SUPREME COURT OF NOVA SCOTIA
Citation: Delorey v. Strait Regional School Board, 2012 NSSC 450

Date: 20121231
Docket: SPH No. 390139
Registry: Port Hawkesbury, N.S.

Between:

Denise Ruth Delorey, Jamie Dean Samson, Geraldine Ann Samson and Raylene McGhee

Applicants

v.

Strait Regional School Board

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	August 23, 2012 in Port Hawkesbury, Nova Scotia
Written Decision:	December 31, 2012
Counsel:	Christopher Boyd, for the Applicants Peter McLellan, Q.C., and Mark Tector for the Respondent

The Court:

INTRODUCTION

[1] This is an application for Judicial Review of decisions of the Strait Regional School Board (the "Board") to close two (2) schools. The Applicants (or certain of them) are parents of children attending these schools, members of the School Advisory Committee and the Study Committee. The Study Committee was formed as part of the closure process.

[2] The schools in question are: (1) Reverend H.J. MacDonald Elementary School in Heatherton, Antigonish County (HJM) and, (2) West Richmond Education Centre in Richmond County (WREC). HJM and WREC are elementary and middle schools, respectively. Both schools are located within the jurisdiction of the Respondent Board, which governs the four (4) counties of Richmond, Inverness, Guysborough and Antigonish, in Nova Scotia.

[3] The Applicants seek an Order (in the nature of *Certiorari*) quashing the Board's decisions with respect to both schools.

THE BOARD'S DECISION - HJM

[4] The motion to close HJM, as recorded in the Minutes of the Special Meeting held on Monday, March 5th, 2012, reads as follows: (as contained in Exhibit U to J. Beaton Affidavit sworn May 10, 2012 re HJM).

> **MOVED AND SECONDED (KEHOE G./MACDONALD G.)**
>
> **Upon the Strait Regional School Board:**
>
> **1. Having identified Reverend H.J. MacDonald Elementary School, a public school, for review for closure pursuant to the *Education* and *Regulations*;**
>
> **2. Having had an Identification Report prepared with respect to Reverend H.J. MacDonald School;**
>
> **3. Having had an Impact Assessment Report and having had such a report tabled at a public meeting of the Strait Regional School Board on September 27, 2011;**

4. Having the School Advisory Council of Reverend H.J. MacDonald School take on the role of the Study Committee for the school and having the Study Committee conduct its first meeting on October 16, 2011;

5. Having received a written response from the Study Committee and tabling such response at a public meeting of the Strait Regional School Board held on February 1, 2012; and

6. Having conducted a public hearing with respect to Reverend H.J. MacDonald Elementary School on February 16, 2012.

BE IT RESOLVED that the Strait Regional School Board permanently close Reverend H.J. MacDonald Elementary School, a public school.

THE BOARD'S DECISION - WREC

[5] The Motion to close WREC as recorded in the Minutes of the Special Meeting held Tuesday, March 6th, 2012, reads as follows: (Exhibit "N" of J. Beaton Affidavit sworn July 20, 2012 re: WREC).

MOVED AND SECONDED (KEHOE, G./MURRAY, B.)

Upon the Strait Regional School Board:

1. Having identified West Richmond Education Centre, a public school, for review for closure pursuant to the *Education Act* and *Regulations*;

2. Having had an Identification Report prepared with respect to West Richmond Education Centre;

3. Having had an Impact Assessment Report and having had such a report tabled at a public meeting of the Strait Regional School Board on September 27, 2011;

4. Having the School Advisory Council of West Richmond Education Centre take on the role of the Study Committee for the school and having the Study Committee conduct its first meeting on October 16, 2011;

5. Having received a written response from the Study Committee and tabling such response at a public meeting of the Strait Regional School Board held on February 1, 2012; and

6. Having conducted a public hearing with respect to West Richmond Education Centre on February 20, 2012.

BE IT RESOLVED that the Strait Regional School Board permanently close West Richmond Education Centre, a public school.

[6] The motion to close HJM passed with a vote of seven (7) in favour and four (4) against. The Motion to close WREC passed with a vote of seven (7) in favour and five (5) against.

[7] The Board states, in reaching these decisions, that it had prepared and reviewed significant amounts of documentation and received submissions from many members of the public, including the Applicants.

[8] Further, the Board states that its Working Committee discussed the *Education Act*, and its *Regulations* with respect to HJM as early as December, 2009. From that time, the Applicants were provided and took advantage of many opportunities to make submissions and participate in the closure review process.

[9] In regard to WREC, the Board states the community was involved throughout the review process and was provided numerous opportunities over a fifteen (15) month period, to have their voices heard, before members of the Board. Ultimately, however, the Board says the decision to close WREC was within the authority of the elected members of the Board.

GROUNDS FOR JUDICIAL REVIEW

[10] The Applicants cite the following grounds in their Notice of Application for Judicial Review. The Board denies each of the grounds alleged by the Applicants in the Notice.

(a) That the Board's failure to follow the mandatory process in the *Regulations* invalidates the decisions.

(b) That the Board violated the duty of procedural fairness to follow its own its, contrary to the Applicants' legitimate expectations.

(c) That the Board violated the duty of procedural fairness in making its decision to close WREC by denying the Applicants a meaningful opportunity to present their case fully and fairly.

The School Closure Process

[11] The provincial *Education Act*, S.N.S.195-96, c.1 (the *Act*) and the *Ministerial Education Act Regulations*, N.S. Reg 80/97 (the *Regulations*) set out the steps and the time lines required prior to closing a school. Section 89 of the *Act* mandates that the Board follow the procedure set out in the *Regulations*.

> **"Review of school**
> **89 (1) A school board may identify a public school under its jurisdiction for review;**
>
> **(2) Identification of a public school for review must be in accordance with the criteria set out in the regulations;**
>
> **(3) Upon identifying a public school for review, the school board shall prepare and make available to the public a report in accordance with the regulations;**
>
> **(4) Before making any decision respecting a public school that is the subject of a report pursuant to subsection (3), the school board shall, in accordance with the regulations, establish a study committee to review and respond to the report;**
>
> **(5) Following its receipt of a response from the study committee, the school board shall;**
>
> > **(a) make public the study committee response; and**
> >
> > **(b) hold a public meeting;**
>
> **in accordance with the regulations. 2007, c. 15, s. 1**

BACKGROUND

The School - HJM

[12] Rev. H. J. MacDonald School's enrollment has been declining. Currently, it has seventy-three (73) students from Grades Primary to Six (6). It has 6.4 teachers and, as well, four (4) additional staff including: a librarian, teaching assistant, a janitor, and bus driver. It has a gymnasium and a playground and other amenities of an elementary school. It has a proud history in the community of Heatherton.

Enrollment is expected to decline by a further ten (10) students to sixty-three (63), by the 2015 school year.

[13] The cost of operating the school per student is a critical issue, as is student enrollment in relation to the capacity (amount of space) in the school. Under the school's Screening Process, a school which meets two (2) of six (6) criteria is identified for closure. The two (2) criteria which the Board found applied to HJM were that, (1) it was operating at less than fifty percent (50%) capacity in terms of the building design, relative to student enrollment and, (2) the cost of operations per student was significantly higher than the average cost within the system.

The Applicants - HJM

[14] The Applicants have children who attend Rev. HJM, or were scheduled to attend the school in the fall of 2012. The Applicants, Denise Delorey and Jamie Dean Sampson were appointed members of the Study Committee. In addition, they were members of the School Advisory Committee, as well as the informal group called, "Save Community Schools". The latter group was formed in March of 2010 and is also know as "Concerned Parents". The Study Committee was established to review the Impact Assessment Report (the IAR) and provide a response. This included many tasks, such as the requesting and gathering of information, holding community meetings, contact with the three (3) potential receiving schools and meeting with their Advisory Committees. On February 8th, 2012, Ms. Delorey and Mr. Delorey presented the HJM Study Committee response to the IAR. Prior to that on February 1st, the Study Committee forwarded an email to the chair asking the Board to review the response in advance and to advise if clarification was required prior to the February 8th presentation.

The School - WREC

[15] WREC's enrollment like HJM has been declining. In the 2011/12 school year, its enrollment was 148 students. By 2015, it is expected to decline to 128 students. It currently houses Grades 5-8, and is therefore a middle school.

[16] One of the main issues with the school is its need, as alleged by the Board, for major renovations. It was built in 1978. Mid-life renovations normally occur within twenty (20) to thirty (30) years. WREC is currently past that point.

[17] WREC is located in Evanston, and serves the greater western Richmond County area. Approximately 80% of the students who attend WREC reside in the Louisdale and Isle Madame communities.

