IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Comox Valley Citizens v. School District No. 71 (Comox Valley),*** 2008 BCSC 1071

Date: 20080806
Docket: S082767
Registry: Vancouver

In the Matter of ***Judicial Review Procedure Act,*** R.S.B.C. 1996, c. 241

Between:

Comox Valley Citizens for Better Education Society

Petitioner

And:

The Board of Education of School District No. 71 (Comox Valley)

Respondent

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Petitioner:	J.J. Arvay, Q.C. and E. Sigurdson
Counsel for the Respondent:	G.J. Litherland and K. Hune
Date and Place of Trial/Hearing:	20080618-20080619 Vancouver, B.C.

[1] Parents and other interested citizens have grouped together in the petitioner society to challenge the respondent School Board's decisions dealing with when children should leave elementary school for high school, the closure of two schools, a decision to redraw catchment area boundaries, and a sale or a disposition of a school property.

[2] The petition, which the petitioners sought to amend at the hearing, seeks the following relief in its proposed amended form:

1. the decision, by motion of the Respondent on October 23, 2007 that the District be reconfigured to a Kindergarten to Grade 7 and Grade 8 to Grade 12 model, be quashed and the matter returned to the Respondent for reconsideration including further consultation;

2. the school closure by-law regarding Village Park Elementary, passed by the Respondent on November 27, 2007, be quashed and the matter returned to the Respondent for reconsideration including further consultation;

3. that the January 15, 2008 boundary decision of the Board, to the extent that it renders or purports to render Cape Lazo School “empty of students”, be quashed;

4. the school closure by-law regarding Cape Lazo School, passed by the Respondent on May 15, 2008, be quashed and the matter returned to the Respondent for reconsideration including further consultation.

5. the motion passed by the Respondent on May 15, 2008 to proceed with the necessary steps to plan for the disposal of Cape Lazo School, be quashed;

6. an order prohibiting the Respondent from passing a by-law authorizing the disposal of Cape Lazo property, anticipated to be passed by the Respondent on or about June 24, 2008;

7. an order prohibiting the sale of the Cape Lazo School property until the matter is reconsidered by the Respondent; and

8. an interim order pursuant to s. 10 of the *Judicial Review Procedure Act* prohibiting the sale of the Cape Lazo School property pending hearing of this Petition.

[3] As to the amendments sought, only the third paragraph is seriously contested by the respondent.

[4] It is common ground that for all but the decisions surrounding sale and disposition of a school property, this court's supervisory jurisdiction extends only to the process followed by the respondent; the merits of the respondent's decisions are not open to review.

[5] As to the decisions surrounding the sale or disposition of the school property, the argument is whether the statutory requirements for such sale have been met.

[6] Throughout this judgment I will use the phrase “school property” as meaning real property used for educational purposes.

[7] The petition raises issues under five main headings. These are:

1. The process surrounding the decision to change the year after which students leave elementary school for high school (the reconfiguration decision);

2. The process surrounding the decision to close Village Park Elementary School (“Village Park”);

3. The process surrounding the decision to close Cape Lazo Middle School (“Cape Lazo”);

4. The lawfulness of the decision to dispose of Cape Lazo; and

5. Whether the petition should be amended to include the third prayer for relief set out above: "that the January 15, 2008 boundary decision of the Board, to the extent that it renders or purports to render Cape Lazo School 'empty of students', be quashed", and if the amendment is permitted, whether the relief sought should be granted.

BACKGROUND

[8] Prior to March 2007, School District No. 71 operated on what is termed a "two transition" model. That is to say, students entered elementary school at Kindergarten, and at the end of Grade 6 the students moved to middle school (the first transition). At the end of Grade 9 the students then progressed to high school (the second transition).

[9] This two-transition model was not however as cleanly delimited as the phrase suggests. Dr. Tinney's affidavit describes that, before a decision in March 2007 to adopt a single transition model, the district had 15 elementary schools that ended at Grade 6, one that ended with Grade 7, four middle schools that operated from Grades 7 to 9, one that operated with Grades 7 to 8, two secondary schools with Grades 9-12 and one with Grades 10-12 only.

