracts, including those cited by Kings, involve relationships of a commercial nature.

[174] In oral argument, the Three Towns expands on this point: There are no similar factual circumstances to those of the case at bar involving multiple public bodies, from which this Court can take guidance, except possibly *Green Tree Village Community Centre* v. *Strata Plan NW 194*, [1980] B.C.J. 52 (BCSC).

[175] In that case, five Strata Corporations (which appears to be similar to condo corporations in Nova Scotia) and a society entered into agreements whereby the Strata Corporations agreed to share the expenses of a to-be constructed community centre. One of the Strata Corporations attempted to terminate the agreement before the community centre was constructed, at a time where there was no breach of the agreements with respect to the construction of the community centre. The effect of permitting the unilateral termination would have been to doom the community centre to failure. Citing *Luxor (Eastbourne*) v. *Cooper*, [1941] A.C. 108, at p. 137, for the law respecting the implication of terms in a contract, the court declined to imply a term authorizing unilateral termination of the agreement.

[176] The Three Towns argue that a relevant circumstance is the statutory framework at the time the agreements were entered into. Section 42(7)(b) of the *Act* authorized the Governor in Council to terminate Section 42 agreements. Section 42(7)(a) did authorize the Governor in Council to amend an agreement with the approval of all parties. No provision in the *Act* permitted a municipality to unilaterally terminate or amend a Section 42 agreement.

[177] Finally, the Three Towns note that as recently as 2005, courts have acknowledged that in the appropriate circumstances, agreements may be viewed as of perpetual duration. They cite *Shergar Developments* v. *Windsor*, [2004] OTC 130 (OSCJ), wherein a 1888 agreement to maintain railway bridges was upheld against a railway company which had abandoned use of the rail line.

Analysis

[178] Absence of an express provision for termination does not raise a presumption that the agreement is perpetual or that it is unilaterally terminable on reasonable notice.

[179] Whether the Court should imply a provision, respecting duration, is a matter of interpretation that involves:

a) general contract law respecting implying a term where none expressly exists; and,

b) examining the entire context of the contract and the parties' relationship in order to ascertain objectively and accurately the intentions of the parties (**Geoff Hall**, p. 115).

[180] The following propositions are not helpful:

a) No agreement should bind a party indefinitely.

b) A party should not be entitled to unilaterally walk from an agreement solely because it is not beneficial to that party.

[181] The analysis in this dispute necessitates reconciling the general principles for implying terms (in this case, respecting duration) with the principles underlying the law of frustration. This reconciliation is not directly addressed by Geoff Hall.

[182] As noted, the principles of frustration are concerned with equity and fairness - whether the occurrence of an unexpected event is so outside the range of risks allocated in the agreement that the values favouring enforcement are outweighed. It is not concerned with the presence or absence of other provisions for termination of the agreement, but rather whether the unforeseen event is so great as to discharge an agreed obligation.

[183] The principles which underlie the approach of courts to implication of terms are not so clear.

[184] **GHL Fridman**, at pp. 465 - 481, concludes that the basis for implication of a term is discovery of what the parties would have intended - not what a court thinks reasonable or fair. He lists three circumstances when implication is permissible:

(i) when it is reasonably necessary, having regard to the surrounding circumstances;

(ii) when based on custom; and,

(iii) when a statute makes the implication of a term in a contract necessary.

This analysis is close to that of Justice LeDain in *Canadian Pacific Hotels* v. *Bank of Montreal* [1987] 1 SCR 711, where he listed three kinds of implied terms: implied by custom or usage, implied as a legal incident of a particular kind of contract, and implied on the presumed intention of the parties where necessary to give business efficiency to a contract.

[185] The most significant circumstance for implication is where it is necessary to make the agreement effective - to give it "business efficacy." This involves asking what the "officious bystander" would say that the parties intended if the issue was drawn to their intention. **Fridman** notes Lord Denning's unsuccessful attempt in *Liverpool City Council* v. *Irwin*, [1976] Q.B. 319 (CA), overturned by the House of Lords, [1976] 2 All E.R. 39, to give courts the power to import terms not only when the parties left a gap unwittingly or carelessly or when it was necessary to do so, but whenever it was reasonable to do so.

[186] In *Shell United Kingdom Ltd.* v. *Lostock Garages Ltd.*, [1977] 1 All E.R. 481, Lord Denning corrected his analysis and described two distinct sources of implied terms:

i) terms that are implied by custom, and

ii) terms that are implied into specific contracts, *ad hoc*, on the basis of necessity - not on the basis of reasonableness alone.