[18] The receiving school of Richmond Academy is located in Louisdale. It has also experienced an enrollment decline of 35% in the 10-year period from 2000-2010. This reduction is expected to continue to include another 100 students in the next five (5) years.

[19] WREC provides recreational facilities and a meeting place for the community, as well as being an emergency response site and a safe zone for the Strait Richmond Hospital. Like HJM, it is a focal point and central part of the Richmond community.

The Applicants - WREC

[20] The Applicant, Geraldine Samson has two (2) children, a son, that attended Grade 8 at WREC in 2011-2012; and a daughter in Grade 2 at Felix Marchand Education Centre (FMEC). In 2011-2012, WREC had its own School Advisory Council. For the past year, she served as Chair of the WREC School Advisory Council. Prior to that, she served on the joint council for WREC and its feeder school FMEC from 2006-2011. She was chair of that joint council in the year 2010-2011. She was also appointed to the Study Committee for WREC on October 4, 2011.

[21] The Applicant, Raylene McGhee has a daughter Caleigh, and a son Darcy who completed Grades 7 and 6 respectively at WREC in the 2011-2012 school year. She was approached by a member of the WREC Study Committee to provide assistance in analyzing the financial data. Ms. McGhee holds a Masters in Business Communications.

Summary of Steps - *Acts & Regulations*

[22] A summary of the steps and time-lines as set out in the *Act* and *Regulations* is set out in further detail in the Applicants' Brief of April 20, 2012, as follows:

> **"Closure Review Process**
> **(a) In order to identify a public school for review, the board must prepare an Identification Report ("IDR") containing a variety of information regarding**

the school and the Board region as a whole and table the IDR by April 1 of the given school year (see section 16 of the Regulations);

(b) Once a school has been identified for review, the Board must prepare an Impact Assessment Report ("IAR") describing the anticipated impact of school closure on students, the community as a whole, and the Board. The IDR must be appended to the IAR and the IAR must be tabled by September 30 (see section 17 of the Regulations);

(c) Once the IAR has been tabled, the Board must create a Study Committee for the school by October 7. The Study Committee is composed of various groups including parents, the principal of the school, teachers and staff at the school and other community members. The purpose of the Study committee is to prepare a written response to the IAR and submit the response to the Board no later than February 1 of the year following the year in which the Closure Review Process was initiated (see section 18 of the Regulations);

(d) Once the Study Committee submits its response, the board must table the response at a meeting by February 28. By March 24, the Board must have a public hearing regarding the IAR and the Study Committee's response. The public is given an opportunity to make representation at the hearing (see section 19 of the Regulations); and

(e) After the public hearing (and before March 31), the Board must make a decision regarding the outcome of the Closure Review Process at a public meeting (see section 20 of the Regulations)."

THE CRITERIA

[23] According to the Board's Screening Process, schools which meet two (2) of the following six (6) criteria are identified for closure.

"**The six (6) criteria set out in the its are as follows:**

(i) The existing or future regular staffing allocation does not support the delivery of the Public School Program by qualified and competent staff (i.e., core subjects, music, physical education, Resource/Guidance, French Second Language, and/or technology education).

(ii) The final staffing allocation for the school is significantly skewed relative to the remainder of the region.

(iii) The facility operating cost per student per square foot is significantly higher than the system average.

(iv) Circumstances in the system indicate that change in facility use will result in reduced operating costs for the Strait Regional School board.

(v) Enrollment is less than 50% of the capacity for which the building is designed, resulting in significantly more space than required.

(vi) The school and/or school site requires a substantial amount of major maintenance or major renovation."

[24] In the case of HJM, the school met the following two (2) of the above criteria: (iii) operating costs per student were higher than the system average and, (v) low enrolment relative to the capacity of the school.

[25] In the case of WREC, there were three (3) factors which led to it being identified for closure under the Screening Process: (iii) the operating costs per student were higher than the system average; (iv) savings of $392,881.00 to the Board as a result of the closure; and, (vi) required renovations in excess of $1 million.

[26] It is important to recognize additional factors in relation to these criteria.

[27] The Board's position is that the Screening Process was designed to select schools on a preliminary basis, without an in-depth analysis which is to occur later in the process. The Applicants argue there is now a new regime (brought about by changes to the *Act* and new *Regulations),* while acknowledging the Screening Process itself is within the control of the Board and not subject to provincial law. The Applicants further argue the Screening Process is procedural in nature and therefore the doctrine of legitimate expectations applies. If the process is not procedural, and instead substantive in nature, then the doctrine has no application.

[28] The Applicants have not challenged the legality or validity of the Screening Process itself. In fact, the Applicants' argument is that the Board failed to follow the Screening Process. (see para. 128)

THE LEGAL TEST

[29] The leading case in Nova Scotia on judicial review of public school closure is **Potter** v. **Halifax School Board***,* 2002 NSCA 88*,* a decision written by Oland, J. of the NSCA. The test as outlined in **Potter** may be framed in the form of a question, namely: Did the Applicant(s) parents have a meaningful opportunity to present their case fully and fairly, in respect of the school closures?

[30] The Board relies heavily on the **Potter** case, in which the Court of Appeal found in favour of the Board. Each case, of course, must turn on its own facts.

[31] The Applicants' position is that **Potter** is of questionable assistance, as the changes to the *Act* and the *Regulations* have ushered in a new regime, requiring more accountability and stricter compliance. These new *Regulations* have not before been judicially considered, the Applicants submit. Further, they argue that the *Regulations* not complied with were the very ones the legislature introduced to instill public confidence. As such, the Applicants say the new *Regulations* are mandatory, and thus non-compliance would render the decisions, a nullity.

[32] The Applicants allege there were violations by the Board of the *Act* and *Regulations* in the school review process. The Board maintains any non-compliance is of a nature that should not alter the decisions, as the Board provided, in certain instances, more than which the *Regulations* required.

[33] Prior to addressing the grounds for review, it must be noted there are issues which impact on the analysis of all three (3) grounds cited by the Applicants.

THE ISSUES

[34] Those issues, which must be addressed in this decision are:

(a) What is the appropriate Standard of Review (the SOR) of the Boards' decisions?
(b) Is a SOR analysis required?
(c) Were the *Regulations* under the *Education Act* breached, and are those *Regulations* mandatory or directory?
(d) How do the *Regulations* impact on the SOR?
(e) How do the *Regulations* impact on the *Act* and the legal test as stated in the **Potter** decision?

These issues will be addressed in the analysis throughout the decision.

[35] The Applicants state a SOR analysis is unnecessary, but defer to the Court's determination. The Applicants maintain the *Regulations* are mandatory and, thus the decisions become a nullity if a breach is established.

[36] Similarly, the Applicants argue that procedural fairness, brings with it a standard of correctness. I concur. The SOR for procedural fairness has been pre-determined by jurisprudence. A matter is either procedurally fair or it is not. What is equally, if not more important, is the content of such a duty, on the facts in any given case. As has been stated, anything that affects the right to be heard brings with it the potential for prejudice, which in turn, suggests that compliance is mandatory.

[37] The Respondent Board maintains the SOR is one of reasonableness based on a SOR analysis, taking into account the following factors: (1) Purpose of the *Act*; (2) Privative Clause; (3) Nature of the Question and, (4) The Expertise of the Tribunal.

[38] A troublesome feature is if the legislature intended strict compliance with the *Regulations,* that would suggest that the SOR would be, correctness. On the other hand, the *Regulation*s say the decision is legislative and not judicial. This suggests that there would be more deference shown to the elected Board in reaching their decision.

[39] As well, the trend is for Courts to show deference to Tribunals in reaching decisions on matters of a legal nature. (**HRM v. NS Human Right Commission**, [2012] SCC 10). The legislature, therefore, may well have intended the Board to decide the issue of school closures, and not the Courts. If so, does the jurisdiction to make such a decision on a reasonableness standard only arise if there has been first strict compliance, with the Regulations? This issue of compliance would seem to be a decision of the Courts, as the Applicants suggest.

[40] In **Potter**, the issue of judicial intervention appeared to be based on the duty of fairness and whether the Applicants had a full and fair opportunity to present their case. In short, there may be separate and distinct standards of review

applicable to the decisions here, (1) in regard of compliance with the *Regulations* and, (2) in regard of the Boards' decision.

[41] The Respondent Board argues that the merits of the decision must be reviewed separately from issues of procedural fairness. As such, the Board argues whether there has been compliance is a "substantive" decision to which must be applied the appropriate SOR - which they say is reasonableness.