[10] Although there had been some discussion about reconfiguring this educational model for some years, for the purposes of this application the discussion became more focussed in late 2006. That was when the School Board began to

consult with parents, the public and other interested groups over whether or not this two-transition model should change to a single transition model, by adjusting the years of elementary school and high school and eliminating middle school entirely.

[11] In March 2007, the Board made the decision to move from the double transition model to a single transition model. This decision did not please a number of people who were affected by it. The single transition model adopted was Kindergarten to Grade 8 (K-8), followed by high school from Grades 9 to 12 (9-12).

[12] The Board was assisted in arriving at this decision by a report from its superintendent, Dr. Tinney.

[13] Having made this decision, the Board then launched into a process to consider whether it should close any or all of six schools recommended for closure in Dr. Tinney's report. That process began in April 2007 and involved public consultation over the spring, summer and early autumn of 2007.

[14] During the school closure consultation process, some people who continued to disagree with the reconfiguration decision made in March attempted to use the opportunity presented by the closure consultation to reopen the reconfiguration debate. They were directed to the topic at hand, school closures, and were told that the reconfiguration issue was closed.

[15] On October 23, 2007 the Board resolved to change its reconfigured model from the K-8 model adopted in March 2007 to a model where children attended

elementary school from Kindergarten to Grade 7 (K-7), and then attended high school from Grades 8-12 (8-12).

[16] On November 27, 2007 the Board resolved to close three of the six schools under consideration and defeated the motion to close the other three schools. One of the schools to close as a result of this decision was Village Park, and one of the schools that escaped closure was Brooklyn Elementary School ("Brooklyn").

[17] At the same time, the Board resolved to initiate the school closure process for Cape Lazo.

[18] In mid-January 2008 the Board adjusted the catchment area boundaries which determine to a large extent the schools children will attend based upon their area of residence. One effect of that decision was that Cape Lazo was left with no catchment area, that is, no geographical area within which students would be expected to attend Cape Lazo.

[19] In the late spring 2008, and up to the time of hearing of the petition, the Board was taking steps to negotiate a sale of Cape Lazo to the area's francophone education authority, the Conseil Scholaire de Francophone ("CSF").

[20] The respondent requires, or at least it desires, the funds from the sale of Cape Lazo in order that it might renovate Brooklyn, one of the schools that escaped closure, to accommodate students and programs redirected to Brooklyn, partly as a result of the decision to reconfigure from a double transition to a single transition model, and partly as a result of the decision to close Village Park and other schools.

CHANGE IN RECONFIGURATION

[21] Issues that flow from the Board's decision to change its configuration from the K-8, 9-12 model to a K-7, 8-12 model include:

1. Does a duty of procedural fairness arise in the context of this decision?

2. If so, what is the content of this duty?

3. Was any duty owed by the Board breached in this case?

4. If there was a breach of a duty owed by the Board, what remedy should flow?

Does a duty of procedural fairness arise in the context of this decision?

[22] The duty of fairness arises where a decision is: 1) administrative in nature; and, 2) affects the rights, privileges or interests of an individual. See ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, at para. 20.

[23] The duty of fairness or the rules governing procedural fairness do not apply to a body that is exercising purely legislative functions. See ***Re Canada Assistance Plan***, [1991] 2 S.C.R. 525, at para. 60.

[24] I find that the rights, privileges or interests of individuals, whether they are parents, students, teachers or other staff employed in the respondent's schools were affected by the decision to change the line that divided elementary school from high school from the end of Grade 8 to the end of Grade 7.

[25] Whether the decision to change the configuration was administrative or legislative goes a long way to determining whether the process leading to the decision attracts a duty of fairness.

[26] It is worth bearing in mind that the decision to change from a two-transition model, where students passed through a middle school between elementary school and high school, to a single transition model, where students moved directly from elementary school to high school, was made in March 2007 after a process of broad consultation that had gone on since at least December 2006.

