COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39,* 2025 BCCA 160

Date: 20250516
Docket: CA49560

Between:

Queen Elizabeth Annex (QEA) Parents' Society

Appellant
(Petitioner)

And

Board of Education of School District No. 39 (Vancouver), Conseil scolaire francophone de la Colombie-Britannique, and Attorney General for British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Dickson
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2023 (*Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39*, 2023 BCSC 2123, Vancouver Docket S231314).

Counsel for the Appellant:	M. Charles
Counsel for the Respondent, Board of Education of School District No. 39 (Vancouver):	G. Litherland K. Sandulescu L. McClanaghan
Counsel for the Respondent, Conseil scolaire francophone de la Colombie-Britannique:	M.C. Power J.E. Laxer C.J. Rusko N.J. Isaac E.C. Lapper
Counsel for the Respondent, Attorney General of British Columbia:	

Place and Date of Hearing:	Vancouver, British Columbia January 15-16, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 16, 2025

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Justice Dickson
The Honourable Justice Edelmann

Summary:

An elementary school providing French immersion education to around seventy students from kindergarten to grade 3 was closed, and the site leased to the francophone school board. An organization comprised of interested parents sought judicial review of those decisions. Its petition was dismissed. On appeal, it argues that the chambers judge erred in finding that the decision was procedurally fair and reasonable, and in ordering costs against it. It argues that by attending workshops on the public consultation process undertaken in making the closure decision, the Board contravened the requirements in the School Act that meetings be open to the public. It also argues that the decision was unreasonable because the true rationale was an improper attempt to secure funding from the Province, which had tied funding to the disposition of school sites in order to transfer them to the francophone school board, and other reasons that were not rational or coherent. Finally, it appeals the cost order made against it in the underlying petition, which was based partially on it advancing arguments of bad faith, submitting that the litigation here is akin to public interest litigation, which should be protected from cost awards.

Held: Appeal dismissed. The appellant has not shown error in the chambers judge's conclusions that the school closure decision was not discussed or debated at the workshops. The workshops therefore did not deprive the public from observing a material part of the decision-making process. They were not meetings under the School Act. The chambers judge also correctly found that the decision to close and dispose of the school site was reasonable. It was entirely appropriate for the Board to consider the funding incentive provided to it by the Province, which was in turn motivated by court orders requiring the province to take action to assist the francophone school board in securing school sites. This was not an improper rationale, and it was not hidden from the interested parents and other stakeholders. The decision as a whole was coherent and rational and justified in light of the factual and legal constraints. Finally, costs orders are highly discretionary, and the appellant has not shown any error that would require appellate intervention. The appellant itself requested costs of the hearing. Although it was given an opportunity to make submissions on costs, it did not. In an earlier application for an injunction, the appellant was put on notice of the lack of merit of many of its claims. It chose to continue its spurious allegations of bad faith. The analogy to public interest litigation falls short. Although the cost award is significant, there is no basis to set it aside.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The closing of a school will often have a significant impact on students, families, neighbourhoods, and communities. However, sometimes a school must be closed in order to advance the learning opportunities for the students in the community as a whole.

[2] The Queen Elizabeth Annex ("the QEA") is a small school located on the west side of Vancouver, built in 1964, and operated by the Board of Education of School District No. 39 (Vancouver) ("the Board"). Since 2012 the QEA operated as a fully French Immersion school for grades kindergarten to grade 3, after which the students who wished to continue with French Immersion transferred to Jules Quesnel ("JQ"), a school located a kilometer away. The QEA is not a seismically safe school. Its age and deteriorating condition mean it is not worth repairing.

[3] On June 6, 2022, the Board approved the permanent closure of the QEA and on April 11, 2023, declared it as surplus. Since September 2023, the Conseil scolaire francophone de la Colombie-Britannique ("the CSF") has leased the QEA from the Board and has established a French-language school for s. 23 rights holders under the *Charter of Rights and Freedoms* Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ("the *Charter*").

[4] The appellants, the Queen Elizabeth Annex Parents' Society (the "Society"), sought judicial review of the decisions to close the school and declare it surplus.

[5] The claim sought a declaration that the decision to approve the permanent closure of the QEA (Bylaw 2022) was unreasonable, contrary to the *School Act*, R.S.B.C. 1996, c. 412 ("the *Act*") and ministerial orders and/or was made in bad faith. It claimed that the Board failed to comply with mandatory ministerial orders that governed the process and consultation leading to the adoption of the 2022 closure bylaw; that the Board breached the rules of procedural fairness and natural justice during the mandatory consultation process leading to the adoption of the 2022

closure bylaw; and that the decision made on 11 April 2023 declaring the QEA as "surplus" was unreasonable.

[6] The judicial review was dismissed on December 1, 2023 with costs ordered against the Society. The Society appeals the dismissal of the review of the closure order and the costs order.

[7] I would dismiss the appeal for the following reasons.

Background

[8] The chronology of the events leading to the school closure and the decision declaring the QEA surplus reaches back over 17 years.

[9] In 2008 the Board put forward a proposal to close the QEA, sell the property, use the funds to renovate University Hill School, and build a new school at the University of British Columbia. The CSF expressed an interest in the QEA. After a protest by parents, the QEA remained open and has been used solely for French Immersion instruction as of 2011. The background is set out in the reasons of Justice Russell in *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education),* 2016 BCSC 1764 at para. 3603; affirmed 2020 SCC 13 ("the Russell decision)".

[10] In 2009, École Élementaire Anne-Hébert was acquired by the Province and transferred to the CSF. That school is in the Killarney area of Vancouver.

[11] In 2016, a second attempt was made to close the QEA and other schools due to falling enrollment. A public outcry ensued, and the Board decided not to close any schools. The Province fired the Board Trustees on October 17, 2016.

[12] Justice Russell's decision was released on September 26, 2016. She found that the government failed to sufficiently fund the CSF. She concluded that the Province did not have the power to compel school boards to transfer land. Of significance, she found that the west side of Vancouver needed French language schools, as the minority francophone education was inadequate and contrary to

s. 23 of the *Charter* (paras. 14 and 6834(i)). She determined that the province is constitutionally obligated to assist the CSF with its negotiations with school boards to help it obtain a site to construct its school: at paras. 6353–6356.

[13] In April 2018, a report by Partnership BC, a government agency, highlighted the QEA and another school as potential sites for the construction of the CSF's school.