[42] I agree there can be distinct standards of review as noted above. The first step required to be taken (as noted in **Dunsmuir** v. **New Brunswick**, [2008] S.C.J. No. 9, 2008 SCC9) is to determine whether the SOR for school closures, has already been judicially determined. The Applicants submit an analysis is unnecessary in reviewing the *Regulations*, as the issue in reviewing the *Regulations* is procedural, involving a new scheme. Thus, the Applicants argue compliance by the Respondent Board is mandatory. The position of the Applicants therefore are that a SOR analysis is unnecessary where the issue is procedural fairness.

[43] The submission of the Respondent Board is that the SOR has not been pre-determined by the Courts. As the cases before me, including the leading case of **Potter**, were decided before **Dunsmuir**, I agree with the Respondent that a SOR analysis should be performed. While the appropriate standard may be evident, it is prudent to carefully consider all of the factors, in determining how a review of the Board's decision should be approached. The customary four (4) factors are: (a) Purpose of the *Act* and the Board, (b) Privative Clause, (c) Expertise and (d) The Nature of the Question.

(a) <u>The Purpose of the *Act* and the Board</u>

[44] The Respondent cites the purpose of the *Education Act* as the primary policy function of the Board. While I agree the purpose of the *Act* may determine the purpose of the Board, there are different roles mandated to the Minister of Education and to each Board. The purpose of the *Act* is contained in Section 2 as follows:

> **<u>Purpose of Act</u>**
> **2 The purpose of this Act is to provide for a publicly funded school system whose primary mandate is to provide education programs and services for students to enable them to develop their potential and acquire the knowledge,**

> **skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy. 1995-96, c. 1, s. 2.**

[45] Under Section 64(1) of the *Act*, the Board is accountable to the Minister and is responsible for the control and management of the public schools within its jurisdiction. Notably, the purpose of the *Act* refers to the system being "publicly funded". Under Section 64(2), the Board (in addition to many other things) is required to:

> **(v) develop regional strategies and business plans;**
> **(ab) provide for the effective management of the financial officers of the Board;**
> **(ac) supervise capital expenditures.**

[46] We are told by the Board, it is of critical importance that it present a balanced budget. Indeed, this is a requirement under the *Act*. Notwithstanding any policy of the Board, the identification of a school for closure must be in accordance with the *Regulations*, as stated in Section 89(2) of the *Act*.

[47] There is little question the *Regulations* intended the Board to have jurisdiction to close a school. The comments of the Minister of Education, Marilyn More, (in **Hansard**), are illustrative of the legislatures intention in introducing the 2010 amendments. In particular, the review of any school identified for closure should provide for:

> **(i) More time for Board staff and Study Committee Members to do their work;**
>
> **(ii) The identification of reviews and methodologies used in enrollment projections when preparing the necessary Identification and Impact Assessment Reports.**

[48] Of note is the inclusion of community factors, rather than just education factors only, adding something to the process which is often over-looked. An example is information on the use of the school facility by the community, outside normal school hours. (see para. 19)

[49] Arguably, the purpose of the *Act* and the Board points to a standard of deference, the Board being in the best position to manage its resources.

(b) Privative Clause

[50] The Respondent Board cites *Regulation* 20(3), as a privative clause, as follows:

> **20(3) A decision of a school board made in accordance with the *Regulations* is final and should not be altered by the Minister.**

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

[52] Arguably, this "partial" privative clause is neutral with respect to defining a SOR.

(c) Expertise

[53] I agree with the Respondent that the Board has the expertise in the matter of school closures and interpreting its own statute. In particular, the level of expertise in considering policy matters, outweighs the Courts' expertise in this regard, especially as they are an elected Board and accountable to the local community. The amendments to the *Regulations* were aimed specifically at community involvement and engagement in the school review process.

[54] This factor strongly favours significance deference in reviewing the Board's decision.

(d) The Nature of the Question

[55] The legislature's intent was clear in its drafting to specify in *Regulation* 19(7), that a School Board is deemed to be performing a "legislative and not a judicial function."

[56] The decision to close a school is one involving fact, policy, and a certain amount of discretion. These can be intertwined. Notably here, the decision is connected closely to the Board's function and its "home" *Statute*.

Conclusion re SOR

[57] It is generally accepted that certain factors may, depending on the circumstances, be more relevant and require emphasis than others in determining the SOR. Combined with the expertise of the Board, I favour the nature of the question to be considered as the appropriate factors in determining the SOR in this case.

[58] I hastily add there can also be degrees of compliance. Depending upon whether a certain *Regulation* is mandatory or directory, such a finding may lead to a choice between correctness and reasonableness as distinct standards of review.

[59] I have queried whether a correctness standard should apply to the pre-condition (the part requiring compliance), while the standard of reasonableness would apply to the actual decision to close the school.

[60] I have concluded that, apart from procedural fairness considerations, the weight of the evidence points to a reasonableness standard, as the applicable SOR of the Board's decisions. I so find having regard to the customary factors.

GROUNDS FOR JUDICIAL REVIEW

(1) REGULATIONS - ALLEGED BREACHES

[61] The Applicants submit that the Board violated the *Regulations* under the *Education Act* in arriving at its decision to close HJM and WREC. They allege four (4) types of breaches: (1) Missing data; (2) Vague data (3) Different methodologies; (4) Failure to append the IDR to IAR.

[62] I repeat the position of the Applicants that compliance with the *Act* and *Regulations* is mandatory, and therefore the Board's failure to follow the statutory directives, invalidates the Board's decision. In this regard, it is useful to consider how the breaches alleged relate to the criteria used to identify each school for closure. In **Potter**, certain types of breaches involving school closures were found to be directory, rather than mandatory. This allows for the exercise of discretion in determining whether a decision is valid or invalid.

[63] *Regulations* 16 and 17 of the *Act* are set out in detail in Appendix "A" attached to this decision.

(a) Missing Data - School Region v. Catchment Area

[64] Under the *Regulations*, information on school enrollment is required for the "school region". "School Region" is defined as the area within the jurisdiction of its Board. That would mean the four (4) counties within the Board's jurisdiction.

[65] In the IDR, the Board provided information for the Board's catchment area, rather than the full region. This means for HJM, it contained data for Antigonish County; and for WREC, it contained data for Richmond County.

[66] *Regulation* 16(1) mentions the word "must" once which, of itself, is not determinative of whether the provision is mandatory. Moreover, data is required on general population patterns and projections over the next five (5) years in the "school region".

[67] The Board states the figures provided better represent their catchment area, rather than the full region which is vast, and spanning over four (4) counties.

[68] *Regulation* 17 requires the IAR to contain data on capital construction for the school region. The IAR for HJM contained only data on capital construction planning for its catchment area, as did the IAR for WREC. *Regulation* 17 uses the word "must" twice in its wording.

[69] In HJM's case, both criteria used to identify for closure as part of the Screening Process involved the number of students (or enrollment). In the case of WREC, two (2) of the criteria related to extensive renovations, while the third (3rd) criteria related to operating costs per student (and thus enrollment).

[70] As stated in **Potter**, it is impossible to lay down any general rule for determining whether procedural provisions are mandatory or directory. The Court found the breaches would only be relevant if they impaired the duty of the Board to act in a fair and reasonable manner. At paragraph 120, Justice Oland considered it significant that none of the *Education Act*, *the Ministerial Regulations*, or the board's closure policy contained any penalty or remedy for failure to observe any procedural provision.

[71] In **Potter**, it was argued the Board did not have the factual information it was required to have before placing the schools on any "short list". For example, it did not name or provide notice of the schools considered for closing, among other alleged violations.

[72] In the case before me, the benefit of reviewing “school region” data (as opposed to “catchment area”data) would be to provide a comparison to other schools in the region. Otherwise, without a comparison, one might theoretically consider closing all schools.

[73] The Affidavit of Mr. Beaton, however, in response stated all schools were evaluated using similar criteria for enrollment and capital construction. In this way, the Board did comply partially or indirectly with the *Regulations*. As well, the birth statistics reviewed did cover the entire region. Finally, the Executive Summary provided information on enrollment up to and including the year 2015.

[74] Arguably at least, sufficient data was provided in compliance with the *Regulations*.

(b) <u>Vague Data</u>

[75] The Applicants argue the Board must cite all sources of data to enable parents to effectively challenge the IAR. They say the precise sources are difficult to determine. The sources relate to transportation, financial and property service, efficiencies, and projected human resource costs.

[76] There is a reference to sources such as the "SRSB" and "works cited" in the IAR. The Applicants state that the vagueness of the sources is prejudicial to the Study Committees (for HJM and WREC) in that it is difficult to verify the sources as credible, or take issue with them.