[27] This is significant because the petitioner argues that this earlier consultation process raised a legitimate expectation that affected persons would be consulted before the reconfigured model was changed. The petitioner says that the reconfiguration question was subject to a duty of procedural fairness from the outset, and, if it were not, the consultation process that surrounded the earlier decision led to a reasonable expectation of procedural fairness that then bound the Board when it later revisited the issue in October of 2007.

[28] The respondent argues that the ***School Act,*** R.S.B.C. 1996, c. 412 is a complete code, and that any jurisdiction the court might have had over questions of procedural fairness has been ousted by the statute, relying on ***B.C.T.F. v. British Columbia (Attorney-General)*** (1985), 23 D.L.R. (4th) 161 (B.C.C.A.).

[29] The court in that case held that a directive issued by the Treasury Board acting under general language found in the ***Financial Administration Act,*** S.B.C. 1981, c. 15, was not effective to override specific language in the ***School Act***. The

court said the ***School Act*** was a complete code governing staffing and compensation matters in the school system. I conclude that the ***School Act*** does not limit the court's jurisdiction to scrutinize a school district's administrative decisions for procedural fairness, where appropriate and necessary.

[30] Legitimate expectations cannot attach a duty of procedural fairness to a legislative decision. As was said in ***Sunshine Coast Parents for French v. Sunshine Coast School District No. 46*** (1990), 49 B.C.L.R. (2d) 252 (S.C.):

> An elected body may be charged both with administrative powers and with delegated legislative powers. The latter are not subject to the rule [of legitimate expectation], …

[31] A duty of procedural fairness may arise, however, if the elected body has adopted policies that require it to follow a particular process: in that event, the body may make itself subject to legitimate expectations. See, for examples ***Sunshine Coast*** at para. 20, and ***Czerwinski v. Mulaner,*** 2007 ABQB 536 at paras 29-32.

[32] The petitioner points to ***Pursell v. Coast Mountains School District No. 82,*** 2005 BCSC 365 as an example where a duty of procedural fairness attached to a school district decision to change from a 5 day instruction week to a 4 day week. In that case, as in previous litigation between the same parties (***Pursell v. Coast Mountains School District No. 82,*** 2004 BCSC 269), the duty was found to attach as a matter of interpretation of a section of the ***School Act*** and regulations made pursuant to it, and the scope and content of the duty was extrapolated from school closure cases.

[33] ***Pytka v. Halifax District School Board*** (1993), 124 N.S.R. (2d) 1 (S. C.) is not particularly helpful, as it was decided on the basis that a decision to amalgamate two schools should be treated as a decision to close a school, and that type of decision is subject to a duty of procedural fairness in British Columbia. ***Hardy v. British Columbia (Minister of Education)*** (1985), 22 D.L.R. (4th) 394 (B.C.S.C.) is another school closure decision of this court.

[34] On these authorities, I take it that a decision or action that would ordinarily not give rise to a legitimate expectation of procedural fairness, such as a legislative decision or action, may attract that expectation in two ways: first, if the body making the decision or taking the action has bound itself by a policy that creates the legitimate expectation; or, second, if the decision or action is subject to a statutory or subordinate legislative requirement that otherwise gives rise to a duty of procedural fairness.

[35] The respondent in this case had bound itself, at least insofar as any reconsideration of its earlier reconfiguration decision,¡ by its Board Procedural Bylaw 2002, the material part of which read:

> 6.8 A question previously dealt with will only be reconsidered if a Trustee gives notice that a motion to reconsider will be presented at the next regular meeting. The notice, complete with supporting documentation, must be given to all Trustees either in writing through the Secretary-Treasurer four days in advance, or with the agenda. A motion of the Board to reconsider must be passed by having a majority of all its members cast an affirmative vote. Provided the motion to reconsider is approved, the original question can be dealt with forthwith.
>
> 6.9 No motion other than to postpone consideration of a question, or a procedural motion, shall be repeated during the calendar year

> except by the reconsideration process. A motion to rescind a duly approved resolution shall follow the reconsideration process.