[14] In 2019 a third attempt to close the QEA occurred. The students, who by this time were comprised of grades K-3 in the French Immersion program, could be accommodated at JQ, which is the French immersion school the students would transition to after completing grade 3. On September 23, 2019, the Board voted in favour of considering closing the school. The Board received a statement from the then Minister of Education, Rob Fleming, stating "If the [Board] is able to consult, gain support and transfer the QEA to become a new public francophone school for French-speaking rights holders in the City of Vancouver, [he] will have an opportunity to bring forward to government a new school at Olympic Village utilizing contributions from the [Board], the Ministry and the City." The QEA Parent Advisory Council opposed the closure and on October 28, 2019, the Board decided not to proceed with the closure. In response, the CSF issued a notice to mediate in a November 2019 letter addressed to the Chair of the Board, "to try to further negotiations surrounding the use of school facilities in Vancouver, west of Granville Street, including the Queen Elizabeth Annex."

[15] In March 2020, Mr. Fleming outlined the Province's position in the Legislature stating:

> We have spent a year looking at an ideal site for a francophone public school on the west side of Vancouver. That's what the court said our ministry must do. We worked for a year with the Vancouver school board, and the best site we could identify was Queen Elizabeth Annex. Why was it the best site? It was geographic location. It was cost. It's also a school that's underutilized. It has currently 68 students. It was only built for 150. It was an annex overflow school from years and years and years gone by, and it's a seismically unsafe school. So, it became an ideal site to deconstruct that school and build a brand-new one.

> We would compensate the school district for that, and those funds would be largely unrestricted for the district to invest in other priorities. Olympic Village would be their number one priority, I would presume, because they sent it to the ministry as their number one priority six months ago, in July 2019.

[16] On December 21, 2020, the CSF started an action seeking, among other things, an order that the Board promptly transfer the QEA site to the CSF in compliance with the Russell decision.

[17] In 2021 the building of the Olympic Village school was announced, however, the Board required funding that was not immediately forthcoming from the Province.

[18] In January 14, 2022, parents were advised that the QEA had been identified for closure at the end of the 2022-2023 school year, and that a report recommending the closure pursuant to Policy 14 (the "Staff Closure Report") would be presented at a special meeting of the Board scheduled for January 17, (which it was). Policy 14 set out the public consultation process. Notice was given to all the parents and guardians of students at the QEA, as well as those attending JQ and the Queen Elizabeth Elementary ("QEE"), both of which would be absorbing the QEA students. The report set out seven bases for the closure of the QEA, three of which were related to the CSF:

i) adoption of a long-range facilities plan, to manage its facilities more efficiently and effectively;

ii) improving the French immersion and general elementary school experience by moving the QEA students to the K-7 classes at JQ, avoiding the mid-elementary school transition to JQ;

iii) savings of between $150,000 to $300,000;

iv) seismic safety: the QEA is not a seismically safe school, but JQ has been seismically upgraded;

v) the CSF's November 2019 notice to mediate;

vi) the CSF's December 2020 notice of civil claim; and

vii) the generation of revenue for capital priorities: "should the Board make the decision to close the [QEA] they could then make the decision to dispose of the [QEA] site to the [CSF]. This would generate significant capital revenue for the board to allocate to enhance projects …". Included in the priorities was the Olympic Village school.

[19] The Board commenced a comprehensive consultation process, which included:

i) The Board retained Delaney and Associates Inc. ("Delaney") to assist with the planning and organization of the public consultation process;

ii) On February 10, 17, March 7 and 8, 2022, District staff and/or Delaney met with parents and other stakeholders to seek input on the process;

iii) On March 28, 2022, Delaney held one of two "workshops" to brief the Board on the public consultation process;

iv) On April 5, 11 and 25, 2022, all Board families received emails with the subject line "Vancouver School District seeks feedback about the recommendation to close Queen Elizabeth Annex", attaching a fact sheet about the possible closure of the QEA. The emails set out feedback opportunities including completing an anonymous survey, sending emails to "engage@vsb.bc.ca", which was a designated email account that would be shared with the Board, and attending virtual community dialogue sessions;

v) Between April 19 and 28, 2022, five community dialogue sessions were held via Zoom. Each meeting accommodated up to 25 participants and lasted approximately 90 minutes. A number of the QEA parents provided input. The sessions were not with the Board trustees, but with Delaney

and Board staff. A PowerPoint slide show was shown setting out the reasons for the closure of the QEA;

vi) On April 19, 2022, a public delegation Board meeting was held. Members of the public, including a number of the QEA parents, presented to the Board on the proposed closure of the QEA;

vii) On May 25, 2022, Delaney conducted the second "workshop" to brief the Board on the report it had prepared;

viii) On May 27, 2022, the Delaney report, a 123-page report summarizing the input gathered from the community dialogue sessions, emails and survey was released publicly;

ix) On May 30, 2022, the Board considered the Delaney Report at a public meeting; and

x) On June 2, 2022, the Board held a special meeting for the purposes of public consultation. Members of the public, including the QEA parents, presented to the Board on the proposed closure of the QEA.

[20] The meetings were live streamed on the Board's YouTube channel. A video of the meeting was posted online for later viewing. The Delaney report was posted to the Board's website, along with a summary of email submissions received during the consultation process, and a link to the YouTube video of the June 2 special meeting.

[21] On June 6, 2022, the Board voted on the motion to close the QEA. The motion passed with six votes in favour and three against. Each Board member explained the reason for their vote. Trustee Wong explained that it was a difficult decision, but ultimately the needs of the entire Vancouver School Board community, equity of resource allocation, achieving funding for an Olympic Village school, seismic safety, and the CSF's action all favoured closing the school. Trustee Chan-Pedley cited the fact that the disposition of the QEA appeared to be necessary to achieve funding for an Olympic Village school, and given that position she felt

compelled to do what she could to provide for the whole of the district. Trustee Gonzales cited declining enrolments, the need to take a holistic and equitable approach to the district as a whole, and the Board's need to fund new schools. Trustee Ballantyne agreed with the points raised by Trustees Wong and Gonzalez. The Board Chair, Trustee Fraser, cited facilities and resources across the district. Trustee Cho also cited the need to responsibly allocate resources across Vancouver, as well as the district's structural deficit.

[22] On June 23, 2022, the Board advised the QEA parents that beginning September 2023, their children would be relocated. It is worth noting at this juncture that the QEA was not a catchment school. The French immersion program it offered was a "choice program" that drew from the entire district. Of the 52 children remaining at the QEA (K-2 as the grade 3's would transition to JQ in any event), 41 were relocated in the French Immersion program at JQ, and 11 went to other French immersion schools, left the district, or went to the QEE. Now, only the children who were in kindergarten in 2022 remain as "ousted" students, as the rest would have transitioned out of the QEA.