[77] The Study Committee made requests for additional information and for the most part, received the additional information it requested. In one instance, there was a delay in the Board providing requested information by the Applicants. This related to the cost avoidance factor of $1 million if the Board closed WREC. (see Record at page 1773.)

[78] A key consideration is whether the Board had before it, the type of information contemplated by the *Regulations*, in both the case of HJM and WREC.

[79] In reviewing the Record there was an inordinate amount of information on both schools provided, both as required by the *Regulations,* as well as additional information that was requested.

[80] The Applicants cited additional complaints, including an improper calculation of the operating cost per student, absent the qualifier "per square foot".

[81] The Applicants submitted additional arguments, such as the gym at HJM being included in the calculation of the capacity per student enrollment.

[82] The Applicants claim that for HJM there should have been more information on the capacity of the receiving school, and bussing times. There was also an issue of a Board member who wanted to vote by phone but was denied.

[83] The Applicants claim that for WREC the operating costs were “artificially high”, and for example included the cost of an elevator, which did not exist. In the Response Affidavit of Mr. Beaton, there is both a denial of this allegation and an explanation as to same.

[84] Arguably, imprecise data was provided. The Board provided explanation and considers the data it provided to be sufficient.

(c) <u>Different Methodologies</u>

[85] In creating the IDR and IAR for each school, the Board calculated enrollment projections based on birth statistics and enrollment levels. The Applicants argue the data was “inputted” and figures were “outputted” without a clear understanding of how the figures were calculated. They say further that the actual methodologies are in effect the “black box”, without which the estimates cannot be verified.

[86] The Applicants argue further that the figures differed greatly in the IDRs compared with the IAR regarding the operation and maintenance costs for both

schools. The reported costs in the IARs were, in fact, lower but did not contain reasons. Paragraph 31 and 33 of Mr. Beaton's Affidavit states:

> "**31. As with the IDR and IAR for HJM, between the time of the WREC IDR and the release of the WREC IAR, the Board obtained updated information with respect to enrollment, etc. for the 2011/2012 academic year. The WREC IAR was released in the Fall of 2011. The Board, at that time, had confirmed some information with respect to costs and enrollment for that year."**

[87] Paragraph 33 of Mr. Beaton's Affidavit stated further:

> **"33. Differences in the annual facility and maintenance costs were due to software issues and Mr. Cormier's removal of the maintenance wages (the explanation given in paragraphs 53 and 54 of my May 10, 2012 Affidavit in relation to HJM, would apply to WREC, IAR and IDR as well)."**

[88] The Board states that it attempted to the extent possible, to use the same methods for both schools. Many questions were posed in relation to the figures and the information provided on both schools. This is evident from the Applicants' Brief in paragraph 19.

> "**19. Both Study Committees made frequent requests for information from the Board. Although Board staff generally provided the requested information in a timely manner, there were occasions where the Committees had to wait a significant period of time for a response. This hindered the ability of the Committees to properly analyze the information and synthesize it into their reports, particularly given the limited amount of time to draft the reports.**"

[89] An important feature is not whether a subsequent explanation is given, but why the explanation was not given in the report itself. The Board's responses when questions were asked were generally thorough. An example on this point is found at paragraph 54 of Mr. Beaton's May 10, 2012 Affidavit:

> "**54. I am informed by Mr. Cormier, and verily believe, that at the November 28, 2011 meeting there was a question regarding the difference in the 2009-2010 annual facility and maintenance number between the IDR to the IAR. Mr. Cormier explained that, due to a software issue for the 2010-2011 calculation, maintenance wages were not broken down per school, but that maintenance wages had been included for 2009-2010. Accordingly, in**

> **order to present numbers that considered the same costs, Mr. Cormier removed the maintenance wages from the 2009-2010 figure. The net effect of these differences between the IDR and IAR was that the annual facility and maintenance costs for HJM in the IAR were in fact lower than in the IDR. In other words, the differences in the IAR were in JHM's "favour"."**

[90] I repeat the procedure (explained above) was equally applied to the WREC, IDR and IAR. The time allowed for a response is an important consideration, given what the Minister said about the intent of the *Regulations*, namely, "..there would be more time for Board staff and the Study Committee members to do their work." The Applicants say the Board has all the advantages in this regard.

(d) <u>Failure to Append - And Other Alleged Failures</u>

[91] The Applicants state the Board failed to append the IDR to the IAR as required by the *Regulations.* The IARs were completed on or near the 30th of September, 2011. The IDR for both schools were appended on October 12, 2011, twelve (12) days later. The IDRs had been previously made available to the Applicants and posted on the Board's website since March 29, 2011, about six (6) months earlier.

[92] I believe that a lack of information, such as the impact of the closures on receiving schools (as alleged) is a more serious violation than the failure to append. Paragraph 24 of the Affidavit of Geraldine Sampson states as follows in relation to WREC:

> **"24. The IAR did not contain descriptions of the impact on any potential receiving schools in the event WREC was closed as required by the *Regulations*. For example, Tamarac Education Centre is a P-8 school in Inverness County attended by more than 30 Richmond County students in the WREC catchment area. East Richmond Education Centre is also a potential receiving school. Neither school was mentioned in the IAR."**

[93] Similarly, Paragraph 41 of the Affidavit of Denise Delorey states: (see para. 27 of J. Beaton's Response).

> "**41. The IAR did not contain descriptions of all potential receiving schools in the event HJM was closed. For example, the East Antigonish Education Centre was not considered even though it was geographically closer to HJM then the Antigonish Education Centre, which was included in the IAR.**"

[94] I note that Richmond Academy, the receiving school for WREC is within the WREC family of schools and was the only receiving school identified. The IAR for WREC does, in fact, contain information on Richmond Academy, including enrollment, configuration, physical condition, building use, transportation, and proposed attendance boundary.

[95] The *Regulations* state that the IAR must contain "any additional information about, "...(v) the impact on any public school that might receive the students...". The IAR for WREC includes a summary containing a discussion of both WREC and the receiving school. (Item 6.0 at Page 25.)

[96] The IAR for HJM identified three (3) potential receiving schools, those being: St. Andrew's Consolidated, Antigonish Education Centre and St. Andrew's Jr. School. It includes an Appendix containing a list of detailed questions about (and for) each of these receiving schools.

[97] Attached to the WREC IAR are a total of five (5) appendices. Three (3) of these are entitled: "Routing, Mapping and Description under Consultation", which explain the various routes for bussing. The Board's position that there will be a reduction in travel and wait times, resulting from the students transferring to Richmond Academy was not seriously challenged by the Applicants. The remaining two (2) appendices, B-1 and B-2 are floor plans respectively for WREC and Richmond Academy.

[98] In **Potter**, taking into account the prior *Regulations* in place at the time, the Court of Appeal concluded that when a Board considers the closure of a particular school, it is required to give the parents a meaningful opportunity to present their case freely and fairly.

[99] The 2010 *Regulations*, as amended, have been described by the Respondent as adding a "minor clarification". In my view, they do much more than that. Clearly, they add the requirement for at least one (1) additional public meeting. As well, they contemplate the engagement of the community, allowing more time for staff and the Study Committee members to do their work. Identifying sources of data and methodologies for the enrollment projections is considered critical so as to contribute to a greater public confidence in the review process.

[100] There is no set test for determining whether *Regulations* are mandatory or directory. As noted in **Potter**, it is impossible to apply a general rule where procedural provisions are concerned. The scope of the statute and legislation must be reviewed to determine the level of compliance required. If all procedural matters were complied with perfectly, the Board could still arrive at its decision for other reasons.

[101] In **Potter**, the Court commented on the common law duty of fairness. Court intervention would normally be required if the process was so flawed as to require the Court's intervention. It is clear from the evidence, the Board was struggling with financial constraints. The legislation specifically mentions that the Board is administering "public funds", in managing the schools within its jurisdiction.

[102] The power to make *Regulations* given to the Minister under the *Act* respecting the review of schools is permissive (Section 145(m)). By describing the decision as legislative and not judicial, the legislature has suggested that decisions to close a school are of a factual, policy and discretionary nature.

[103] The *Regulations* further use such language as "any additional information" in describing what information the Board must look to when considering a school for closure. The Respondents say if a decision is made to permanently close a school, the school must be closed within five (5) years. (They say also that a Board may discontinue the school review process at any time after identifying it for closure (*Reg. 20(5))*.

Conclusion re Alleged Breaches of the *Regulations*

[104] On the facts before me, there is little question as to the level of public participation and community engagement. It was extensive. A review of the *Regulations* suggests to me that while the legislature intended there be full compliance, it also left an element of discretion with the Board. This is consistent with reviewing the decision on a standard of reasonableness.