[36] The respondent fulfilled its obligations under this policy in that at the meeting of September 25, 2007 a trustee gave notice of a motion to reconsider the K-8 configuration at the next regular meeting (the date was misstated in the minutes, but nothing turns on that). The motion to reconsider was passed at the October 23 meeting before the Board turned to the reconfiguration question.

[37] In my view neither that notice, nor the Board's decision at its regular meeting in October to reconsider the configuration decision, required the respondent to begin an entirely new process of consultation. The respondent did what was required of it by its procedural bylaw, and no more was needed.

[38] The petitioner has not shown that the reconfiguration decisions were required to be subject to procedural fairness by the ***School Act***, any regulation made under it, or any Ministerial Order made under authority of the Act. Legitimate expectation does not arise from any statutory source in the context of this decision.

[39] I conclude that the reconfiguration issue is legislative rather than administrative, and it is best left to the legislative discretion of the respondent, in the same way as the decision surrounding French immersion in ***Sunshine Coast,*** at least before the impact of policies adopted by the school board in that case operated to impose the duty of procedural fairness.

[40] I do not overlook the argument that, by giving notice and engaging in consultation before making the original decision to change the district's configuration

from a two transition to a one transition model, a legitimate expectation was created. In my view, a body that chooses to give notice and to consult before exercising a legislative function does not bind itself to do so for every subsequent decision, nor for any variation of the decision on which notice and consultation have been given.

[41] I conclude that the process leading to the respondent's decision to change the reconfiguration from K-8, 9-12 to K-7, 8-12 was not subject to a duty of procedural fairness. The relief sought in the first paragraph of the petition is dismissed.

Closure process - Village Park

[42] One of the schools listed for potential closure in the spring of 2007 was Village Park. At its November 27, 2007 Board meeting, the Board passed first and second reading of a by-law to close Village Park.

[43] The process by which this decision was reached started at a regular Board meeting on April 24, 2007, when the Board adopted motions to initiate closure proceedings on six schools, Village Park included.

[44] The motion reads:

> It was regularly moved and seconded that the *Permanent School Closure Policy 3050* and *Board Regulation 3050 R1* be enacted for considering closure of Village Park Elementary School.

[45] The petitioner complains that the process followed between April and November 2007 was not fundamentally fair because it was premised on two assumptions that were later proved wrong:

1. That the grade configuration adopted in March 2007 would remain at K-8, 9-12; and

2. That if Village Park closed, children displaced by the closure would attend either of two other schools, one of which was Cape Lazo.

[46] The petitioner says that when the Board decided on October 23, 2007 to change its grade configuration from K-8, 9-12 to K-7, 8-12 and then decided on November 27 to close Village Park, leave Brooklyn open, and to initiate the closure consultation process with respect to Cape Lazo, the consultation process surrounding the potential closure of Village Park was rendered largely meaningless. This is because the parents of children affected by the potential closure of Village Park had responded, or not responded, in the expectation that some of their children would go to Cape Lazo, and none would be going to Brooklyn. Had the possibility that their children might attend Brooklyn, and not Cape Lazo been known, the petitioner argues that the affected Village Park parents might have responded in different ways, and might have brought about different decisions by the Board.

[47] The court's jurisdiction is confined to the process surrounding a closure decision, not the merits of that decision: see ***Civitarese v. Kootenay-Columbia School District No. 20***, 2003 BCSC 1275, para. 37.

[48] School closure decisions attract a duty of procedural fairness because they are largely administrative in nature, not legislative: ***Potter v. Halifax Regional School Board***, 2002 NSCA 88. In this case, the respondent has additionally bound itself to a duty of procedural fairness by adopting Policy 3050R1, which requires

public consultation before any final decision to close a school. That is stated to include full disclosure of all facts and information considered by the school board with respect to proposed school closures. The policy appears to comply with the minimal requirements set out by Koenigsberg J. in ***Mercer v. Greater Victoria School District No. 61***, 2003 BCSC 1998, at para. 93. This policy is also required by Ministerial Order 320/02, which obliges the respondent to "… develop and implement a policy that includes a public consultation process with respect to permanent school closures and this policy must be available to the public."