[23] On December 8, 2022, the Society (the petitioner/appellant) was formed in order to bring this litigation. On January 13, 2023, the QEA parents were advised that "the Board has made the decision to begin an engagement process, as per Board Policy 20, to consider the potential declaration of the site as surplus to the educational needs of the District." The petition was filed on February 23, 2023. The Surplus decision was passed on April 22, 2023.

[24] On June 9, 2023 Justice Crerar refused to grant an injunction to the Society (2023 BCSC 990), however, the CSF agreed not to change anything that would interfere with a remedy should the Society be successful in having the Board's decision reversed. The Board leased the QEA site to the CSF as of September 2023, and has since been operating a school at the site.

[25] On December 1, 2023 Justice Gomery, in chambers, upheld the decisions of the Board on the judicial review and ordered costs against the Society in favour of

the Board and the CSF in reasons indexed at 2023 BCSC 2123. The Province did not seek costs.

Reasons of the Chambers Judge

[26] The issues raised before the chambers judge by the Society were that the procedure was unfair, the decision was unreasonable, and the Board acted in bad faith. The respondents submitted that the petition should be dismissed because of the delay in bringing it. The Society raised a number of issues with the consultation process and the Board's closure decision. It raised six allegations of procedural defects with the consultation process: (1) the workshops were private meetings, contrary to ss. 65–73 of the *Act*, which requires that meetings of the Board be held in public; (2) the Board received and relied upon information that was not publicly disclosed; (3) the Board failed to hold a public consultation meeting as required; (4) alternatively, if the June 2022 meeting was the public consultation meeting, the Board failed to give notice of the meeting; (5) the Board failed to conduct the meeting in accordance with requirements in its policies; (6) overall, the Board failed to provide the public a fair opportunity to make meaningful representations opposing closure. The Board and the CSF argued that the petition should be dismissed because of the delay in bringing it before the court.

[27] Of these, the only ground that has been raised on appeal on the issue of procedural defects is (1), that the workshops held in March and May were in fact secret meetings where the Board discussed the closure decision. The Society also contends that the closure decision was unreasonable.

[28] The chambers judge found that the workshops were not meetings of the board because no discussion or debate of the closure decision occurred at those meetings. He found that the applicable test was from *Southam Inc. v. Council of the Corporation of the City of Ottawa* (1991), 5 O.R. (3d) 726 (Div. Ct.) at 731, 1991 CanLII 7044, which asks: is the public being deprived of the opportunity to observe a material part of the decision-making process?

[29] The chambers judge concluded that the workshops provided the Board with information about the process for public consultation, and did not deal with the substance of the closure decision. As such, holding the workshops did not deprive the public of an opportunity to observe a material part of the decision-making process.

[30] The chambers judge found that the closure and surplus decisions were reasonable. He analyzed the reasons provided by different trustees at the public meeting, as well as their press releases after the decision. The reasons for closing the school were partially related to the higher than average per student operating costs and partially related to an offer from the province to provide funding for a new school in Olympic Village, if the QEA were closed and offered to the CSF.

[31] The Society alleged that the latter rationale was improper, because the *Act* requires the Board to be guided by the best interests of students. The chambers judge disagreed. He found that in considering funding availability for a new school in an under-resourced location, the trustees were balancing complex, competing community interests, which they were entitled to do.

[32] The Society argued that the surplus decision was not factually justified because the Board relied on information about declining enrollment that was inaccurate, given there was another staff report that indicated that enrollment in the District had modestly risen after the Covid-19 pandemic. The chambers judge found that that information did not make it unreasonable for the Board to rely on the overall negative trends in enrollment presented to them.

[33] The Society alleged that the closure decision should be set aside because it was made in bad faith. This submission was based on the supposition that the Province wrongfully incentivized the QEA closure by withholding funding to open a school in Olympic Village unless the QEA was closed, and that this secret agenda was hidden from parents. The chambers judge found that this arrangement was not hidden from parents, who in fact referenced it in their presentations at public meetings, and it was not wrongful, as it was implementing a judicial decision in

favour of the CSF requiring the Province to work to make school locations available to it.

[34] Finally, the chambers judge ordered that the Society pay ordinary costs on Scale B to the Board and the CSF, as a result of advancing meritless allegations of bad faith.

Issues on Appeal

[35] The Society raises three issues on the appeal. It submits that the judge erred in: i) concluding that holding the two workshops was not a breach of procedural fairness; ii) concluding that the closure decision was reasonable; and iii) ordering costs against the Society.

Position of the parties

The Society

[36] The Society argues that the chambers judge erred in finding that the workshops were not meetings under the *Act*. It submits that when all members of a committee are summoned to attend a scheduled gathering, that constitutes a meeting under the *Act.* It further contends that any ambiguity or lack of information about what transpired at the workshops should be interpreted against the Board.

[37] The Society also submits that the chambers judge erred in finding that the closure decision was reasonable. It submits that the Board kept the true reason for its decision (which it alleges was a quid-pro-quo with the Province for funding) secret, and advanced false rationales, which were themselves "irrelevant, misleading, or predicated on wrong information." In particular, it takes issue with statements by staff that the QEA had a relatively high operating cost, that seismic safety was a concern (as it argues that other schools were also seismically unsafe), or that enrolment was declining.

[38] Finally, the Society argues that the chambers judge erred in awarding costs against the Society, because he failed to weigh the litigation conduct of all the parties and failed to consider the public interest nature of the proceedings. It submits

that its argument that the closure decision was made in bad faith was not made for an improper purpose nor did it take up an inordinate amount of time. It points to other parties' actions in the court below that it says delayed the proceedings and should have been considered by the chambers judge. Finally, the Society argues that it should have been protected from a costs award because it did not advance its claim out of an economic interest, and the litigation raised important issues which extended beyond the immediate interests of those involved.

The Board

[39] The Board submits the workshops were not meetings as that term is used in the *Act*. It says that the Society's argument overlooks the chambers judge's findings of fact that no decisions were made at the workshops, the trustees did not discuss or debate whether the QEA should be closed, and neither workshop was material to the substance of the decision at hand. It submits that the chambers judge did not make a palpable and overriding error in finding those facts. Those findings were supported by the available evidence: affidavit evidence from an attendee, emails about the workshops, and a copy of the PowerPoint presentation that was presented at the workshops. Gatherings where no usual business is discussed, no decisions are made, and matters are not moved materially along are not meetings.