[105] The **Potter** case was decided before **Dunsmuir**. Although arguably there might be a separate SOR, I find that the *Regulations* have been complied with sufficiently to satisfy the purpose of the *Act*. For example, on the question of the catchment area versus the school region, the Board looked at all the schools in the region in terms of

enrollment and other criteria for closures, including birth certificates. Although this did not meet the definition of "school region" it was sufficient to satisfy the purpose of the *Act*.

[106] Sources and accuracy of data are clearly important, as are methodologies. I do not agree that the Board necessarily has all the advantages. In terms of WREC, there were a total of twenty-two (22) meetings held throughout the school review process. If the Board looked at all the schools, then it indirectly took into account enrollment across the "school region" and general population patterns in the region. In this way, the Board complied with the intent of the *Regulations,* if not the letter.

[107] One of the key questions in **Potter**, as earlier noted, was whether the Board had before it, the information contemplated by the *Regulations*. By and large, I find in the case before me, that it did, even though every aspect of it may not have been perfect. An example would be Ms. Delorey's statement that her question regarding teacher reduction at HJM went unanswered.

[108] In **Potter**, the Court referred to the case of **Tweed** v. **Assiniboine South School Division No. 3** (1982), 18 Man R, (2d) 403 (Man. C.A.), where Freedman, C.J., referring to Professor S.A. de Smith in his text *Judicial Review* spoke of "serious public inconvenience" that could be caused by holding *Regulations* mandatory. He said further they could be directory **"if the court is for any reason, disinclined to interfere with the *Act* or decision that is impugned".**

[109] I am not inclined to interfere with the Board's decision, on the basis of any non-compliance (of the kind alleged here),with the *Regulations*. The declining enrollment at HJM and the extensive participation in the closure of WREC (and HJM) lead me to conclude that the *Regulations* breached were directory in nature. Also, I do not consider the late appending of the IDR, which had been provided early in the process, to be the type of non-compliance requiring the Court's intervention. I have weighed and considered prejudice overall in reaching this conclusion.

(2) LEGITIMATE EXPECTATIONS

[110] The Applicants argue that the Board failed to meet their legitimate expectations in two "key" ways: (i) by failing to comply with its Screening Process; and (ii) by denying the Study Committees the opportunity to respond to a Board Staff presentation, referred to as the "Staff Clarifications Report".

THE LAW

[111] The doctrine of legitimate expectations is related to procedural fairness in that it inquires into the conduct of the governing authority in carrying out its authority. It is this conduct that may give rise to the expectation. Applying logic, there must not only exist an expectation, but it must be legitimate. Knowledge, therefore, by those seeking procedural fairness, gives rise to a breach when the established practices or procedures have not been followed. (**Furey** v. **Conception Bay Centre Roman Catholic School Board** (1993), 17 Admin. L.R. (2d) 46).

[112] I have given consideration to whether certain conduct of itself, amounts to a miscarriage of justice and therefore a lack of procedural fairness. In the context of this case, I am of the view that the conduct did not rise to the level where actions by the Board should result in a remedy to the Applicants, based on conduct alone.

[113] I turn now to discuss further the law with respect to legitimate expectations.

[114] Procedures essential to a fair hearing must be addressed in a judicial review, as in **Potter**. There are a host of related issues, including whether a decision is substantive or procedural in nature. If procedural, the doctrine of legitimate expectations would apply. If substantive, the reasonableness SOR would apply. It must be recognized, therefore, that the doctrine of legitimate expectations has its limitations. "The expectations must not conflict with the public authority's statutory remit". (**Mount Sinai Hospital** v. **Quebec (Minister of Health and Social Services)** 2001 2 S.C.R 281 (SCC).

[115] *Black's Law Dictionary (4th Ed.)* defines remit as "to send or transmit". It defines it another way as "to give up, to annul or to relinquish". "Remit", in the context of this case, means that the expectations must not be inconsistent with the stated purpose of the *Act*.

[116] In **Mount Sinai,** the Court stated knowledge by those seeking fairness was not a necessity, as the focus is on "promoting" predictability in governments' dealings with the public.

[117] In addition, the legislature has deemed the Board's decision here to be legislative and not judicial. It has been held in the past that *certiorari* as a prerogative remedy is less applicable to decisions of a policy nature. These are often legislative

type decisions, emanating from elected bodies. Courts have, however, set aside decisions made in breach of procedural guidelines where there was a breach of a "specific assurance" of consultation. (Stanley A. De Smith, *Constitutional and Administrative Law,* 1st edn (Harmondsworth: Penguin, 1971) at 7.2340)

[118] In **Furey,** the Nfld. Court of Appeal discussed the doctrine of legitimate expectations and noted certain of its limitations: (i) it is procedural only with no substantive rights; (2) it creates only a right to make representations or to be consulted; (3) it does not fetter the decision following further review.

[119] Generally, as indicated in the minutes of the Board Meetings and the language used in the alleged violations themselves, show there has been extensive consultation with and representations made by the Applicants.

(i) <u>The Screening Process</u>

[120] If the Applicants here had an expectation with regard to the Board's Screening Process, could it be said to be legitimate? Unlike the *Regulations*, the process provides no established procedures for representation or consultation. The process does not replace the "Public School Review Process" prescribed by the *Regulations*. According to the Board, the process supports it. The *Regulations* and the process are related in the sense that the 2010 process was terminated because of the deadline for submission of the IAR was missed.

[121] The Applicants argue they had a legitimate expectation that the there would be no review for ten (10) years. Alternatively, they argue if a further review was commenced, it would be terminated in the event of a failure to follow the *Regulations*. I have discussed the effect of the failure to append and other alleged breaches of the *Regulations*. Expecting the 2011 process to be terminated a second time, for failure to append for example, when the IDR had been previously made public and posted on the Board's website is not, in my view, legitimate. The requirements of the duty to act fairly must be assessed contextually in each case.

[122] Similarly, I have already mentioned there was no requirement under the process for representation or consultation. (see para. 23)

[123] The Screening Process of the Board states as one of its criteria that a school which has "undergone" a school closure review process in the previous ten (10) years

will not be screened to determine whether it should be reviewed for closure. The Applicants state that HJM underwent a school closure review process in 2010, and thus had a legitimate expectation that HJM would not be subjected to a further review for another ten (10) years.

[124] The Board has brought forth evidence of media reports, quoting certain of the Applicants as making statements that would suggest an awareness that the process could begin again the following year. Without relying on that evidence, I turn to the evidence of Denise Delorey who, in her Affidavit, stated she had an "understanding" that under the Board's process, HJM could not be subject to a further review for ten (10) years. (Paragraph 10 of April 3, 2012). She stated further that she was in attendance at the Board meeting, where the Board resolved to "terminate" the review process. The Minutes and the resulting resolution of that meeting (October 20, 2012) stated :

> **"That the Board discontinue the 2010-2011 school review process without completing the review process for HJMacDonald".**

[125] As mentioned, HJM had undergone in part, a review process in 2010. I think, therefore, the context of the wording in the criteria, for schools to be excluded, is relevant. That wording is as follows:

> **"Schools which <u>have</u> undergone <u>a school review process</u> within the past ten years."**

[126] In my view, the term "undergone", respectfully means "completion" of the school closure review process. Support for this can be found in the plain and ordinary meaning found in *Oxford's Concise Dictionary* which states in relation to "undergo", to be in past tense, "underwent", and past part "undergone". "Underwent" certainly suggests completion. "Undergone", preceded by "have" has a similar meaning, although arguably "underwent" is stronger in terms of "completion".

[127] In my view, "a school review process" means the entire process and therefore "undergone" in effect means, "underwent", a complete process. Further, the word "have" before "undergone" suggests finality, not a partially completed process. In 2010, the school review process had only begun without being completed, as the Minutes state.

[128] Consequently, I am of the view that what the Applicants had was in the nature of a hope rather than an expectation that there would not be a further review for HJM under the Screening Process.

[129] The Applicants argue further that they had a legitimate expectation that the Board would follow its own criteria, and not select schools for closure that did not meet those criteria.

[130] The Board decided that HJM had met two of them.

[131] The Applicants argue the criteria were not met and that the Board would be saving in operating costs (approximately $25,000.00) if HJM was kept open. The Board counters and says that a school with operating costs of more than $1000/student is well above the system average. There are other schools besides HJM with operating costs above the system average. The Board says further that closure of HJM will, contrary to the Applicants' position, save the Board a significantly higher amount ($269,000.00). There is further an issue around the calculation of costs "per student" and whether the denominator, "per square foot" should be added to the calculation.

[132] Whether or not there was a legitimate expectation that the Board would follow the established criteria, is not necessarily the sole issue. Whether the doctrine applies in this case is also an issue. Even if the Applicants had a legitimate expectation, the decisions the Board made must be procedural in order for relief to be provided to the Applicants.

[133] In **Mount Sinai**, the difference between substantive and procedural was discussed. It was acknowledged it was sometimes difficult to distinguish between the two. At paragraph 35, it was stated by Binnie J. (with McLachlin, C.J. concurring) that:

> **"The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad policy is pre-eminently for the Minister to determine, not the courts."**

[134] In my view, a substantive review of the criteria, based on the merits was required. The Board was considering "broad policy" in selecting the schools under its legislative mandate. As such, the doctrine of legitimate expectations does not assist

the Applicants in terms of procedural fairness on these points. In my view, the decisions with respect to the criteria were more than procedural.

[135] In terms of WREC and the alleged failure to follow the Board's own Screening Process, the Board concluded that the school had met not two (2) but three (3) criteria. Those were: (1) A significant reduction in operating costs if the school were closed; (2) That the school required extensive renovation; (3) That WREC had an elevated operating cost per student. As with HJM, the Applicants argue the Board did not provide data on the system average nor did it include the "per square foot" denominator in calculating the system average.

[136] Once again the Screening Process did not provide established procedures. There was no requirement, as stated, with respect to notice. It was instead a means for the Board to identify, based on a preliminary review, those schools which should be reviewed. Under the *Regulations*, a more detailed review would be required.

[137] The process itself, further did not require data on the system average. The Board maintains, as stated by Mr. Beaton in his July 20, 2013 Affidavit, that the process was developed on the basis of the Strategic Plan which provided for the option of calculating the operating costs "per student" only.

[138] The Applicants argue further that no detail was given as to why the additions and upgrades to WREC were necessary, such renovations which were to exceed $1 million dollars.

[139] It is important to reiterate that with legislative decisions, public authorities can still be held to established guidelines. There were none here in terms of procedures for the use of Screening Process. It is, therefore, difficult to point in the evidence to behaviour that would raise a legitimate expectation for certain procedures to be followed at the screening stage.

[140] As stated previously, even if the Board's Screening Process gave rise to a legitimate expectation, decisions under the process in my view were more than just procedural, even though the determination under the process, was a preliminary process. The fact that it was not an in-depth review does not mean it was not a

substantive decision. It was arrived at through averaging and generalization of data. A more in-depth review and further consideration would occur later. [1]

[141] Until then, the SOR, is reasonableness, as the Respondent argues it is throughout the Board's decision making process. I concur. There was no requirement in the screening process for "justification" that the criteria were met.

[142] I will later address whether there was a need for the Board in implementing the Screening Process to import a duty to act fairly. This duty would involve something less than the usual procedural fairness requirements. (Dickson, J. in **Martineau v. Matsqui Institution**, [1980] 1 S.C.R. 602).

(ii) <u>The Staff Clarification Reports</u>

[143] Following the written submission of each of the Study Committee Reports for WREC and HJM, due and presented on January 31, 2012, a Working Committee of the Board met and responded to the Board to provide clarification on certain matters. The Applicants for each school argue there was no opportunity to respond to these staff clarifications.

[144] On February 8th, each school's Study Committee had an opportunity to present their report at a special meeting of the Board. The Working Committee of the Board had its meeting on February 15th. Following that at WREC, a public hearing was held on February 20, 2012. The Applicant, Geraldine Sampson, addressed the Board. Similarly, and as required by the *Regulations*, a Public Hearing was also held earlier at HJM on February 16, 2012.

[145] The Applicants claim that neither Study Committee had been made aware of staff presentation in advance.

[146] The Applicants claim they had a legitimate expectation they would have an opportunity to rebut the staff presentation, by way of oral submissions.

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[1] The term "procedure" has been defined to include in its meaning:

"...whatever is embraced by the three (3) terms, "pleading", "evidence" and "practice"." (<u>*Words and Phrases, Legal Maxims*</u> Canada, 2nd Edition, Volume IV)."

[147] Unless the *Regulations* or the duty to act fairly requires it, I do not think the Applicants were required to be notified of every step in the proceeding and given an opportunity to make representations and/or be consulted. Notably, fairness does not apply to legislative decisions (see Guy Regimbald, *Canadian Administrative Law*, *First Edition*, © LexisNexis Canada Inc 2008**,** at pg. 227). The *Regulations* do not require it any more than they required the Board to have the Special Board meeting on February 8th, for the Study Committees to present their reports to the Board. The Board, nevertheless, held such a meeting.

[148] There is little or no evidence to support a finding of a legitimate expectation that the Board would provide yet another opportunity to the Applicants to involve themselves (in effect), in the internal workings of the Board. There is no conduct which the Board committed that would reasonably give rise to a legitimate expectation that the Committees would be given an opportunity to respond to the staff clarifications.

[149] Section 89 of the *Act* is restrictive. It is drafted in the negative in that a School Board may <u>not</u> close a public school <u>except</u> in accordance with the process outlined in the *Act* or *Regulations*.

[150] Does this mean that a deviation from the process renders a school closure to be nullity?

[151] The Board used its own Screening Process to first identify which schools would be considered. Was using that process an unwarranted intrusion into the closure process? *Regulation 16* of the *Act* identifies considerations, such as data and statistics, which must be in a report identifying a school. The report is required to address a number of factors, but the criteria used by the Board to screen is based on its own six (6) criteria, which was part of its Strategic Plan.

[152] Is this permitted by the *Act* or the *Regulations*?

[153] Under Section 64(2)(v) the Board is required to develop "regional strategies and business plans". (see para. 45)

[154] Notably, the *Regulations* say also that a report of a Board should contain "any additional information supporting the reasons for identification". Thus, in my view,

the Board's use of their own Screening Process may be used so long as the report it generates, complies with *Regulation 16*.

[155] Similarly, staff clarifications are neither mentioned in the *Act* nor prescribed for in the *Regulations*. I repeat, a school may not be closed, "except in accordance with", the process prescribed by the *Regulations*. If it is not part of the regulatory process, then injecting the "clarifications" into that process is arguably wrong, as they (the clarifications) are not called for or expressly permitted. Such clarifications are neither permitted or prohibited by the *Regulations*.

[156] What is the right approach to this issue of statutory interpretation?

[157] The primary purpose of the *Act* is to provide educational programs and services for students to enable them to contribute to a healthy society and a sustainable economy. Closure of a school impacts on this purpose as surely as does not the need for the Board to make an informed decision. To this end, the *Regulations* state that the Board shall provide public access to all information that the School Board uses to make its decision and to report on the closure of a school (Section 19(1)(c)(f)).

[158] Further, the *Regulations* state that any person may make written submissions to the Board, before a decision is made, and in conducting a public hearing to afford any person an opportunity to make representations. This promotes a fully open, transparent, and informative process.

[159] If the Board can hear from any person, in writing or by representation, it follows logically that they could, if they deem it necessary, hear from their own employees', their own staff.

[160] In **Potter**, the parents' objected to not having an opportunity to object to the Executive Council's recommendation that a school be considered for closure. The senior staff had been instructed to prepare a report with the recommendation for the school closure. The Court rejected the parents' objection, finding instead that staff reports were one (1) of the sources of information that the Board was to consider. The Court, in **Potter**, further noted that information received at a public meeting is another.

[161] Under the Screening Process, a staff report is prepared which identifies which schools meet two (2) or more of the six (6) criteria. The Working Committee of the Board is a public meeting and documentation was available.

[162] In my view, if the *Regulations* were intended to prevent the Board from deploying its resources in carrying out its mandate, it would have said so in the legislation. The Board must be able to allow staff to assist them as appropriate. The staff here were not asked to recommend a course of action. Instead they were acting in a consulting role, as requested by the employer, the Board.

[163] For these reasons, I do not interpret the *Regulations* as ensuring the parents had the "last word". The Board must be able to carry out its legislative function, subject to providing a meaningful opportunity for the Applicants to be heard.

[164] This is consistent with the common-sense approach as recommended in **Potter**. It is consistent also with the discretion afforded to the board in **Hanna** v. **Sunwest School Division**, No. 207, 2008 SKQB 315, as to the manner the board chose to act, in determining the best interests of all the children in the district.

[165] I have said I would return to whether the Board had a duty to act fairly, so as to consult and allow representations to the Applicants in advance of the identification of schools under the screening criteria.

[166] Is a strict application of the duty of fairness required by **Baker** v. **Canada (Minister of Citizenship and Immigration)**, [1999] 2 SCR 817 required here? In my view, not necessarily. It depends on the nature of the investigation and the consequences to those affected by it. Here it could be said that while a review of the Screening Process is preliminary, its consequences are grave in that once selected, the school is then "fed" into the closure process prescribed by the *Regulations*.

[167] It may further be argued that because it is preliminary, it is more procedural than substantive, thus supporting the expectation that a certain procedure will be followed.

[168] Does this duty require the Board to meet the legitimate expectations of those challenging the decisions? In **Potter,** it was found that school closure required a duty of fairness and the reason was the Board was not exercising a policy or legislative

function. The new *Regulations* have changed that somewhat, and have deemed it is a legislative decision.

[169] Even if it could be said the Board's Screening Process was not substantive and not legislative, there has to be a basis for the legitimate expectation in the first place. The decision is not directed to one individual but affect students, staff, parents and community.

[170] From a practical point of view, the Board members are accountable to the electorate. Even so, they were cognizant of the need to act fairly. I find requiring consultation and input from potential Applicants at an early stage in the process is akin to providing them with every detail. There is no basis for such an expectation as long as broad grounds for the preliminary decision are given, which was the case here. (see **Selvarajan** v. **Race Relations Board,** [1976] 1 All E.R. 12 at 19 (C.A.)**,** as referred to in Regimbald, *Canadian Administrative Law*, *First Edition*, © LexisNexis Canada Inc 2008 at pg. 256.)

[171] I, therefore, find for the above reasons that the second ground of the Applicants' argument based on legitimate expectations is without merit.

(3) BREACH OF NATURAL JUSTICE - WREC

[172] The final argument of the Applicants is that the Board breached the rules of natural justice by: (i) late disclosure of requested information regarding structural (and layout) deficiencies of WREC's physical building, and (ii) late provision of certain appendices to the Study Committee Report - the attachments. These attachments contained a petition and student surveys. This, says the Applicants, constituted a breach of natural justice, denying them of the opportunity to present their case fully and fairly.

(i) Disclosure of Requested Information

[173] The Applicants state the structural information was provided with the requested information, approximately one (1) week prior, on January 24th, 2012, and the Committee had little time to digest it and use the relevant portions for its report. It is important to consider the time-line. The Study Committee Report was due on January 31st, 2012.

[174] There had, according to the Record, been an initial request dating back to November 8th, 2011. The report was submitted on time by the Committee. The presentation of the Study Committee's Report would occur over two (2) weeks' later on February 20th, 2012. There was, on February 8th, a special Board Meeting presentation by the WREC Study Committee, including Geraldine Sampson. The public meetings of the Study Committee had been held on November 27th, 2011 at WREC and on December 6th, 2011 at D'Escousse. The Board would not vote on the school closure until March 6th, 2012.

[175] The WREC Study Committee diligently met five (5) times, after receiving the final information on January 24th, 2012 and submitting its Report. In the activity section of the Committee's Report, it states:

> **"The Study Committee has met twenty-three (23) times to request supporting documentation from SRSB, conduct public meetings, collect staff/student input, review available documentation and finalize a recommendation. Meeting dates are outlined in Appendix 1, page 18."**

[176] I have reviewed the Record to determine whether there has been procedural fairness. At Volume VII, page 1749, is the request of the WREC Study Committee, dated November 8th, 2011. The first response from the Board, however, is not January 24th, 2012. The first response from the Board was, in fact, two (2) days later on November 10th, 2011 when the Board's secretary wrote to acknowledge the request and seek clarification about the questions. She stated it would begin to coordinate the information in the numerous areas identified in the request. Some of the documentation requested dated back ten (10) years.

[177] I note, further, from the Record that a follow-up to the original request was made on November 29th by the Applicants. The response to the request from the Board came on December 7th, 2011, stating the Board has "compiled the responses to your request for information regarding the IAR for West Richmond Education Centre", stating: "These are attached for your information". The Board went a step further to include the following:

> **"Please note that staff are available to meet with the Study Committee to respond to other inquiries which may arise. Kindly contact Mr. Terry Doyle, Director of Operations, at 747-3631."**

[178] The July 20th, 2012 Affidavit of Mr. Beaton states that not only did Mr. Doyle provide detailed responses, but a meeting was arranged with the Board's Director of Finance, Mr. Cormier. This was attended by the Applicant, Raylene McGee.

[179] There was a further request for information made on January 17th, 2012, such request containing eight (8) separate items. A detailed response to all eight (8) items was provided a week later on January 24, 2012, by Mr. Doyle, on behalf of the Board. (Record-Volume VII, page 1769-1773).

[180] On the evidence before me, I see no merit in the claim that the Applicants were denied procedural fairness with respect to the information requested of and received from the Board. On the contrary, the Board provided a full and fair opportunity to the Study Committee to avail itself of the relevant documentation. I note certain of the routine access requests were made to the Board while it was still attempting to comply with other or previous requests and for both schools. The Board, in making its senior staff fully available to the Committee, is clear evidence of that.

[181] Also, the Applicants in the letter of November 8th requested a detailed cost breakdown of all repairs required for WREC to meet current codes. (Record at page 1729, paragraph 1(c)). The Board responded that until WREC was selected for a renovation project, "that type of detailed code review" would not occur. (Record at page 1757). The Applicants subsequently requested on January 17th, 2012, a complete breakdown of costs associated with the $1 million dollar in upgrades identified in the IDR.

[182] The Board responded in its letter of January 24th, 2012, by providing a list (Tab A) of the anticipated costs of replacing building systems and indicated this was done in consultation with Lou Bona, Manager of Building Systems, and in consultation with architects and engineers. The Applicants then alleged that because this Report was prepared in March of 2011, the earlier position taken by the Board (that WREC needed to be selected for a detailed code review) was a deliberate attempt to consume the Committee's time and effort.

[183] I have carefully considered this matter and the Record and I note at page 1771 of the Board's letter of January 24th, that these were "anticipated upgrades". In addition, in that same letter, the Board pointed out that there would be "other building requirements resulting from detailed code reviews." In my view, there is not an

inconsistency in the Board's position taken at page 1757 and page 1771 of the Record as explained above.

[184] I reject therefore the Applicants' argument that the Board deliberately attempted to delay the Committee.

(ii) <u>Provision of the Appendices</u>

[185] I turn now to consider the second prong of the Applicants' procedural fairness argument involving WREC, that being the content of the WREC Study Committee Report and, in particular, the timeliness of providing the lengthy attachments. The Applicants claim these attachments were not included, when the report was first given to Board members.

[186] According to her Affidavit (at Paragraph 46) Ms. Sampson emailed the WREC Report to the Board's Superintendent, Mr. Beaton, without the lengthy attachments on January 31st, 2012. She also delivered a hard copy with the attachments to the Board's Secretary, Joan Bona, on the same day.

[187] There was a Board meeting the following day on February 1st, at which the Study Committee Report was tabled. A special Board Meeting was scheduled for February 8th, at which the Study Committee would present its response. A further public meeting for the WREC report was scheduled for February 20th, 2012 at the school. At that meeting, the Board would receive presentations and input from the public.

[188] A review of the Record confirms that it was not until February 21st, that an email was sent to Board members advising them of the content of the binders (containing the attachments). Although this was the day before a Working Committee Meeting of the Board (on February 22nd), it was after the February 8th, 2012, Study Committee presentation. That meeting lasted approximately one (1) hour.

[189] It is reasonable to conclude that time simply did not permit the binders to be prepared at the February 1st meeting, the day after a hard copy of the Report had been submitted.

[190] It was not only Ms. Sampson who expressed concern over the timing of providing the entire report. Board member, Kim Horton, expressed concern as to why

the binders were not provided "for perusal right from the date of the presentation." (see Record at pg. 378).

[191] According to the Board, as contained in the Record response of secretary Joan Bona, there were "FOIPOP concerns" about identifying persons whose names and addresses were on the Petitions, as well as the names of students. Therefore, portions of the report were not made public.

[192] The *Regulations* required the Study Committee's response to be filed by January 31st. This was done. Section 89(5) states that following receipt of that response, the School Board shall:

> **(a) Make public the Study Committee response; and**
> **(b) Hold a public hearing which shall include public consultations.**

[193] These (a & b above) must be done in accordance with the *Regulations*. *Regulation* 19(1)(a)(b) requires the response to be tabled at a public meeting no later than February 28th; and at least one (1) public hearing to be held no later than March 24th. Both of these were required to be completed in the year following the year the review was initiated. Both of these were complied with here.

[194] There is no set date in the *Regulations* as to when the Board members are to be given the response or when it is to be made public. As stated in **Potter**, a common sense approach to the circumstances of each case is required.

[195] From the evidence, there are certain facts which should be emphasized when addressing whether procedural fairness was met.

[196] The entire Report with Appendices was filed with the Board and tabled by the Board on February 1, 2012. Some but not all of the Board members were aware of the binders containing the attachments well before the Public Meeting on February 20, 2012. The Chair, for example, had seen the full Report shortly after it had been submitted on January 31st (Paragraph 58 of Sampson Affidavit). The Report itself made reference to the Appendices, which included summaries of the student surveys and comments.

[197] The community had significant involvement in the Committee's response. This was a main goal of the *Regulations*. A fairly comprehensive summary of the

"comment board" was described in the body under separate headings. The Petition was also summarized. All Board members were made aware of the binders by the February 21st email of Ms. Bona. Unfortunately, this was after the Public Hearing on February 20th. The Committee, in its presentation, made several references to the Appendices at that meeting, but that is not the point. It is clear that all Board members were aware and had access to the attachments, approximately two (2) weeks before the scheduled vote, on March 6th, 2012.

[198] The Record shows that the binders were on display at the Working Committee Meeting on February 22, 2012. Ms. Bona's letter stated they were "available for viewing in the Presentation Table". While the email was to the Board members, the meeting was also public. The Notice published by the Board of the March 6th meeting invited the public to "inspect and/or obtain a copy of all documentation". This included the WREC Study Committee's Report, as tabled on February 1st, 2012. A key issue is that certain aspects of the Report was not published on the Board's website, for privacy reasons.

[199] In **Potter**, the Court found in reviewing the previous *Regulations*, that the legislature considered public involvement in the school closure process desirable. Under the current *Regulations*, I find the legislature went a step further and considered public involvement to be imperative, and from a community perspective.

[200] I find that the test outlined in **Potter** is essentially unchanged. If there is any refinement, it would be whether both the parents, and the public were given a meaningful opportunity to present their case fully and fairly. What must be taken into account, is the circumstances of each case, and in particular the nature of any alleged breaches of the *Regulations*.

[201] In the case before me, I find, as was found in **Potter**, that the Applicants left no stone unturned, in their credible efforts to challenge this decision. I find further that the circumstances of the late disclosure of the Appendices, taking into account the vast amount of information provided and available, would have made little difference in the overall school closure process. Clearly, had the Board members not received the Appendices, that would have been different, but that was not the case. All Board members received them at least two (2) weeks before the meeting scheduled for the Board to vote on the school closures. Prior to that, they had the Report itself, which contained summaries of the attachments.

[202] In the end result, I find the Board had all of the information before it, for due consideration, that was intended by the *Regulations* in arriving at its decision to close WREC.

CONCLUSION

[203] While the process involved some imperfections, there has been reasonable compliance by the Board, sufficient to meet the purpose of the *Education Act and Regulations*.

[204] Closing a school is neither an easy or popular process. To some extent, procedural mis-steps are inevitable. Courts should be loathe to interfere with such decisions. Failing a serious breach, such decisions are better left to the officials elected for that purpose. The legislature made it clear, that decisions to close schools are legislative and not judicial decisions.

[205] Therefore, while it may be tempting for a Court to intervene to "save" a community school, the Court must show restraint.

[206] It would be wrong for the Court to intervene, by suggesting that the Board make two (2) or three (3) classrooms with split-grades, at HJM for example, simply because small schools can be a good thing.

[207] In these circumstances, it is beyond the role of the Court to substitute its decision for that of the Board. There are just too many factors which must be taken into account when deciding what is best to do, in managing a Board's resources.

[208] Once again, how a Board decides to manage its own resources should, in most cases, be their own decision. One may expect it will regrettably involve difficult decisions. The closing of a school is arguably, the most difficult decision a Board must make.

[209] It is somewhat ironic that the review process works best if the parents and the community at large are fully engaged in the process, which was the case here. This ensures a complete balancing of and full consideration of the issues.

[210] Two (2) of the issues which had to be considered in this decision were, whether the staff clarifications were an alteration to the process as defined by the *Regulations* and whether the initial Screening Process left too much room for inequality in the selection process. For example, in terms of inequality the Mulgrave and Pleasant Bay schools had higher costs per student, than did the schools selected.

[211] I am satisfied the Board's approach was both reasonable and inclusive. I say this knowing the tremendous effort the Applicants and their counsel, Mr. Boyd, put into this process, of which the Court Application was only a part.

[212] I am profoundly aware that if the school closure process was not well founded or well conceived, that Court intervention is required. Having considered the Record, the evidence, and written and oral submissions, the Board's decision has met the test of reasonableness.

[213] The Board's reasons as a whole with respect to each school can be said to support the decision. I am satisfied the Board had sufficient information, as contemplated by the *Regulations,* available to it in arriving at its decision.

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

[215] The Board's decision with respect to each school logically follows as one of the expected outcomes during the fifteen (15) month process, which process I conclude was a probing analysis.

[216] In my view, the Applicants were given a meaningful opportunity to present their case fully and fairly, with respect to the closure of both schools. As well, the community (the public) was given a full and fair opportunity to be involved in the school closure process as required by the *Regulations*.

[217] For all of the reasons contained herein, I see no reason to invalidate the Board's decisions. The Board's decisions therefore to HJM and WREC are hereby confirmed.

[218] In the result, the Application for *certiorari* to quash those decisions is hereby dismissed.

[219] Order accordingly.

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Murray, J.

APPENDIX "A"

Identifying public school for review

16 (1) For the purpose of identifying a public school under its jurisdiction for review, a school board must prepare an Identification Report containing data, statistics and any additional information supporting the reasons for identification, including all of the following:

(a) enrollment patterns within the school region for the current fiscal period and past 5-year fiscal periods;
(b) enrollment projections within the school region for the next 5-year fiscal period;
(c) general population patterns and projections within the school region for the past, current and next 5-year fiscal periods;
(d) factors relating to the physical condition of the public school, including all of the following:
    (i) its ability as a facility to deliver the public school program,
    (ii) facility utilization, including excess space,
    (iii) condition of the building structure and systems,
    (iv) costs associated with its maintenance and operation.

(2) An Identification Report may contain data, statistics or other information about any of the following:

(a) current municipal or Provincial plans for infrastructure development within the school region;
(b) the geographic isolation of the public school, if any, within the school region;
(c) factors relating to student transportation to and from the public school;
(d) proposed development, including residential or economic development, within the school region.

(3) An Identification Report must cite all sources of data and statistics and document the methodologies used in the creation of the report.

Subsection 16(3) added: N.S. Reg. 164/2010.

(4) No later than April 1 or, for the school review period commencing April 1, 2008, no later than April 30, a school board that has prepared an Identification Report must make the report available to the public.

Subsection 16(3) renumbered 16(4): N.S. Reg. 164/2010.
Section 16 replaced: N.S. Reg. 240/2008.

Impact Assessment Report

17 (1) On identifying a public school for review in accordance with Section 16, a school board must prepare an Impact Assessment Report in respect of the public school and table the Impact Assessment Report at a public meeting of its members no later than September 30.

Subsection 17(1) amended: N.S. Reg. 164/2010.

(2) An Impact Assessment Report must:

(a) be made in the form approved by the Minister;
(b) contain the Identification Report prepared under Section 16; and
(c) outline a comprehensive review of the potential impact of a school board decision to permanently close the public school that is subject to review, including data, statistics, and any additional information about all of the following:
(i) the capability of the public school to deliver the public school program,
(ii) any educational benefits to students of the public school that would arise from their attendance at another public school, including access to services and programs such as special services, particular courses and extra-curricular programs,
(iii) the time and distance involved in transporting students of the public school to another public school,
(iv) the ability of students of the public school to continue to access and participate in extra-curricular activities,
(v) the impact on any public school that might receive the students of the public school,
(vi) capital construction planning for the school region,
(vii) any property services efficiencies that would be gained,
(viii) the operational and capital requirements arising from maintaining the status quo,
(ix) any efficiencies in educational staffing that would be gained,
(x) the extent of community usage of the school over the last year,
(xi) any alternatives available to the community with respect to facilities available for community or regional use,
(xii) any other impact on the community.

Subclause 17(2)(c)(xiii) repealed: N.S. Reg. 164/2010.
Clause 17(2)(c) amended: N.S. Reg. 164/2010.
Section 17 replaced: N.S. Reg. 240/2008.

(3) An Impact Assessment Report must cite all sources of data and statistics and document the methodologies used in the creation of the report.
Subsection 17(3) added: N.S. Reg. 164/2010.