[49] The duty of fairness is aimed at seeing that statutory decision makers, including school boards, give interested persons a fair opportunity to participate in decisions that affect their rights, privileges or interests. See ***Baker v. Canada (Minister of Citizenship and Immigration)***, *supra,* at para. 28.

[50] The respondent established a committee for each of the six schools being considered for closure. That may have had the effect of focussing the attention of directly affected parents on particular schools that concerned them, at some expense to the broader picture, but the parents of children at Village Park, who were engaged in the process to determine whether or not that school should close, were also aware that a similar process was being followed with respect to Brooklyn.

[51] In my view, the duty of fairness was satisfied with respect to the process surrounding the decision to close Village Park. Those interested or affected had notice that the school might close and had ample opportunity to review the

information for and against closure and to make representations for and against closure between April 24, 2007 and November 27, 2007.

[52] That the motion to close Brooklyn was defeated on November 27, 2007 should not have come as a surprise to the parents of Village Park students or other interested parties. That had been a possibility since the closure process was initiated. Closure of one school was not dependent on closing another, in either appearance or fact.

[53] Whether or not the decision to alter the configuration model from K-8 and 9-12 to K-7 and 8-12, as opposed to the original decision to change to the single transition model, had any bearing on the decision to close Village Park is, at best, unclear. I have not been satisfied that there was sufficient connection between the two decisions or their processes, to support a finding of a defect so fundamental that it affects the very basis of the decision, the test set out in ***Cook v. Coquitlam School District No. 43*** 2007 BCSC 1229, at para. 52.

[54] The court's supervisory jurisdiction is limited, and the processes under review need not approach perfection. They need be adequate according to the factors set out in ***Baker*** and, in my view, the processes followed were adequate with respect to the decision to close Village Park. The relief sought in paragraph two of the Petition is dismissed.

[55] To the extent that the complaint over the Village Park closure process is influenced by, or influences, the situation with Cape Lazo, I shall deal with it in that context.

Closure process - Cape Lazo

[56] It is of no consequence to this decision that Cape Lazo was a middle school when this process started and would cease to be a middle school as a result of the reconfiguration process.

[57] The petitioner's complain that the decisions on October 23, 2007 and November 27, 2007 made it inevitable that Cape Lazo, which is a newer building, would no longer be required as an elementary school for some of the children displaced by the closure of Village Park. They also complain that the Board's decision to not close Brooklyn means that many of the children displaced from Village Park, will attend Brooklyn, which is an older school, and viewed as less desirable by many of the parents.

[58] The respondent Board began the process to consider the closure of Cape Lazo at its November 27, 2007 meeting.

[59] The impetus for that process was a report from the Superintendent, Dr. Tinney, which is dated October 31, 2007 but which he delivered to the Board in draft form on October 15, 2007.

[60] In that report Dr. Tinney stated that he had considered responses obtained through the school closures consultation process, and he then made several recommendations including: the configuration change from K-8, 9-12 to K-7, 8-12; that Village Park be closed; if the Board accepted his recommendation to change the

configuration to K-7, 8-12, Brooklyn Elementary not be closed; but, instead, the Board begin the process to consider closing Cape Lazo.

[61] The draft report was released to the public by a press release on October 16, 2007, and as already indicated, on October 23, 2007, the Board, at its regular meeting, voted to change the single configuration to K-7, 8-12.

[62] The petitioners complain that the October 23rd decision on configuration which led, according to Dr. Tinney's reasoning as set out in his report and recommendations, to the November 27 decision to leave Brooklyn open, led inexorably to the closure of Cape Lazo and that any consultation process surrounding the closure of Cape Lazo was a sham because the decision, if not already formally made, was by then a foregone conclusion.

[63] Adding to the petitioners' cynicism is the recommendation that once closed, Cape Lazo be sold and the proceeds of sale be used to fund renovations to Brooklyn which would be necessary if it were to remain open.