[40] Second, the Board argues that the chambers judge dealt extensively with the Society's arguments about the statements of staff on operating costs, seismic safety and enrolment data, and held that the focus of his inquiry was not on the rationale put forward by staff, but that put forward by the decision makers themselves. The chambers judge's task was not to closely scrutinize every closure rationale provided by staff, but to look at the reasons provided by the trustees and determine whether *those* reasons were based on an internally coherent and rational chain of analysis that is justified by the relevant facts and law. The Board further argues that the closure decision was reasonable: the CSF litigation was an appropriate concern for the trustees to consider, it was not hidden from parents or the public, and it was only one factor that the trustees who voted in favour of closure cited in their decision.

[41] Finally, the Board submits that the costs award should not be set aside because costs awards are highly discretionary, the Society has not identified an error in principle, the Society itself sought costs in the proceeding below (and again on this appeal), and there was no evidentiary basis for the Society's bad faith claim.

The CSF

[42] The CSF advances substantially similar arguments on the definition of "meetings" and the reasonableness of the closure decision as the Board.

[43] It adds that the QEA is now closed, and its former students have already been transferred to a nearby, seismically safe French immersion school. It submits that this Court should not grant any remedy that would result in the closure of the only school in Vancouver, west of Granville Street that offers French first language education protected by s. 23 of the *Charter*.

[44] The CSF points out that the Society did not make cost submissions below, so the chambers judge cannot be faulted for not accepting arguments that the Society never made.

The Attorney General of British Columbia

[45] The Attorney General of British Columbia ("AGBC") appropriately takes no position on the merits of the appeal. It outlines the role of the Province vis-à-vis the CSF. It points to its duty under s. 23 of the *Charter* to assist the CSF in its efforts to acquire suitable sites, including in Vancouver west of Main Street. It notes that the Province must also comply with the courts' long-standing declarations. Those obligations, coupled with the Province's role in funding capital projects, make it both necessary and appropriate for the Province to actively support the CSF in its negotiations with the Board. It submits that this active assistance properly included attempting to incentivize the Board to consider transferring the QEA to the CSF by offering to support the Board's request for capital approval for the Olympic Village school. It notes the comments in the Russell decision, at para. 5766, where the court

said, "[s]itting idly by when the CSF needs assistance does not meet the Province's duty to do whatever is practical in the circumstances."

Discussion

Standard of review

[46] The parties agree on the applicable standard of review. This Court steps into the shoes of the petition judge and decides whether they identified the correct standard of review and applied it appropriately. The standard of review on the issue of procedural fairness is correctness (sometimes termed "fairness"). The standard of review of the closure decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 23; *British Columbia (Police Complaint Commissioner) v. Sandhu*, 2024 BCCA 17 at paras. 65–68; *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 57. The Society submits that although the chambers judge identified the correct standards of review, he erred in applying those standards.

[47] In addition, the CSF submits that deference is owed to the chambers judge's findings of fact in relation to the issue of procedural fairness, citing *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, 2023 BCCA 342 at paras. 58, 60.

[48] The standard of review with respect to the costs order is highly deferential: *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39 at para. 126. This Court will only interfere with a costs order if the judge below misdirected themselves on the applicable law, erred in principle, ignored or misapplied a relevant factor, made a palpable error in assessing the facts or came to a decision so clearly wrong that it amounted to an injustice: *Gichuru v. Purewal*, 2021 BCCA 91 at paras. 13–14.

Legislative and policy framework

Closure process

[49] The sections of the *Act* relevant to the closure process read as follows:

> Board is a corporation

65 (1) The trustees elected or appointed under this Act for each school district and their successors in office constitute a board of education for the district and are continued as a corporation under the name of "The Board of Education of School District No. 5 (Southeast Kootenay)", or as the case may be.

(1.1) A board is responsible for the improvement of student achievement in the school district.

[…]

(5) A board may exercise a power with respect to the acquisition or disposal of property owned or administered by the board only by bylaw.

[…]

Establishment and closure of schools

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

[…]

Jurisdiction of minister

168 (2) The minister may make orders for the purpose of carrying out any of the minister's powers, duties or functions under this Act and, without restriction, may make orders

…

(p) respecting the opening and closing of schools under section 73 (1) (a),

[50] The Ministry of Education has enacted a ministerial order for school closures:

Closure of Schools

3 (1) In this Ministerial Order, closing a school permanently means the closing, for a period exceeding 12 months, of a school building used for purposes of providing an educational program to students.

[…]

Closure of Schools by Board

4 (1) The board must develop and implement a policy that includes a public consultation process with respect to permanent school closures and this policy must be made available to the public.

(2) When considering closing a school permanently, the board must apply the policy referred to in subsection (1).

5 (1) The public consultation process must include:

> (a) a fair consideration of the community's input and adequate opportunity for the community to respond to a board's proposal to close the school permanently;
>
> (b) consideration of future enrolment growth in the district of persons of school age, persons of less than school age and adults; and
>
> (c) consideration of possible alternative community use for all or par of the school.
>
> 6 The power of a board to permanently, close a school under section 73 of the *School Act* must be exercised only by bylaw.
>
> […]
>
> 9 If the Minister makes an order designating for transfer to a francophone education authority land that is owned by a board in fee simple, the board must follow the policies and procedures for school closure established by the Minister.

[51] The Board also established policies, two which are relevant to this appeal.

[52] Policy 14 relates to school closures. It sets out a consultation process when the permanent closure of a school is being considered. The process begins by a staff recommendation that must be communicated to affected school communities, and may consider program offerings; space available at nearby schools; distances between schools; traffic and travel patterns and safety of access for students being relocated; current and projected enrolment levels; class size; funding formula considerations; age of the building and operating costs, including the need for seismic upgrades; and other relevant factors. The Board then considers that information and either concludes that no further action is required or forwards the information to the Facilities Planning Committee, which in turn provides a recommendation to the Board. If the Board decides to move forward with the process by passing a motion at a public meeting, a public consultation process begins. The Board must allow a period of 60 days for public consultation. It must make available the rationale for the proposed school closure, including providing information on the factors set out above. It must hold at least one public consultation meeting during this time.

[53] Policy 20 relates to the disposal of lands. It similarly requires a public consultation process that considers future enrolment growth in the district, alternative community use of the surplus space, and the community's input on the Board's plan.

Meeting process

[54] The *Act* deals with meetings of the Board as follows:

> Quorum
>
> 66 A quorum of a board is a majority of the trustees holding office at the time of the meeting of the board.
>
> Meetings and chair
>
> 67 (1) After the general local election of trustees in a school district, the secretary treasurer for that school district must convene a first meeting of the board as soon as possible and in any event within 30 days from the date that the new board begins its term of office.
>
> (2) At the meeting convened by the secretary treasurer under subsection (1), the board must elect a chair and may elect a vice chair from among its members.
>
> (3) A board must meet as often as is necessary to transact its business and in any event not less than once in every 3 months.
>
> (4) A majority of the board may elect a new chair or vice chair at any time.
>
> (5) A board must establish procedures governing the conduct of its meetings and must permit any person to inspect those procedures.
>
> (5.1) Without limiting subsection (5), a board may establish procedures respecting the provision of advice by a district parents' advisory council to the board.
>
> (6) A board may allow trustees to participate in or attend a meeting of the board by telephone or other means of communication if all trustees and other persons participating in or attending the meeting are able to communicate with each other.
>
> (7) If a trustee participates in or attends a meeting of the board by telephone or other means of communication as provided under subsection (6), the trustee is to be counted for the purposes of establishing a quorum.
>
> Passage of bylaws
>
> 68 (1) Before it is passed, a bylaw of the board must be given 3 distinct readings.
>
> (2) Subject to subsection (3), at each of the readings of a bylaw, the bylaw must be read in full.

(3) A reading of a bylaw may, if a written or printed copy of a bylaw is in the possession of each trustee and is available to each member of the public in attendance at the meeting at which the bylaw is to be read, consist of a description of the bylaw by

(a) its title, and

(b) a summary of its contents.

(4) The board may not give a bylaw more than 2 readings at any one meeting unless the members of the board who are present at the meeting unanimously agree to give the bylaw all 3 readings at that meeting.

Attendance of public and secretary treasurer at meeting

69 (1) Subject to subsection (2), the meetings of the board are open to the public.

(2) If, in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting.

(3) Despite subsection (2), the secretary treasurer or another employee designated by the board under subsection (4) must be present at the time that a decision of the board is rendered and must record any decision.

(4) If the secretary treasurer is unable to attend a meeting or if the meeting concerns the work performance or employment of the secretary treasurer, the board may designate another employee of the board to attend the meeting in place of the secretary treasurer to perform the duties of the secretary treasurer at the meeting.

[…]

Minutes

72 (1) The minutes of the proceedings of all meetings of the board must be

(a) legibly recorded in a minute book,

(b) certified as correct by the secretary treasurer or other employee designated by the board under section 69 (4), and

(c) signed by the chair or other member presiding at the meeting or at the next meeting at which the minutes are adopted.

(2) Except for minutes of a meeting from which persons other than trustees or officers of the board, or both, were excluded, the minutes must be open for inspection at all reasonable times by any person, who may make copies and extracts on payment of a fee set by the board.

(3) A board must prepare a record containing a general statement as to the nature of the matters discussed and the general nature of the decisions reached at a meeting from which persons other than trustees or officers of the board, or both, were excluded, and the record must be open for inspection at all reasonable times by any

> person, who may make copies and extracts on payment of a fee set by the board.

Procedural fairness

[55] All parties agree that the principle of procedural fairness applies to the Board's decisions. What is required to satisfy the duty of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 1999 CanLII 699 at para. 21). Administrative decisions are made using a "fair and open procedure, appropriate to the decision … with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (*Baker* at paras. 22, 28 and 30).

[56] In *Vavilov* at para. 77, the Court said this with regard to the issue of procedural fairness:

> [77] …The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74?75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21….

[57] In *Baker*, the Court addressed the role of participatory rights in the context of procedural fairness:

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> …

> 28 The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.
>
> …
>
> 30 At the heart of this analysis [in relation to participatory rights] is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly…

Procedural fairness in the context of school disclosure

[58] In *Ross v. Avon Maitland District School Board,* [2000] O.J. No. 5680, 2000 CanLII 22817 (ON SC), considering an injunction application in the context of a school closure, Justice Heeney said:

> 28 It is well established that it is not open to the court to consider whether the decision of the Board to close SDHS was right or wrong, wise or foolish. The central consideration is whether the Applicants were treated fairly or unfairly in the decision-making process: *Fisher Park Residents Assn. Ltd. v. Ottawa (City) Board of Education* (1986), 1986 CanLII 2569 (ON SC), 57 O.R. (2d) 468 (Ont. H.C.).
>
> 29 The duty of fairness includes the obligation to give those persons affected by a decision such as this an opportunity to be heard. Public consultation is a condition of a valid decision to close a school: *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 1992 CanLII 7675 (ON SC), 9 O.R. (3d) 737 (Ont. Div. Ct.). A mere *pro forma* opportunity to present their views will not suffice. Instead there must be "meaningful participation in the actual decision-making": *Bezaire* (supra) at p. 753.

[59] The scope of judicial review in the context of school closures is limited. Justice Koenigsberg explained in *Mercer v. Greater Victoria School District No. 61,* [2003] BCJ No 3097, 2003 BCSC 1998, 130 ACWS (3d) 229 at para. 90, citing *Ross*:

> [90] It must be emphasized that the scope of judicial review in these circumstances is narrow. In *Ross v. Avon Maitland District School Board*, [2000] O.J. No. 5680 (Sup. Ct. Just.) at paragraph 2, that Court explained the role of the Court in the following terms:
>
> > It is not within our power to second guess the financial and political decisions of elected officials who act within their legal jurisdiction. The merits of the Seaforth School closing, the rightness or the wrongness of these decisions are issues of community concern, finance, and politics beyond the limited reach of this

> unelected court. It is not for the court to say whether the decision to close the school is right or wrong. The narrow mandate of the court is to inquire whether the school closing is authorized by law, whether there was adequate public consultation as required by law, and whether the decision is taken through a process that is procedurally fair.

[60] In *Mercer*, the question posed was whether the Board's implementation of its policy in relation to the consultation process was fair (para. 89). Justice Koenigsberg concluded that fairness required that the affected parties be afforded timely disclosure of relevant information and a full opportunity, in the circumstances, to develop and present their viewpoints, such that they have had a legitimate opportunity to attempt to influence the Board's decision (para. 93).

[61] In *Cook v. Board of School Trustees of School District No. 43 (Coquitlam)*, 2007 BCSC 1229, Justice Dickson (as she then was), also relied on *Ross* to affirm that the merits of the decision to close a school are "not the business of the court" (para. 43). Justice Dickson also noted that the petitioner seeking to set aside a school closure order bears a heavy burden. Not only must a procedural defect be established, but that the defect was "so fundamental that it affects the very basis of the board's decision" (para. 52).

[62] Successful judicial reviews of school closures are rare. Only two successful cases were cited in this appeal: *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), 1992 CanLII 7675 (ON SC), 94 DLR (4th) 310 (ONDC) and *Comox Valley Citizens v. School District No. 71 (Comox Valley),* 2008 BCSC 1071. Neither of those cases are analogous to the present circumstances. In both, there was no consultation process whatsoever. In *Bezaire*, affected parents and students only learned of the decision to close nine schools from media reports after the decision was made. In *Comox*, the board redrew catchment areas to deprive the school of eligible future students and avoid the consultation rules for school closures. The decision was "a *de facto* school closure" made "prior to any meaningful consultation": at para. 72.

Was the decision to close the QEA procedurally unfair

[63] The Society says that the Board did not follow proper or fair procedure when it held two "workshops" that were not open to the public. The parties agree that Board meetings are required to be open to the public, subject only to s. 69 which allows that meetings be private if "the public interest so requires," which is not engaged here. The question raised is whether the events that occurred on March 28 and May 25 were meetings or correctly described as workshops. While meetings are required to be open to the public, workshops are not.

[64] The leading decision in terms of defining "meetings" and the one all parties agree establishes the correct test, is *Southam Inc. v. Hamilton Wentworth (Regional Municipality) Economic Development Committee (Ont. C.A.),* 66 O.R. (2d) 213, 1988 CanLII 4709. The majority said:

> Upon these facts, I have no difficulty in finding that what took place on September 26th was a meeting of the Economic Development Committee. The by-law gives no definition of "meeting" but Black's Law Dictionary, 5th ed. (1979), at p. 886 reflects common parlance when it defines "meeting" as: "... an assembling of a number of persons for the purpose of discussing an acting upon some matter or matters in which they have a common interest ...". In the context of a statutory committee, "meeting" should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction. And that is precisely what was being done on that occasion. No matter how the meeting might be disguised by the use of terms such as "workshop", or the failure to make a formal report, the committee members were meeting to discuss matters within their jurisdiction. What the committee was trying to do was to have a meeting in camera, something expressly forbidden under the by-law.

[65] Subsequently, in *Southam Inc. v. Ottawa (City) Council*, [1991] 5 O.R. (3d) 726, 1991 CanLII 7044, the Divisional Court considered what constituted a meeting, and said this:

> The respondents then suggested that the fact that the Calabogie events were not substitutes for regularly scheduled meetings was pivotal. However, it would appear that this is rather a question of looking at the essence of the events. Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed: for example, the prayer to commence the meeting or the seating of councillors at a U-shaped table. Neither should it depend entirely on whether the meeting takes place commencing at 2:30 p.m. on the first and third Wednesday of a month or is in

> substitution for such a Wednesday meeting. The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?
>
> [Emphasis added.]

[66] The Society takes issue with the fact that the chambers judge did not refer to *Hamilton Wentworth*, however a judge does not necessarily commit reversible error for failing to refer to every decision that touches on an issue. The chambers judge did quote and correctly relied on *Southam v. Ottawa*.

[67] The determination of whether the duty of procedural fairness has been properly applied turns on the context and the factual matrix in which the decision was made. The chambers judge made the following critical findings of fact, which are reviewable on the palpable and overriding error standard:

> [42] On March 28 and May 25, 2022, a majority of the trustees were briefed by Delaney at what were termed "workshops". This was consistent with an established practice of the Board through which trustees are informed of matters in advance of their formal meetings. In an affidavit, Mr. Nelson describes the practice as follows:
>
> > 5. From time to time the Board holds workshops for trustees so they can obtain information or briefings on certain matters. In some instances, the trustees are informed of District programs (such as food services, support for vulnerable students, learning programs for special needs students, or new educational programs). Sometimes, a workshop will be scheduled to brief the trustees on a content-heavy report or document before it is made public. This is so they can be ready to discuss and debate matters at a public Board meeting and make more considered and informed decisions.
>
> [43] Minutes are not kept. Workshops are not identified as meetings of the trustees on the Board's website. Mr. Nelson's evidence is that no board business is transacted and no decisions are made at workshops.
>
> [44] At the March 28 workshop, Delaney's principal, Jessica Delaney, made a presentation on the proposed communications and engagement plan for the public consultation on the proposed closure of the QEA. At the May 25 workshop, Ms. Delaney made a presentation on the contents of Delaney's report on the public consultation process. The day prior, Mr. Nelson circulated the report under cover of an email advising the trustees that discussion should be limited to the consultation process and report's

findings, and the closure should not be discussed at the workshop. He stated:

> As it is important that trustees 'keep [an] open mind' up until the June 6 Special Board meeting, when you will be making a decision regarding the proposed closure of QEA [,] [d]iscussion at this workshop will be limited to the engagement process and findings. The proposed closure itself will not be discussed, as this discussion should occur in public at the June 6 Special Board meeting.

[45] The petitioner submits that the workshops were, in truth, clandestine and illegal meetings of the trustees. The argument is that the workshops were meetings because they were gatherings of a quorum of trustees held in furtherance of the Board's consideration of the closure proposal, and they were illegal because the Board can only meet privately if it has determined formally that the public interest requires a private meeting, and no such determination was made. Moreover, when a private meeting is held, minutes are still required and none were kept.

[46] It is possible for a Board or a municipal council to veer, stumble or drift into illegality by overlooking or outright ignoring its statutory responsibilities to carry on business publicly and with all due formality; *Aitken v. Lambton Kent District School Board,* [2002] O.J. No. 3026, 163 O.A.C. 148 (Div. Ct.) at para. 38; *City of Yellowknife Property Owners Assn. v. Yellowknife (City)*, 49 M.P.L.R. (2d) 65, 1998 CanLII 6961 (N.W.T.S.C.) at paras. 16–19 and 25. On the other hand, an oral briefing of trustees, without more, need not necessarily be characterized as an illegal meeting; *Vanderkloet v. Leeds & Grenville County Board of Education* (1985), 51 O.R. (2d) 577 at 586-587, 1985 CanLII 1976 (C.A.), leave to appeal to SCC ref'd (1986), 54 O.R. (2d) 352 (S.C.C.); and *Metchosin (District) v. Metchosin Board of Variance,* 1992 CarswellBC 632, 1992 CanLII 499 (B.C.S.C.) at 16–17. It is necessary to draw a line. In *Southam Inc. v. Council of the Corporation of the City of Ottawa* (1991), 5 O.R. (3d) 726 (Div. Ct.) at 731, 1991 CanLII 7044, speaking for the Court, Farley J. suggested the following test:

> The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?

[47] I accept the test stated by Farley J. in *Southam*. In my view, it strikes a proper balance between competing considerations. On one hand, the formal statutory requirements that the Board act through resolutions passed at meetings, that there be a record of the meetings, and that the meetings be open to the public unless there is a formal determination that the public interest requires otherwise, serve an important public purpose. The trustees

> are elected officials exercising authority in respect of important matters. As counsel for the Attorney General put it, they possess substantial autonomy. Trustees must make inherently controversial decisions, school closures among them. It is important that their decisions be recorded and made in a manner that is susceptible to public scrutiny. On the other hand, trustees have a difficult job and should be afforded some flexibility in how they tackle it. Their time is limited. It is reasonable and appropriate for trustees to want to be briefed in advance of a meeting, and an oral briefing is sometimes more efficient and informative than a stack of written materials.
>
> [48] Applying this test, I find that the oral briefings at 'workshops' on March 28 and May 25, 2022, did not deprive the public of an opportunity to observe a material part of the decision-making process. No decisions were made. The trustees did not discuss or debate whether QEA should be closed. The March workshop discussed the process for public consultation. The May workshop reported on the results of the public consultation process facilitated by Delaney. Public consultation was a means of ensuring that the Board was properly informed, and the public was given a full opportunity to have its say. Neither workshop was material to the substance of the decision at hand. Accordingly, the workshops were not meetings contemplated by ss. 65–73 of the *School Act.*

[68] The Society says that the conclusions made above at para. 48 are legal conclusions, not factual ones, or alternatively raise questions of mixed fact and law. It says that, at the end of the day, this Court can evaluate the affidavits and the record and make a different determination with respect to whether what occurred were meetings. It submits that there is no need to find a palpable and overriding error. Alternatively, it submits that there is an extricable error of law, in that the facts together cannot by themselves lead to the conclusion that what occurred was a workshop and not a meeting. In addition, it submits that it was an error in law to conclude that these were workshops as there is a gap in the evidence in terms of what occurred on the two dates. Thus, there is no evidentiary foundation to make the finding.

[69] After a thorough review of the material before him, the chambers judge, at para. 48, stated his findings of facts that are relevant to the conclusion and then stated the conclusion. The chambers judge accepted that nothing was done at the workshops to move the Board materially along the way in terms of their decision-making, and thus, the public were not deprived of the opportunity to observe a material part of the decision-making process. Those are findings of fact that he was

entitled to make on the evidence before him, which he reviewed at length. Could the Board have turned on the YouTube channel and broadcast the workshop? It could have. However, there is nothing in the evidence (or lack thereof) to suggest that what occurred was anything beyond what it purported to be — a discussion of the process for the public consultation and learning the results of the public consultation facilitated by Delaney. Indeed, Mr. Nelson took pains to ensure that there was no discussion by the trustees of the decision to be made.

[70] The Society needs to show that the chambers judge made a palpable and overriding error in terms of his findings of fact in order to successfully challenge the decision on the basis of procedural fairness. It has not done so. It has not identified a legal error.

[71] I add, parenthetically, even if the Society were right, that this Court could review the evidence and substitute our opinion for that of the reviewing justice, I would have come to the same conclusion. In my view, the evidence supports the finding that both of the oral briefings were workshops and not meetings.

[72] I would not give effect to this ground of appeal.

Reasonableness review

[73] In a reasonableness review, the only role of the court is to determine if the rationale for the decision and the outcome are unreasonable (*Vavilov* at para. 83). The Court in *Vavilov* noted that a reasonable decision, which is based on a consideration of the context and whole of the decision, is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." Such a decision will be granted deference (paras. 85 and 97).

[74] At para. 100 of *Vavilov*, the Court emphasized:

> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

> justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[75] Significantly, at para. 102, the Court reminded us that the reasonableness review is not a "line-by-line treasure hunt for error." The Court went on to say:

> However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56.

[76] In other words, the decision must "add-up" (para. 104), be internally coherent (para. 105), comply with the underlying statutory scheme (para. 108) and must consider the evidentiary record and general factual matrix and be reasonable in light of those circumstances (para. 126).

The relevance of s. 23 of the *Charter* and the CSF

[77] As noted above, the context in which the decision was made is relevant. Here, one of the considerations was the fact that the QEA was the best choice for the CSF to provide francophone education, a constitutionally protected right for s. 23 rights holders.

[78] Section 23 of the *Charter* preserves minority language rights and provides:

> 23 (1) Citizens of Canada
>
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

[79] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at para. 15, upholding the Russell decision, the Court set out the purposes of s. 23:

> [15] I would add that in conducting the analysis under s. 23, a court must bear in mind that this section has three purposes, as it is at once preventive, remedial and unifying in nature. It is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities (*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 3; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 27). Dickson C.J. explained this remedial purpose by reproducing the comment of Kerans J.A. that "the very existence of the section implies the inadequacy of the present regime" (*Mahe*, at p. 363). In the face of this "inadequacy of the present regime", s. 23 was thus designed to alter the status quo. Finally, the section also has a unifying purpose in that it accommodates mobility by enabling citizens to move anywhere in the country without fearing that they will have to abandon their language and culture (*Solski*, at para. 30; *House of Commons Debates*, vol. 3, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286).

[80] The CSF is the school board responsible for delivering public funded minority language primary and secondary school instruction in British Columbia pursuant to the *Act* and guaranteed by s. 23 of the *Charter*. The trustees are elected and represent the s. 23 language rights holders in British Columbia. The Province also has responsibilities to deliver minority language rights in this province.

[81] In the Russell decision, the judge required the Province to do "whatever is practical" to actively assist the CSF to find and secure facilities and it cannot remain passive or neutral (paras. 6329–31 and 6347). Justice Russell found that the Province should incentivize agreements between majority language boards and the CSF including by linking the approval of majority language board capital projects to transfers of surplus sites and facilities to the CSF. Courts in this province have repeatedly found breaches of s. 23 rights, in large part, due to a lack of sites to build schools: Justice Willcock in 2012 (upheld 2015 SCC 21) and Russell J. (upheld 2020 SCC 13).

[82] On February 13, 2023, Bill 22-2022, the *School Amendment Act*, *2022,* S.B.C. c. 20 s. 1 was brought into force, adding a new Division, 1.1 — the Transfer

of Land to Francophone Education Authority to Part 7 of the *Act*. This amendment gives the Minister the power to transfer school board land to the CSF. The power has not yet been utilized.

[83] The Society submits that "the Board has an overarching statutory mandate to enable all learners to become literate, to develop their individual potential to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society…". Yet, the Society appears to argue that the needs of the francophone students, who have a constitutional right to French language education, and the students in the under-resourced Olympic Village area are not covered by the same mandate, or are secondary, to the children in grades K-3, in a French Immersion non-catchment school.

[84] The Board did not focus solely on the needs of those students, although they correctly considered their needs. The Board also outlined the other issues with the QEA, such as it was expensive to operate, that the children could be accommodated at JQ if they wished to continue with French immersion, and that QEA is seismically unsound.

[85] The chambers judge's reasons for finding the decision reasonable are concise and complete, and I can do no better than to repeat and adopt them:

> [133] The petitioner's focus on the rationales for the closure put forward by district staff is mistaken. The issue is not whether all of staff's arguments for closure were correct or reasonable. The issue is whether the Board's reasons for closure are based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrained the Board. In my view, the reasons satisfy this test.
>
> [134] The trustees' reasons for closing QEA are intelligible and coherent. They make sense. I reject the petitioner's submission that the Conseil's lawsuit and the Province's support for the Conseil's acquisition of the QEA site were irrelevant considerations. Both considerations bore on the potential financial implications of the closure for the district, and it would not have been open to the trustees to overlook them.
>
> [135] The trustees' difficult task is to manage the district's resources – buildings and grounds, budgets, and staff – for the provision of schooling to all the school-age children in the district. Section 74(1) of the *School Act* states:

> 74 (1) Subject to the orders of the minister, a board is responsible for the management of the schools in its school district and for the custody, maintenance and safekeeping of all property owned or leased by the board.

The trustees' reasons manifest an understanding and appreciation of this task.

[136] The clear and overriding theme of the majority trustees' reasons, variously expressed, is a concern with "equity of resource allocation" (Wong), providing "for the whole of the district" (Chan-Pedley), "the financial and operational well being of the district as a whole" (Gonzales), "considering our facilities and resources across the district" (Fraser), and being "responsible in the allocation of resources across Vancouver" (Cho). The law requires such an approach.

[137] There was a clear basis in the information provided to the Board for it to conclude that the costs of operating QEA were relatively high. The petitioner accepts that, on a per-student basis, they exceeded the average per-student grant from the Ministry. It just says that the excess cost was modest, when supplements and special grants are considered. That the net cost saving from closing QEA might be modest, especially in the context of the Board's overall budget, does not mean that it was irrational or unreasonable for the Board to take that cost saving into account.

[138] That closing other schools might have resulted in greater cost savings was neither here nor there. The Board was not considering proposals to close other schools. The proposal to close QEA was supported by various considerations, some of which would not have been engaged by proposals for other school closures.

[139] The trustees do not appear to have relied to any significant degree on staff's suggestion that being in a bigger school would be better for students. They did not decide to close QEA on the basis that enrollment or interest in French immersion was declining. It was open to the trustees to rely on facts and data submitted to them by district staff, so long as they remained open to additional facts and opposing viewpoints.

[140] Nothing in the reasons suggests that the majority trustees closed their minds to the arguments presented to them by parents opposing closure. It is evident that they were paying close attention. For example, Trustee Wong is persuaded that the QEA closure might well lead to overcrowding at Jules Quesnel, and views this possibility as a problem that would have to be addressed. He accepts the parents' argument in this regard, but does not accord it conclusive weight. In various ways, the majority trustees acknowledge the passion, commitment and intelligent arguments of the parents opposing closure. It is simply that they are not persuaded by them.

[141] To reiterate, this was a policy-driven and highly discretionary decision requiring a balancing of complex, competing community interests. It was the trustees' responsibility to make it. Approaching the decision with appropriate deference, as I must, I cannot say that it was substantively unreasonable. The closure decision should not be set aside.

[86] The members of the Board who voted in favour of the closure of the QEA made the decision transparently, after a substantial consultation process in accordance with the applicable legislation and Board policies and appropriately considered the circumstances and the factual matrix in relation to the allocation of resources across the district.

[87] In my view, it cannot be said that the decision of the Board to close the QEA was unreasonable.

[88] I would, therefore, dismiss the appeal in relation to the decision to close the QEA.

Costs appeal

[89] The chambers judge ordered that the Society pay costs to the CSF and to the Board on the basis of advancing meritless allegations of bad faith. The AGBC did not seek costs. The judge recognized that cost awards are uncommon in judicial review proceedings.

[90] Cost orders are "quintessentially discretionary", and the standard of review is highly deferential (*Nolan*, at para. 126). This Court will only interfere with an order for costs if the judge erred in principle, ignored or misapplied a relevant factor, or came to a decision so clearly wrong that it amounts to an injustice (*Gichuru*, at paras. 13–14).

[91] The Society recognizes that cost orders are discretionary, but submits that in these circumstances, the order of costs amounts to an injustice. It submits that it did not have an opportunity to make submissions on costs, expecting there to be a costs hearing. Counsel for the Society consulted with the respondents regarding making further submissions on costs. However, before that could occur, the Society retained new counsel, who opted to appeal the decision rather than pursue further submissions before the chambers judge.

[92] The Society submits that the bad faith aspect of the petition and argument was a small part of the argument and ordering costs for the entire proceeding was excessive and unjust as there were many applications with differing successes.

[93] The Society submits that it raises important issues akin to public interest litigation. It has no pecuniary interest in the litigation. The litigation was not frivolous or vexations. It says these reasons all support not ordering costs against it (citing *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner),* 2005 BCCA 368 at para. 8).

[94] The Society sought costs against the respondents in its petition. It pleaded bad faith in the petition alleging dishonesty against the Board staff, partiality, and a conspiracy between the Province, the Board and the CSF (see paras. 35–41 of the pleadings). It persisted with its allegations that the Board was not truthful and not impartial in its decision-making. It argued before the chambers judge that there was a "common design" between the Board, the Province and the CSF to close the QEA, and that the Board hid that there was essentially a "quid-pro-quo" for closing the QEA and receiving funding from the Province for the Olympic Village school.

[95] The findings with respect to the issues of bad faith are found in the reasons at paras 157 to 169. The chambers judge soundly rejected all of the allegations of bad faith finding that there was no evidence to support the allegations, and indeed, there was evidence to contradict the submissions made by the Society.

[96] The Board sought costs from the Society at the hearing, in part, because of the allegations of bad faith. The Society did not make submissions before the chambers judge, but it is clear that there was an opportunity to do so. Written submissions of the Board to the chambers judge clearly seek costs.

[97] In addition, the Society was aware that its case had difficulties when Justice Crerar concluded that it did not meet the test for an injunction. Despite that, the Society continued casting aspersions against the three respondents, which the chambers judge concluded were without merit. Indeed, the parties had a court

ordered constitutional duty to address the issue of schools for the s. 23 rights holders.

[98] Although the costs order is significant, I do not see a reversible error in the chambers judge's decision. In light of the serious and unfounded allegations made against the respondents, in my view, the decision is not so clearly wrong that it amounts to an injustice.

[99] I would dismiss the appeal against costs.

Conclusion

[100] I would dismiss the appeal from the judicial review and the costs order.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Edelmann"