[187] Finally, **Fridman** described the three possible bases for the theory of implied terms:

i) where the parties' intentions are clear from the contract and its surrounding circumstances, and they would have included the term if they had thought of it;

ii) to give effect to the reasonable expectations of the parties; and,

iii) to give purpose and effect to the rest of the agreement.

[188] **Fridman** notes an element of fiction and deficiencies in each of these theories. The first theory gives the courts a limited role and the last, a more activist role.

[189] **John Swan** in *Canadian Contract Law*, 1st Edition (Markham: LexisNexis, 2006) at Chapter 8.1.3, describes the process "as an exercise of judicial policy-making where the gaps are filled, not by considering what the parties, had they thought about the issue, might have provided, but simply by what the court thinks should be provided." (p. 531).

[190] The idea that the sole source of the parties' obligations is their will as expressed in the contract is 19th century thinking that should no longer apply. When it is plain that there is an omitted term, a solution may be found by drawing inferences by what the parties said or did, but equally from common understandings in the trade or even by "default rules" imposed by the court. **Swan** advances as the proper approach that was taken by the Ontario Court of Appeal in *Scapillati* v. *A Potvin Construction*, 1999 CarswellOnt 1844, where the court considered not only the parties'

intentions but also factors, such as the nature of the parties' relationship, custom, general knowledge and foreseeability.

[191] I do not accept that imputing a term into a contract can be made solely on the basis that it is reasonable for the purpose of giving business efficacy to the contract. It can be made when it is reasonably necessary to give efficacy to the agreement. The analysis of "fairness" must be made in this context.

[192] The conclusion in this proceeding does not turn on whether the Court takes the "traditional" approach - what the Court thinks the parties would have expressly considered if they had considered the issue, or the "modern" policy-based approach - an objective analysis of what should be done in light of the nature of the parties' relationship, the nature of the agreement, the general knowledge of the parties, and custom.

[193] Both approaches lead to the same result. Whether by way of the imputing an intention to the parties or an analysis of what the Court thinks is necessary to give efficacy to the agreement, no right should be imputed that would permit unilateral termination on reasonable notice of this agreement by Kings.

[194] Applying the traditional approach, I agree with the Three Towns that the correct interpretation of the agreement, in the context of the circumstances that existed in 1982 and 1989, is that it contained several elements, one of which dealt with the funding formula for municipal contributions to the school board. The agreement contained a provision (Section 12) for amendments.

[195] The fact that, since 1996, amendments to the *Act* appear to have made the other elements of the agreement superfluous does not eliminate the express provision in the agreement that enables the funding formula to be amended, nor my conclusion that the parties likely understand that section 11 was a mechanism to revisit the funding formula, and section 12 was the legal mechanism by which it could be formally changed.

[196] This interpretation is reinforced by the fact that the 1982 agreement was one of the series of similar district school board agreements created from a provincial template. Some of the agreements included provisions for termination in the sense of allowing a party to withdraw from the agreement, that is, to withdraw from the school district (an apparent option in 1982), and for review of the funding formulas and/or operations, and for amending the agreement, but none of the agreements contained a provision for "termination" of the entire agreement. This contextual factor reinforces the Three Towns' argument that the funding formula was intended to be dealt with by way of the amendment clause.

[197] Examples of the provisions include:

Section 10 of the Annapolis agreement:

> (A) This agreement may be amended at anytime by mutual consent of the parties involved. [The exact words of the Kings' agreement]
> (B) Notwithstanding Section 10 (A) above, the funding arrangements described in Schedule F shall be in force for the 1982 calendar year and these funding arrangements shall be automatically reviewed as of that date.

Section 10 (B) of the Digby agreement:

> (B) Notwithstanding Section 10 (A) above, the funding agreements described in Schedule F shall be in force for the 1982 calendar year and each year thereafter, unless changed by the mutual consent of the parties to this agreement, as arranged by a review of the funding, which may be requested by any of the parties from time to time.

Subsection 10 (B) of the Guysborough agreement:

> (B) Notwithstanding Section 10 (A) above, the funding arrangements described in Schedule F shall in force for the 1982 calendar year.

[198] The West Hants' agreement does not contain the standard Section 10, but Section 11 "Limit to Agreement" reinforces the idea that changes to the agreement are matters of amendment:

> It is agreed that this Agreement shall enure to the benefit of the and be binding upon the parties hereto, their successors and assigns, however, this Agreement shall be subject to an automatic review by the parties hereto every three (3) years and following such review, must be renegotiated at the request of any party. Notwithstanding the above, amendments to this Agreement resulting from this review must be agreed to in writing by the parties to this Agreement.

[199] The Lunenburg agreement similarly tied review of the provisions of the agreement to a clause permitting amendments.

[200] None of the agreements expressly provided for termination. Three of the agreements did expressly provide for the admission to, or withdrawal from, a school district of a municipal unit. Said differently, there was no provision for termination of district school boards but provision for the withdrawal of a municipal unit in some agreements. An example of the clause found in the Shelburne, Lunenburg and Yarmouth agreement is Section 10 (B) of the Shelburne agreement:

> Municipal units may be admitted to or withdraw from the District and as parties to this agreement only by agreement, in writing, of all parties hereto.

[201] Application of the "modern" approach adds other contextual considerations.

[202] The first of these contextual considerations is the relationship of the parties and the setting of the contract. The nature of this contract is not commercial. In this sense, it is unlike almost all of the case law cited to the Court that involves relationships where the parties must both benefit from the contract or there is the possibility that one of the parties may go out of business or cease to exist. Relevant considerations in commercial cases often include the personal relationship between the

parties, particularly in the context of employment and franchise agreements. Cameron J.A. said it succinctly in *Imperial Oil* at ¶¶ 34-35. In his text, **Fridman** enumerates, beginning at p. 469, circumstances where terms are implied, many of which involved commercial transactions that inject the element of personality, trust, and capacity to perform.

[203] This agreement was made between governments in the context of the Walker Commission and the statutory framework for municipal education funding contained in the *Act*. The agreement does not depend upon personal relationships or competencies ("best efforts" considerations), or "trust and confidence and the delegation of authority" (Hall, p. 115). The *Act* requires that municipalities contribute to the cost of public education. The only performance required of a municipal unit is to raise its share of the education tax and pay its share to the school board. None of the elements of commercial-like performance exist. None of the risks of bankruptcy, breach of trust or confidence, or substandard/defective performance, exist.

[204] At the time of the 1982 agreement, and for some years before that, the default funding formula required municipalities to share on the basis of assessment (uniform assessment first appeared in 1982). However, the *Act* expressly provided that municipalities could contribute amongst themselves on a basis other than the default formula. It is a relevant contextual consideration that the parties to this agreement turned their minds to the issue of the default legislative formula when they voluntarily agreed to pay on the basis of student enrolment.

[205] The legislative framework has not changed since 1982. The legislation still provides that the municipalities may agree to contribute proportionally on the basis of uniform assessment (the default formula) or on the basis of any agreement entered into by them and the Minister or, since 1996, between them and the regional school board.

[206] A third contextual consideration that pervades the "modern" approach to the implication of terms is fairness.

[207] It is part of Kings' argument that it is unfair that they, almost alone, contributes to public education on the basis of student enrolment and not on the basis of the default formula. They acknowledge that some other municipal units (for example, those in Annapolis County and those in the French language school board also pay in part on the basis of student enrolment). Kings argues that it is unfair that they pay, in effect, almost one million dollars per year more in education funding than they would under the default formula. At the same time that it argues that this is a significant inequity, Kings suggests that the impact upon its partners in the school board is not significant or, at least, not as significant as the Three Towns submit.

[208] The fairness argument necessitates a comparison of the circumstances and impact upon each of the parties in 1982 with the present day. This "change in circumstance" type of analysis is foundational to the frustration analysis (Lord Denning in *Staffordshire;* **Waddams ¶¶** 360-380; **Fridman**, c.17), and was important to some cases decided under the perpetual contract analysis (for example, the majority in *Staffordshire*, *Fort Frances*, *Shaw Cablesystems*, *Imperial Oil*, *Shergar*, *Cumberland Trust v. Maritime Electric* 2000 PEICTD 1, *Hopper Estate v. Salisbury* 2005 NBQB

448). While no party focussed on this comparison or provided direct evidence showing the comparison, the financial impact upon the respective municipal units in 1982 and at the present time is available through the affidavits and records filed.

[209] A comparison of student enrolment, uniform assessment and the respective municipal contributions for public education, as between 1981/2 (when the agreement was negotiated), 1989 (when the agreement was amended) and 2008/9 demonstrates that very little has changed vis-a-vis the municipalities. The only significant change is that uniform assessment in the municipal units has increased more substantially than the municipal contribution to public education. This should have had the effect of reducing the amount per $100.00 of assessment raised by municipalities for the education tax. Said differently, nothing appears to have changed from the time that Kings and the other municipal units consciously agreed to share public education costs on a user-pay (per student) basis, instead of the default (uniform assessment) formula.

[210] It is possible to glean from many of the exhibits filed, and in particular Exhibit 4, Exhibit 7, and Exhibit 6 Tab 19, Tab 79 and Tab 126, the following:

Student Population

	Total	Kings	Kentville	Wolfville	Berwick	Hantsport
1981/2	app.11,000	83%	10%	4.3%	2.7%	N/A
1988/9	11,073	81.9%	8.6%	4.2%	3.2%	2.2%
2008	9,578	80.9%	8.5%	5.2%	3.5%	1.9%

Uniform Assessment

	Total	Kings	Kentville	Wolfville	Berwick	Hantsport
1981	519 Million	370M (71.2%)	77 M (14.9%)	49 M (9.4%)	23 M (4.5%)	N/A
1988	1.493 Billion	1.145B (74.3%)	176M (11.4%)	117M (7.6%)	55M (3.6%)	47M (3.1%)
2008	3.709 Billion	2.735B (73.7%)	388M (10.5%)	367M (9.9%)	116M (3.1%)	103M (2.8%)

Municipal Education Contribution

	Total	Kings	Kentville	Wolfville	Berwick	Hantsport
1981/2						
Per Student	4.078 Million	3.384M	488 Thousand	175 Thousand	110 Thousand	N/A

Per Uniform Assessment		2.903 M	608T	383T	183T	N/A
Difference (reduction in brackets)		(481T)	200T	208T	73T	N/A
1988/9						
Per Student	5.855M	4.795M	501T	245T	188T	126T
Per Uniform Assessment		4.352M	688T	444T	210T	180T
Difference		(443T)	187T	199T	22T	54T
2009/10						
Per Student	11.868M	9.607M	1.010M	615T	414T	222T
Per Uniform Assessment		8.753M	1.241M	1.176M	370T	328T
Difference		(854T)	231T	561T	(44T)	107T

Not all the records show identical information, but only one figure appears to deviate by more than a minor amount from the above. The 1981/2 assessment figure was the "full assessment" option in the Morse September 1980 analysis. Tab 135 contains a school board profile showing "assessment" for calculating the education tax at $861,101,523 (without a municipal breakdown). It also appears that the total municipal contribution for the first year of the district board was estimated at $3,020,855.00 and was actually $4,078,000.00 as noted above.

[211] Observations from these tables are that uniform assessment appears to have increased from about 550 million, inclusive of Hantsport (possibly 863 million), in 1982 to 3.709 billion in 2009/10; or between 430% and 675%. In the same period of time, the municipal education contribution has increased from about 4 million in 1982 to about 12 million in 2009/2010, or about 300%. The increase in the municipal contribution to education has been one-half of the increase in municipal assessment over the same 28-year period. It is logical that the education tax per $100 of assessment should have decreased by about one-half in the last 28 years. This is not a case like *Staffordshire* (where the cost of producing the water increased by 20 times (2000%) that had no way to recover that cost), nor the other cases where the passage of time and inflation created significant financial hardship to the applicant. In this case the assessments, upon which the education taxes are collected, appear to have increased at a substantially greater rate than the tax.

[212] Since Kings entered the 1982 agreement, the student population, the ratio of student enrolment from each of the municipal units and the ratio of uniform assessment among the municipal units, have remained approximately constant. The relative position of each municipal unit, in relation to the others, has not changed. Very little has changed from the time that the parties consciously agreed to adopt the per student funding formula in place of the default uniform assessment formula.

[213] It appears that the differential between what Kings did contribute on the per student formula and would contribute by the uniform assessment formula in 1982 was about $481,000.00. It has almost doubled to $854,000.00 in 2009/10; however, relative to the growth in public education spending by all levels of government and uniform assessment, it has decreased substantially.

[214] Initially, the Three Towns predicted a significant adverse financial impact upon property tax payers if the Court terminated the agreement as requested by Kings. Kings responded with demands for particulars which resulted in an acknowledgment that the consequence was somewhat less dire than initially predicted. For example, in response to Interrogatories, Wolfville admitted that its original estimate of an annual tax increase of $677.00 per dwelling unit would likely be $234.00 per dwelling unit.

[215] Because Kings now pays 81% of school funding *vis-a-vis* the other four municipal units, and the Three Towns that are adversely affected pay 15.6%, the financial impact upon the Three Towns would be about 5.2 times greater than upon Kings. Said differently, for every one cent per hundred dollars of uniform assessment saved on Kings education tax rate, the Three Towns would, on average, be required to collect 5.2 cents per hundred dollars of uniform assessment.

[216] If Wolfville, with 5.2% of the students and 9.9% of uniform assessment, is required to make up $561,000.00 of the $854,000.00 saved by Kings, with 80.9% of the students and 73.7% of uniform assessment, the adverse impact on Wolfville ratepayers would be 7.44 times (744%) greater than the beneficial impact on Kings' ratepayers. If the adverse impact would be $234.00 per dwelling unit in Wolfville, the beneficial impact would be about $31.00 per dwelling unit in Kings.

[217] Kings claims that holding it to its agreement is unfair to the ratepayers of Kings, and the impact on the ratepayers of the Three Towns are not significant. The point of my analysis of financial impacts is that whatever the impact upon Kings, it is significantly less than on its partners. In this respect terminating the agreement would be more unfair to the others, than continuing it would be to Kings.

[218] The most important aspect of this contextual factor is that none of the financial data and variables have changed from 1982 to 2010. The total cost of education has gone up, but relative to that, the value of real property within the municipalities has increased at a substantially greater rate and therefore so has the ability to contribute to public education financing.

[219] Another aspect of the "unfairness" analysis asks the question of whether it is unfair for municipal contributions to be made on a per student, or "user pay," basis as opposed to uniform assessment. Kings proffers no argument on this point other than that the *Act*, based on the analysis in Pottier and Walker Reports, provides a default formula based on uniform assessment. It appears that at the time of the Pottier Report there existed a substantial difference in the quality of education provided to students in some urban areas compared to students in some poorer rural areas. The Reports stated that students should not receive a lesser education because they lived in one of the poorer areas. While the Reports stated that "areas" should contribute on basis of uniform

assessment, the *Act* effectively defined each municipal unit as a separate "area." I am not convinced that it is unfair that adjoining municipalities within the same county, region or "area" contribute on the basis of student enrolment rather than uniform assessment. Contributions by the Province under the foundation program have been calculated on a per student basis. Not all cost-sharing arrangements among municipalities are on the basis of uniform assessment. There is nothing inherently unfair about an agreement that provides for municipal contribution to public education being on a per student basis. Although most other district school board agreements followed the default formula, it does not make this agreement any less fair.

[220] A final contextual issue raised by Kings, both in the frustration issue and in the fairness aspect of this issue, were the fact that in 1982 municipal councils who raised the property taxes and paid the local share of public education had some control over appointments to the district school board. It suggests that the loss of that control by reason of school boards becoming fully elected in 1991, and the merger of the three district boards into one regional board, has reduced municipal input into the public education process.

[221] Until the middle part of the 20th century, school board trustees were elected (not appointed by municipal councils) and school rates were collected almost entirely on the basis of personal and real property assessment within the various school sections. In the history of public education in Nova Scotia, cities, towns and municipalities have appointed a majority of the municipal school board members for only a short interlude. At the present time, school board members are elected on the basis of population from electoral districts within each region. I see no significant change in the nature or quality of "local input" that results from elected school boards than from the short span in the history of education when school board members were, in part, appointed by municipal councils. No evidence was produced that local elected school board members are any less vigilant, vigorous, or effective in promoting local interests that those who were appointed by municipal councils. No unfairness arises from the return to elected school boards.

[222] In summary, the agreement, in its entire context, is an agreement between governments respecting the financing of public education. It is not the kind of agreement to which courts have normally imputed unilateral termination clauses in the absence of an express termination clause. The characteristics of commercial contracts are not present in this circumstance - the financing of public education, and therefore are not relevant.

[223] The circumstances that existed in 1982 are not significantly different today.

[224] The 1982 agreement, as amended in 1989, contained a provision for amending the agreement, One of the elements of that agreement was the funding formula. There is no need to imply a unilateral termination clause on reasonable notice in light of that express provision, which I find was intended by the parties to deal with the situation raised by Kings in this application.

Reasonable Notice

[225] If I am in error in respect of this analysis, and it is fair to imply a unilateral termination clause on reasonable notice, I would not have found that the notice of Kings' formal decision, made (given) in or about January 2008, is sufficient in the context of what was clearly intended to be a long-term agreement. Many of the municipalities negotiated into their 1982 district school board agreements five-year transition periods before implementation of the funding formula. In 1988, Kings proposed to Hantsport that there be a five-year transition period before it became subject to the per student funding formula. This was, and was intended to be a long term agreement. I would likely have found in these circumstances that reasonable notice would be at least five years.

Costs

[226] If the parties are unable to agree, they are free to make submissions to the Court regarding costs.

J.