[64] Finally, the petitioners point to evidence indicating that one of the school trustees, as well as the Superintendent, referred to Cape Lazo as being “empty” or “closed” before the first meeting of the committee struck to review the proposal to close Cape Lazo. As well, an item on the agenda for the Board meeting of January 15, 2008, referred to Cape Lazo as being “empty”.

[65] On January 15, 2008 the Board redrew the boundaries of catchment areas relating to its various schools in such a way as to leave Cape Lazo with no

catchment area at all, thus confirming that there would be no potential student body available for Cape Lazo in the future. The first meeting of the Cape Lazo closure committee was scheduled for two days later.

[66] The petitioners argue that a necessary part of the duty of procedural fairness in relation to school closure is that the Board have an open mind, and that the consultation process is meaningful. To be meaningful, consultation must include the possibility that those expressing views have at least some opportunity to influence the outcome of a decision on which they are consulted.

[67] The respondent argues that a school empty of students is still a school and the fact that one or more decisions had left Cape Lazo with no immediate student body, did not mean that the Board had decided to close Cape Lazo.

[68] Section 73 of the ***School Act***, R.S.B.C. 1996, c. 412, reads:

> **73** (1) A board may
>
> (a) subject to the orders of the minister, open, close or reopen a school permanently or for a specified period of time, and
>
> (b) temporarily close a school building if the health or safety of the students is endangered.
>
> (2) The board may operate more than one school in a single building or location.

[69] School is defined in s. 1 as:

> **"school"** means

> (a) a body of students that is organized as a unit for educational purposes under the supervision of a principal, vice principal or director of instruction,
>
> (b) the teachers and other staff members associated with the unit, and
>
> (c) the facilities associated with the unit, ...

[70] I agree with the petitioners that, for the purposes of this issue, "school" is to be defined more with reference to its occupants, being students, teachers, and other staff, than with the physical shell in which the school is operated.

[71] That seems more in accordance with the reference in s. 73(1)(a) to a school which appears to be distinguished from the reference to a "school building" in s. 73(1)(b). Further, the fact that a board might operate more than one school in a single building according to s. 73(2) lends more weight to the petitioners' argument. This conclusion is also more in keeping with the definition of “school” in s. 1.

[72] It therefore seems to me that the decision to empty Cape Lazo of students, and to eliminate its catchment area was a *de facto* school closure, and that decision having been made prior to any meaningful consultation, there was a denial of procedural fairness.

[73] While Ministerial Order 320/02, as amended, might arguably be more concerned with the physical shell or, in its language, “school building”, it is not inconsistent with this interpretation when s. 2 is read in its entirety. In s. 2, permanent school closure takes its meaning from the use of the building, where it says “the closing, for a period exceeding 12 months, of a school building *used for*

the purposes of providing an educational program for students." [emphasis added] In any event, the Ministerial Order cannot operate inconsistently with the Act, including the definition in s. 1 and the provisions of s. 73 set out above.

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

[75] The by-law closing Cape Lazo is quashed.

Disposal of Cape Lazo

[76] As Cape Lazo has not been properly closed, any question of disposing of Cape Lazo seems premature.

[77] I should, however, deal with the issue in the event that my decision on the Cape Lazo closure procedure is overturned.

[78] Neither party approached this issue on the basis of procedural fairness. Instead, each argued it as a matter of statutory interpretation, and I will deal with it in the same way.

[79] Section 96(3) of the Act reads:

> **96** (3) Subject to the orders of the minister, the board may dispose of land or improvements, or both.

[80] The respondent points to Ministerial Order 233/07, dealing with the disposal of land or improvements. That order defines “surplus property” as property “not required by a board for educational purposes”, states in s. 4 that a board must not dispose of surplus property other than in accordance with the process set out in the Ministerial Order, and requires in s. 7(a) that a board's by-law (the only valid way in which a board can resolve to dispose of school property) must include a confirmation that the board will not require the property for future educational purposes.

[81] The evidence appears to be that at the time of this hearing, the Board's decisions to keep Brooklyn open but to renovate it to accommodate a change in grade configuration and an increase in the number of students, has created a short-term difficulty, being where to put students during the renovation process. That has led the Board to contemplate using Cape Lazo for approximately a year during the renovations to Brooklyn.

[82] At the same time, the Board is negotiating the sale of Cape Lazo to CSF. Dr. Tinney deposes that the proceeds of that sale will be used to fund renovations to Brooklyn.

[83] I understand that the Board proposed to pass the by-law authorizing the disposition of Cape Lazo to CSF just after the hearing of this petition, but to postpone the transfer of possession for approximately one year, while the renovations of Brooklyn are concluded.

[84] I agree with the petitioners that this means that Cape Lazo continues to be required by the Board for educational purposes, at least for another year, and cannot

therefore be “surplus property” within the meaning of the Ministerial Order, nor could the Board properly confirm in a bylaw authorizing its disposal that it “will not require the (Cape Lazo) property for future educational purposes,” as is required by s. 7(a) of Ministerial Order 233/07, at least at this time. Cape Lazo is thus not available for sale or disposition.

[85] But the petition seeks an order quashing the resolution, passed by the respondent May 15, 2008, according to Dr. Tinney. Although the minutes showing the actual resolution are not in evidence, the agenda for the meeting states that the recommendation to be voted on is:

> THAT management proceed with the necessary steps to plan for the future disposal of Cape Lazo Middle School (Facility Code: 7171057) as per our Policy 8041R1, Disposal of Assets

[86] S. 1 b) of the policy referred to states:

> The Board will consider whether or not the asset will meet any future educational needs of the district. If the property is not required for future educational purposes, a Board motion will be passed to proceed with disposition.

[87] While planning for the disposal of Cape Lazo may be premature, and the effort may be wasted, I am not persuaded that I should interfere with the processes of the respondent to the extent sought in paragraph 5 of the prayer for relief. In any event, I do not find that a motion instructing management to plan for future disposal of a school is in this case contrary to statute, Ministerial Order or any other provision having similar force.

[88] Had it been necessary, I would have denied this prayer for relief.

SCHOOL DISPOSAL BY-LAW

[89] The petitioner asks that the court prohibit the respondent from passing a by-law authorizing the disposal of Cape Lazo. Such a by-law was anticipated at the time of hearing, and I do not know if it has been passed since the matter was reserved for decision.

[90] The decision on closure makes this claim moot, as was the last claim dealt with. In any event, I would require far more than I have been shown, in evidence or argument, before I would use the authority of the court to prevent an elected body from exercising the legislative jurisdiction delegated to it.

[91] Had it been necessary, I would have denied this prayer for relief.

Application for amendment

[92] The petitioners seek to add to the petition a claim for declaration that the January 15, 2008 boundary decision, to the extent that it leaves no students available for Cape Lazo, should be quashed.

[93] The respondent argues that this application, coming as it did at the hearing of the petition, is too late, causes too much prejudice, and if the amendment is allowed and the declaration sought granted, will cause great mischief to the respondent's catchment area boundaries generally.

[94] The respondent also says that an adjournment to deal with the prejudice caused if the amendment is granted is not realistic in these circumstances as the

respondent needs to know where it stands as soon as possible. Perhaps more important, the parents of affected students need to know where their children will be going to school The respondent's planning for the 2008-2009 school year, decisions about staffing and a myriad of other decisions may be affected by the outcome of this petition.

[95] In this, I agree with the respondent.

[96] The petitioners have known of the catchment area boundary decision since January 15, 2008. If its significance to other arguments raised by the petitioners was not fully appreciated until just short of the hearing, that is a consequence which I think it most appropriate that the petitioners bear, rather than the respondent.

[97] Additionally, the impact of the change in catchment area boundaries has been considered elsewhere in these reasons, and it appears to me that to permit this adjournment at this stage would cause more prejudice to the respondent than is warranted in the circumstances.

[98] The application to amend is denied.

[99] I will hear the parties on costs, if the respondent disagrees that the ordinary rule, which would see the petitioners recover costs here, should apply.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston