

School Closures in Ontario: Who has the Final Say?

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Abstract

This paper uses Foucaultian theory of governmentality as a conceptual lens to view school closings in Ontario. Governmentality relates to regulations, rules, systems, and procedures that allow governments to exercise control in society. Based on a critical review of select court cases, the paper argues that boards have substantial power to close down schools provided they satisfy the spirit of their own closure policy and ministry regulations. The paper concludes that boards need more legitimization to make closure decisions, given the conflictual nature of such decisions. Legitimization role of community members may be found in a participatory model of policy-making.

Introduction

School boards close down schools permanently for a variety of reasons such as inadequate funding, escalating operating costs, dwindling enrolment rates, or uninhabitable buildings. School boards, however, are obliged to comply with the principle of procedural fairness and the Ministry of Education regulations on school closure before carrying out any closure decisions. In most cases, the affecting communities do not simply stand aloof while school boards close down their schools. Most of these communities normally mount legal battles and political resistance to challenge closure decisions. For example, the trustees of Lakehead District School Board in Ontario have voted to close down Gorham and Ware Community School in Thunder Bay. (Save Gorham and Ware School, n.d.). As a result, the community has mobilized legal, political and financial resources for a show down with the school board. As well, a community in Barrie, Ontario, has engaged in a legal battle with the Simcoe County School Board over its decision to close down King Edward Elementary School (See Simcoe County District School Board, n.d.).

Newspapers in Ontario were constantly filled with numerous school closings prior to the coming of the liberal regime in 2002. Even with the liberals in power, sporadic news about school closings are still reported in the major newspapers in the province. Recently, an Ontario group called People for Education has reported that between 1991 and June 2005, 311 schools will have closed, 275 schools will have closed since 1999, and 36 more will be closed at the end of 2005. This situation raises serious concerns about the fate of public education in Ontario, particularly communities that are experiencing declining populations. Perhaps this prompted the liberals on their assumption of power in the province to put a moratorium on school closings until a new regime of school closure guidelines are put in place (Ontario Ministry of Education, 2005; Chatham Sun, Dec. 17, 2003).

Often communities affected by school closures perceive closure decisions to be unfair, making school closure one of the toughest decisions to make in education administration (Colton & Hull 1983; Cibulka, 1983). Community members' sense of fairness seems to

be informed by their own experiences and personal characteristics such as sex, age, race, education, income and liberalism (Tyler, 1988). Community members' sense of fairness of school closure may also be influenced by standing (Wemmer, 1998). Standing, as Wemmer (1998) defines it, is based on the recognition people receive as important members of a community. For instance, communities perceive schools as belonging to them as one community member said at a Toronto District School Board (TDSB) meeting to discuss school closures,

You have allowed staff to paint a scarlet letter under the name of this school. It is too old, too small, too working class for you to respect its value to its neighbourhood. You behave as though schools belonged to elected officials and not to the community" (Quoted in Basu, 2004, p.428).

The above quote is indicative of tension that usually arises between school board officials, who have been given the legal as well as administrative authority to run the schools, and communities that perceive themselves to be the real owners of schools. Communities as "real owners" of schools feel that it is the management (i.e. school board officials) that has to listen to them rather than the vice versa. Consequently where community members felt that their voices have been marginalized, they may construe a school closing decision as unfair.

School boards are locally constituted autonomous bodies created by the Education Act of the province for the purpose of determining what education programs should be designed, how they should be delivered, and the resources (financial, physical, and human) required to carry out these responsibilities. Conceptually, the organizational structure of Ontario school boards take two distinct but organically related forms: the administrative and democratic. The administrative or bureaucratic component consists of the day-to-day operations of the boards carried out by professional people employed for that purpose. The democratic form, on the other hand, has to do with communities electing trustees to represent their interest at the board policy-making level. These two orientations of school boards led Greene (1992) to characterize board governance in two ways: the professional and political model. According to Greene (1992), when a board operates as a professional organization, the school superintendents by virtue of their expertise are the key decision-makers and the board serves as a communication conduit between the superintendents

and the public. In contrast, when a board operates as a political entity, administrators, board members, parents, and community groups participate in school governance. The distinction between the two governance models is crucial, in that the former (professional) model is more likely to lead to protracted conflicts in school closure decisions (See Cibulka, 1983).

However, it should be noted that the provincial government as the creator of school boards can also reduce their numbers, strip off some of their powers, or cut down the number of trustees. For example, the *Ontario Fewer School Boards Act (1997)* reduced the number of school boards in the province from 168 to 87. Similarly, under the *Education Funding in Ontario (1997)*, the government at that time removed the power of school boards to levy property taxes in their jurisdictions and transferred that power to the municipalities. Prior to this system change, the boards were responsible for levying the property taxes and the municipalities were in charge of collecting them on behalf of the boards. In the same period, the government reduced the number of trustees and based the trustee representation on the number of pupils enrolled in each board's schools (Ontario Ministry of Education, 2000).

Since boards follow the tenets of representative democracy, communities do not participate directly either in developing or implementing policy decisions. In accordance with the traditions of representative democracy, communities are expected to act through their representatives, the trustees, to influence board level decisions. As Justice Kennedy stressed in Selch v. Fort Garry School Division No.5 (1991), "If the board decided wrongly and in disregard to the legitimate concerns of the community, the affected citizens can and should resort to the only means left at their disposal and that is to exert public pressure, and ultimately to express their disapproval in the ballot box". Nonetheless, boards directly consult members of communities after a closure decision has been made. Usually in most school closures, the affecting communities rely less on their trustees and more on their own resources (political, financial, and symbolic) to influence board school closure decisions.

In view of the limited power of communities to influence school closure decisions, I will argue that school boards in Ontario have a substantial administrative authority to make school closure decisions, provided they follow the spirit of their own closure policies and that of the ministry regulations on school closure. Once these are complied with, boards have the freedom to implement closure decisions, regardless of the concerns or dissatisfaction of communities or neighbourhoods affected by those decisions.

This paper is organized into seven sections. The first section discusses the conceptual framework of the paper, followed by a discussion of the Ministry of Education regulations on school closure, both the old and the new. The new ministry school closure regulations aim at addressing some of the weaknesses of the old regulatory regime. The third section discusses the impact of school closures on communities. The objective of this section is to draw attention to school as part of a community's life and that its closure is likely to have a negative effect on the community. The fourth section focuses on the rule of procedural fairness and participatory rights that have historically dominated school closure cases in the courts. The fifth section summarizes and discusses several school closure cases, particularly the decisions of the trial judges. The sixth section discusses how school boards could enhance their legitimization role as an administrative and democratic agency responsible for making school closure decisions. In this section, a few participatory models are described and their salient benefits to communities discussed. The last section concludes that the traditional methods of community involvement in school closure make boards the final decision-makers.

Conceptual Framework

This paper uses Foucaultian notion of governmentality as a conceptual prism through which school closure decisions are viewed. Governmentality is concerned with the form of political rationality used to justify public decision-making in a liberal democracy.

Foucault (1991), the originator of the theory of governmentality, wrote:

Governmentality is the ensemble formed by institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific, albeit complex form of power, which has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security (p.102).

As it applies to school closure decisions, governmentality is a technology that the provincial government uses to control or regulate population, groups and individuals in order to run the education system to achieve its various political or economic goals. It is therefore, similar to ruling from a distance or remote-control, by which school boards as an agency of the government executes their functions. This may help the government to attain its educational agenda. While the provincial government may bear the wrath of communities affected by school closure decisions, school boards bear much of this wrath because of their frontline position as direct providers of public education.

In an early article on governmentality, Miller and Rose (1990) state: “government draws attention to the diversity of forces and groups that have, in heterogeneous ways, sought to regulate the lives of individuals and conditions within particular natural territories in pursuit of various goals”(p.3). Consequently, modern, neo-liberal governments use a variety of boards, departments, institutions, and agencies to regulate the lives and conditions of their citizenry for specific purposes. School boards are then part of the rational tactical ensemble that allows provincial governments to regulate education from a distance. Government is therefore, “the regulation of conduct by more or less rational application of appropriate technical means” (Hindess, 1996, p.106) rather than by brute, physical coercion.

Governments are regarded as a product of governmentality rather than as producers of governmentality. Miller and Rose (1991), again, stipulate that traditional theoretical dualisms such as “state vs. civil society” or “public vs. private” or even agency and government department cease to be of any conceptual significance in governmentality theory because of the diversity and multiple forces and networks through which governments exercise their power. Government in this sense operates in a range of social sites, not just the offices of the provincial departments such as the Ministry of Education.

Ontario Ministry of Education School Closure Guidelines

For over twenty years, the Ontario Ministry of Education (OME) has developed guidelines for closures to be followed by school boards. These guidelines were structured

in such a way that they allow school boards latitude to manage the closure process, which then made it possible for the Ontario government to regulate education to suit its political agendas. The ministry required every school board in Ontario to submit to the ministry, among other things, a definite procedure for community involvement, effects of the closure on the school area, and a minimum of 18 months notice from the time of the board's decision to close the school (Civil Affairs, 1981). In some ways, these guidelines seemed intended to reduce the negative impacts of school closings on communities. For example, the requirement to involve the affecting communities in closure decisions, and the need for a comprehensive closure plan are covered in the advice literature (Andrews, 1983; Burlingame, 1979; Scott, 1983; Zerchykov, 1983). However, the guidelines did not close all the doors that some school boards might have used to dominate school closure decisions. For example, the regulations did not specify the types of involvement school boards should allow a community in closure decisions- and whether, in particular, the community's involvement should be truly joint or collaborative. Collaborative involvement implies interested members of the community and the boards engaging in a deliberative closure decision.

Further, these guidelines did not include any appeal process where a community that disagrees with a board's closure decision could refer the decision to a higher authority. The former liberal government used its majority in the Ontario legislature to defeat a private member's Bill that would have allowed citizens to appeal local school board's closure decisions to the Ontario Municipal Board (Civil Affairs, 1981). The Bill was defeated on the grounds that appeal to the OMB would prolong local boards' closure decisions and that the Ministry guidelines were enough (Civil Affairs, 1981).

Recently, the ministry has published new school closure regulations with the aim to ameliorate the problems with the earlier guidelines (Ontario Ministry of Education, 2005). As a result, the Halton District School Board (Toronto Star, January 14, 2005), the Dufferin-Peel Catholic School Board, and Peel District School Board (The Brampton Guardian, March 2, 2005; April 13, 2005) have put on hold their decision to close down some of their schools in order to review the new ministry policy. The new school closure

policy regulations require school boards in Ontario to develop their own school valuation tool to weigh each of four set of considerations about a school that has been marked for closure:

(1) Its value to the students ;(2) Its value to the community; (3) Its value to the school system; and (4) Its value to the local economy. Among other things, the following are additional requirements:

- A school valuation process determined with the help of public committee and approved by the ministry;
- One year's notice to school community of consideration for closure;
- A draft of the school valuation in plain language must be made available to the public within two months of providing notice;
- Several opportunities for public input must be held with wide notice given;
- A task force to be appointed. The task force headed by a trustee, will have broad membership and hold public hearings, soliciting feedback and gaining community consensus;
- Board's decisions can be appealed on the grounds of process. Upon receipt of a petition with 50 signatures or 50 percent of affected parents, whichever is smaller, the ministry will cause an independent facilitator to conduct a review of the process to determine whether it matches provincial guidelines.

On the face of it, these new guidelines seem to address some of the problems of fairness and due process of the old regulations. For instance, it permits 50 percent of community members who are dissatisfied with a Board's decision to file a petition for review. It also requires the ministry's approval for any committee set up to make any school closure decision. Nonetheless, the regulations do not say what would happen if dissatisfied community members reject the ministry's review process. For instance, Cooke (2005) was appointed as an independent facilitator to review the Lakehead District school Board's closure decisions. He recommended that Fourway School should be closed as the board had planned. What would happen if the parents and other community members disagree with Cooke's recommendation that Fourway should be closed? Would it mean the decision would be reviewed or changed? While the new regulations require boards to conduct an investigation of the importance of the school to the local economy, boards are not required to evaluate the financial implications of closure such as the provision of transportation, operating costs of the receiving school, and what to do with closed school buildings.

In many respects, the valuation of a school is a subjective process, not an objective one. Boards may have to supply much of the information required for the valuation. This could allow boards to maintain their historic domination on school closure decisions by supplying information that would favour their closure decisions. Thus, the new school closure regulations are a partial solution to the systemic problem of community alienation from school closure decisions. It follows that the new guidelines would still facilitate, in terms of the theory of governmentality, the Ontario government regulation of the education enterprise through schools boards in order to achieve its political and economic agenda.

Impact of School Closure Decisions on Communities

The social science literature is riddled with research demonstrating that closing down schools has negative ramifications on the communities or neighbourhoods in which the schools are located. Lyson's (2003) study of schools in rural areas in the State of New York compared rural areas without schools to those with schools. He found that those with schools had higher real estate values, well-developed municipal infrastructures, higher employment rates, a more economically independent middle-class, and lower rate of welfare dependence. One may conclude from this study that when a school closes in a community, it contributes to the economic decline of the community. Downey (2003) in effect supports Lyson's (2003) study. In his report of Rural Education Strategy in Ontario, Downey (2003) extends the economic value of a community to include non-economic, intangible values. He wrote,

In small towns and rural areas, the local school plays an important role in shaping community identity. In single-school communities, the school is frequently the only public institution. It serves as a centre of entertainment, local activity and political involvement, and its educational accomplishments are a source of local pride (p.7).

In many impoverished small communities or neighbourhoods, the school is part and parcel of the community's core institutions. Therefore, closing down a school would affect the life of those communities.

Burger (1983), who studied why some communities protest school closures while others do not protest, presents a similar argument. He contends that some communities protest

school closures not necessarily because of the loss of the educational aspects of the school but rather because of the loss of tie that binds a community together and gives it a distinct identity. Further, Wholeben et al. (1980, quoted in Dean, 1982) emphasize the non-educational value in school closings,

Some of the negative effects of a school closure includes loss of a central focus for the community pride and solidarity; devastated property values; reluctance of child-bearing potential families (with or without existing children) to settle in the area; disruption of students' social contacts and academic learning (p.7).

In fact, the Civil Affairs (1981) documents the same negative effects of school closings on communities where the schools were situated. It also adds that a community diminishes in importance after a school closes down and the students bussed to the next community or neighbourhood for schooling.

In spite of the research reporting negative impact of school closings on neighbourhoods or communities, Dean (1983) contends that these studies are fraught with numerous limitations. He asserts that it may not be possible to show that closure decisions will have or have had negative consequences on a community. He goes on to argue that it would be extremely difficult, if not impossible, to show that school closure itself is the cause and not effect of community or neighbourhood decline. However, school closure could be either the cause or effect of community decline, depending on the circumstances of the community. For example, closing down a school in a community could cause the community to decline in terms of property values, municipal services and emigration. However, a school may be closed due to a decline in the community - declining school enrolment because of declining birth rates or the closing down of a major manufacturing plant that devastated the economic base of the community.

Having acknowledged that school closings have negative economic and social ramifications on communities or neighbourhoods, why should school boards close down schools? Perhaps the appropriate response is that school boards have the political power to close schools in order to achieve their economic goals. This assertion can be backed up in two ways. First, Civil Affairs (1981) states that school funding formula is based on enrolment and as enrolment declines, so does the funding. Accordingly, when the

enrolment at an elementary school (k-5) in London jurisdiction, for example, drops to 150 pupils, a committee is established to begin studying the school's effectiveness and determine whether consolidation should be considered. In North York, the process begins when enrolment in a JK-6 school drops below 121 and in the junior or senior level when enrolment drops below 301. This suggests that economic factors such as declining enrolment -implying declining funding-, underutilizing capacity and operating costs influence school closure decisions (Burlingame, 1979; Dean, 1982; Burns, 1982).

Judicial Review: Procedural Fairness and Natural Justice

School Boards are assigned the administrative and management authority to formulate policies in order to provide or withdraw educational services to students in the boards' areas of jurisdiction. Generally, the decisions of school boards in carrying out their administrative and statutory functions are not subject to judicial review. Nevertheless, Ontario courts and those in other provinces have recognized that school boards' statutory duties on matters within their jurisdiction are subject to judicial review only in limited situations. Successful judicial review entitles an applicant to mandamus, prohibition, certiorari or an injunction that temporarily prevents a board from exercising its statutory powers in school closure (R.S.O 1990, C. J. 1, s. 2(1)). At common law (Brown and Zuker, 2002), a public administrative body owes a duty of fairness to its constituency.

Two major issues tend to dominate school closure disputes: participatory rights of community members and procedural fairness. Waldron (1998) distinguishes between two categories of rights—the rights of man (*sic*) and the rights of the citizen. The rights of man, Waldron states, consist of allowing one to own private property, security and religious liberty. The rights of the citizen, on the other hand, involve voting, eligibility for political office, and the freedom to discuss and criticize the conduct of public affairs. Therefore, the participatory rights of the citizen are political rights that members of a community exercise together in order to make decisions that affect their lives. Procedural fairness has to do with fulfilling the norms, criteria, and other special attributes of an established protocol in order to produce legitimate outcomes (Machura, 1998). Machura (1998) goes on to suggest that “if such procedural criteria are not realized, people tend to

avoid these procedures, disregard their outcomes and despise the authorities enacting these procedures” (p.2).

In Baker v. Canada (Ministry of Immigration and Citizenship) (1995), Justice L’Heureux-Dube’ made the following comments on the nature of participatory rights as part of the duty of procedural fairness:

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 facts is the notion that the purpose of 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 contexts, with an opportunity for those afflicted by the decision to put forward their views and evidence fully and have them considered by the decision-maker (p.22).

The common law duty of fairness is, therefore, flexible and depends on the particular circumstances of the case. While open and fair procedure and full participation are theoretically sound democratic values, boards may not want to achieve that in practice. This is because boards may find the process too time-consuming or costly to achieve in practice, especially where an immediate decision must be made in order to save money or rationalize school operations. It could also be that, to satisfy the financial accountability pressures of the government, boards do not have the luxury of time to engage communities thoroughly in closure decisions. Nevertheless, this does not absolve a board from its moral duty to engage with its constituency in closure decisions. In addition, applicants for judicial review come within the purview of the *Judicial Review Procedure Act* (1990) and must demonstrate a strong prima facie case: that they will suffer an irreparable harm if interim relief is not granted; and that the balance of convenience favours granting the relief sought. Once these standards are met, the courts may grant an injunction that automatically quashes a board’s closure decision temporarily and allows the board to review its decision rather than permanently removing the power to make such a decision. However, the courts hardly grant judicial review except under circumstances of flagrant violation of procedural fairness and participatory rights.

The Courts’ Response to School Closures

It should be noted that the common law duty of fairness precludes the courts from evaluating or critiquing a board’s closure decision. In Fisher Park Residents Association

Inc. et al. v. Ottawa Board of Education (1986), the applicants sought an Ontario High Court of Justice to reverse the board's decision to close Fisher Park School in June 1985. The applicants argued that the Board's decision to close down the school was unfair to them, though the board had followed its closure policy that was constructed in accordance with the ministry guidelines. Justice Eberle stated that the applicants were not treated unfairly and made the following statement before dismissing the case,

... We are not at all concerned with whether the decision to close Fisher Park School was right or wrong, reasonable or unreasonable, the best decision or the worst decision, or somewhere in between. Those questions relate to the merits of the case. The merits or otherwise of the closure of Fisher Park School are not open for my consideration. It is solely the Board of Education which is given that obligation. Accordingly, the decision to close the school cannot be regarded in any way as unfair to the plaintiffs, vigorously though they oppose that decision (p.477-478).

Consequently, the courts are unconcerned with why a school board arrived at the decision to close down a school; otherwise that would amount to interfering in the administrative authority of the board or its administrative competence to provide educational services in its assigned area. Also, the courts do not intervene in closure decisions unless the affecting community raises issues of unfairness in the ways in which the decision was made or implemented. That is, the courts are concerned primarily with the integrity of the procedure the board followed in making its closure decisions rather than whether the decision has devastating consequences on its constituency, or the community finds the decision unreasonable.

In Knight v. India Head School Division No 19 (1999), Justice L'Heureux-Dube' clarifies much more clearly the nature of procedural fairness and natural justice in the following statements:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. The aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome (p.412).

Though school boards owe their constituencies a duty of fairness, that duty is invariably balanced with efficiency and predictability. Accordingly, a school board will not allow public participation in school closure decisions that exceeds its available resources of

time, money, and personnel; nor will it allow a protracted public debate on a closure decision that has a likelihood of not terminating at any point in time. This is the case where the affecting community members and boards have a substantial disagreement on the factors necessitating closure decision. This point reinforces the thesis of this paper that school boards have considerable administrative latitude to decide school closure, provided they comply with the ministry regulations and their own closure policies. In the cases cited above, the courts did not demonstrate any willingness to step in and quash a board's closure decision simply because the consultation process was short, or its closure decision was unfair to the interest of its constituency, or it was injurious to the local economy. Nor did the courts question the fairness or reasonableness of the boards' closure policies or that of the ministry regulations. Perhaps the courts felt that if they did not allow the boards the flexibility and adaptations they need to exercise closure policies, the boards would be crippled in their administrative functions as public institutions responsible for the provision of public education.

However, the boards' duty of fairness to their constituencies cannot be sacrificed on the altar of efficiency and predictability of outcome of community participation in closure decision-making. Boards have moral obligations to be fair in the treatment of their constituencies, and this moral obligation arises not only from the role itself but also from the principle of fairness that dictates that such a role should be performed (Hardiman, 1994; see also Rawls, 1971). Carey (1977) has stated that individual moral obligations exist only if institutions equally have moral obligations to fulfill. Brink (1994) adds another dimension to moral obligation. He distinguished between *prima facie* and *all-things-considered* moral obligations. A *prima facie* moral obligation to do something means that there is a moral reason to do it, but *prima facie* moral obligation, Brink (1994) contends, could sometimes be defeated on other moral grounds. However, *all-things-considered* moral obligations are supported by the strongest moral reasons and are undefeatable on any moral grounds. Consequently, in my considered perspective, boards' duty of fairness to engage their constituencies in closure decision-making is an *all-things-considered* moral obligation. And this moral obligation emanates not only from their role as public institutions, but also fairness dictates that they do so. As I have already

enumerated, school closing impacts the fabric of every aspect of community life. It is from this source that the moral obligation of the boards to engage their constituencies in closure decisions arises.

It is interesting also to note that in some cases the courts have refused to quash a board's school closure decision though the board violated its own policy in respect of notification of closure information to students and parents. In Civitarese et al. v. The Board of School Trustee of School District No. 20 (Kootnary-Columbia) (2003), the petitioners sought judicial review that will set aside a bylaw passed by the respondent board to close the Trail Middle School effective June 30, 2003. While the court acknowledged that the board breached its own policy on notification, Justice Mc Ewan dismissed the application. And the court stated that the distribution of the information package, the materials presented at public meetings, the information posted on the board's website, the notices in the newspapers, and the six opportunities to attend and be heard at public meetings within the District were sufficient to bring potential closure notification to reasonable members of the constituency. Again, in governmentality terms, the courts are part of the control ensemble that allows the government to manage the province's education system.

Similarly, in Mercer v. School District (2003), the petitioners sought an order to set aside the respondent board's by-laws authorizing the closure of four schools. The petitioners alleged insufficient consultations and notifications to the public. The judge dismissed the petition on the grounds that the consultations and notifications were enough. The judge concluded by saying, "essentially, most of the complaints, when analyzed, do not translate into a lack of opportunity to be heard, but rather a disagreement about how responsive or persuasive was the answer to the questions posed, or how responsive were the trustees to queries or demands, quite properly made, for more and better information. This cannot result in a finding of procedural unfairness. It is for the parents and the district board to determine a remedy for that" (p.20). This judgement corresponds to that passed in Young v. Hudson Bay School District No.52 (2001). In this case, the

community members complained that the defendant board failed to supply them with budget information before the board made a closure decision.

Certainly, as Justice Saunders said in MacDonald et al. v. Lambton County Board of Education (1992), a school board has “wide powers of management which it must exercise in its judgment to fulfill its obligations to accommodate and teach its pupils. Included in such powers is the power to discontinue the use of a school building” (p.225). Indeed, the *Education Act section 171* (Brown, 2001) states that a board may determine the number and kind of schools to be established and maintained and the attendance area for each school and close schools in accordance with the policies established by the board from guidelines issued by the ministry. Given these powers, it would be very difficult for a community to convince the courts to quash closure decisions of a school board, unless there are blatant violations of the boards’ own policies or those of the ministry.

Where a board has blatantly violated its own closure policy in respect of public participation or distribution of relevant information, the courts have remitted the matter back to the board for its consideration. This suggests that the board must start the process over again by ensuring that it conforms to its closure policy and that of the ministry. But this does not prevent the boards from closing the schools, nor does it mean that the affecting community members can influence the boards to change their closure decisions.

In Bezaire v. Windsor Roman Catholic Separate School Board (1992), the applicants learned that the defendant board had decided on January 15, 1991 to close St. Patrick. None of the parents were informed that the school had become a candidate for closure nor was public input sought or allowed prior to the closure decision. These violated the board’s own closure policy. The court agreed that the board contravened its own policy that required the establishment of a review committee consisting of trustees, administrators, parents and other personnel as the board deemed appropriate. The court concluded that the board did not set up any such committees, nor were there any written recommendations for consideration. Justice Heeney stressed,

Ambiguous though they are, the guidelines read as a whole are clearly premised on the principle that the closing of a school is the business of the community, and the

community, one way or another, must be consulted. The requirements of publicity, public sessions, and the importance of factors such as the social, cultural and recreational impact of closure on the community, make it clear that real community consultation is a condition precedent to a valid decision (p.752).

The court, thus, upheld the application and remitted the matter to the board for reconsideration. This does not mean that the board can not close the said school. Also the judge's statement that the closing of a school is the business of the community is true only in theory. The question is who ultimately has the power to close a school? Certainly it is not the community, though community consultation process is required to validate a board's closure decision. In fact, consultation provides a community the opportunity to ask questions and to make suggestions on school closure but school boards officials are not obliged to adopt them. The cases above show that school boards have a substantial authority to close down school only after due process of natural justice and procedural fairness had been followed.

Community Participatory Policy-making Models

Though the representative democracy that school boards practice has the benefit of allowing elected individuals to devote their time to policy-making, it also has a serious deficiency-- the detachment and alienation of communities from influencing board policies (Adonis & Mulgan 1994; Gustafsson & Driver, 2005; Leadbeater & Mulgan, 1994; Li, n.d; Smith & Wales, 2000). Judging by the available evidence, the affecting communities always felt that their representatives (the trustees) do not represent their concerns and needs. Hence, some community members in their sense of powerlessness resort to other mechanisms such as legal action, protests, or occupation as a way of influencing closure decisions. For example, in Board of School Trustees of School District 27 (Cariboo/C.hilcotin) v Loeffeler (2004), some parents and community members who were opposed to the closing of Forest Grove Elementary School, in Vancouver area, occupied the school premises to prevent the board officials from implementing the closure decision. The trial judge ruled that the defendant's behaviour amounted to trespassing and ordered their immediate removal from the premises.

Nevertheless, school boards need further legitimization, beyond representative democracy, in making and implementing closure decisions, given the high-conflictual

nature of school closure decisions (Irvin & Stansbury, 2004). As Curtin (2003) rightly pointed out: “The legitimization role of citizen participation in the development of policy options applies particularly where there are high-conflict issues. In this situation, citizen participation in the development of options can be a key element in gaining wide public acceptance of the final outcome” (p.8). Boards’ over-reliance on representative democracy and consultation processes as an approach to policy-making, including closure decisions, gives the boards an image of practicing procedural democracy as opposed to democracy as a regime. Castoriadis (1997) refers to procedural democracy as a set of procedures to achieve decision-making rather than democracy as an institutional way of life. Boards like other public agencies have adopted certain procedures for public involvement, which include, ”serving on juries; attending public hearings, participating in advisory boards, commissions, task force, responding to telephone polls and newspaper clip-out questionnaires, contacting and meeting officials, and writing letters to the editor expressing interest or opposition to some governmental action” (Roberts, 2004, p.331).

However, (Roberts, 2004) argues that “these conventional avenues tend to involve only a small percentage of the citizenry. Most are one-way transmission of information from public official to citizen or from citizen to public official, rather than citizen engagement in dialogues and deliberations over public policy with fellow citizens and public officials” (p.331). Franklin (2003) also contends that in most public hearings, citizens are called upon to comment on what officials had already constructed with no assurances that their inputs will have any weight in the final policy texts.

Roberts (2004) has suggested two levels of participation — individual-level participation and group-level participation -- for the direct participation of citizens in order to bring life to democracy, so to speak. Individual level participation enables citizens to present their views, concerns and preferences directly and interactively to their representatives. Group-level participation entails citizens working in groups of say 3-75 or larger. This model brings tens of hundreds of people together to deliberate a common social issue. The participatory model has several permutations such as deliberative polling, citizen panels, citizen juries and town hall meetings (Averill, 2001) which can be adopted by school boards to complement their practice of representative democracy at the community level.

In deliberative polling, a representative sample is polled on an issue and those polled are invited to discuss the issue. Materials with balanced views of the issue are distributed to the invitees before the meeting. With the help of a trained facilitator, the participants prepare a set of questions and use those questions to dialogue with experts on the issue (Averill, 2001).

The citizen panel is used more locally, and it relies on statistical samples, as does the deliberative polling model. The government seeks the view of the panel over a period of time (Curtin, 2003). Citizens' juries also use representative sample, and it could be either regional or local. The government puts together citizen juries with the purpose of deliberating contested issues and advising public officials (Joshee and Goldberg, 2005; Ward et al, 2003). The citizen forum is used extensively in Britain to resolve social problems. The forum is structured and it involves local dialogues among members of a community. Forum members, according to Curtin (2004), work in table groups of 10 each with a trained facilitator. Since communities affected by closure are small in population, these participatory models are more appropriate for school closure decisions.

Through these participatory models, committed community members would participate in the formulation of school closure policies and their implementation in accordance with the new ministry school closure guidelines. This is more likely to reduce the high incidence of court litigations and their associated costs in school closure decisions, assist community members in developing or enhancing their policy-making capacity, and help to build trust between boards' officials and community members. It would also empower communities and obtain their political cooperation for such policies (Irvin & Stansbury, 2004). When community members are accorded seats at the school closure policy-making table, then we could realistically say that school closure is a community business.

Conclusion

The above analyses have demonstrated that school boards have a significant administrative power to close down a school, if only they adhere to the spirit of their own closure policies and that of ministry guidelines. The principle of procedural fairness does not obscure the fact that school boards are the real makers of school closure decisions,

not communities affected by closure decisions. In terms of governmentality, public participation in the form of consultation --hearings, meetings, publicity and presentations-- are often used to create the impression that school closure is a community business and that community members whose interests or privileges are impacted could influence the outcome of closure decisions. Burns (1982) in his survey of school boards in mid-northern, northeastern, and northwestern regions of Ontario about school closure policy and implementation discovered that,

While concerned citizens may be provided opportunities to express their concerns to boards regarding school closure issues, their view do not appear to have much impact on the final decision. In other words, regardless as to the views of concerned citizens, boards proceed to close the school anyway (p.12).

Closure decisions are administrative in nature, and once a board proposes school closure it could carry it out without the affecting community having the powers to veto the decision. The rules of procedural fairness and participatory rights are used as part of the legitimization or rationalization mechanism to conceal the real power of school boards to make closure decisions. The boards, as some of the selected cases demonstrate, could cut off debates or discussions on school closure in the name of efficiency and predictability of outcome of consultation process. And this happens often in the public consultations on school closure, making consultations a democratic formality without any deliberative engagement with the affecting communities. As Burns (1982), again, has indicated, school boards' interests and the public's interests may be inherently irreconcilable. This irreconcilability of interest led Zerchykov (1983) to offer the following advice to school boards contemplating closure of schools,

... Such reorganization when advanced as an increment benefit in order to improve quality of education (rather than in order to save money), breaks the emotional hold on neighborhood schools but break it in such a way as to confer a benefit. Neighborhood parents are asked to trade off one good for another, putatively "better", good instead of being asked to sacrifice present concrete, differentially distributed good (their neighborhood school) in favor of an abstract diffuse, and future good (p.184-185).

Certainly, most school boards in closure decisions have framed the issue not as economically motivated decisions but as a move to improve the quality of education (see MacDonald v. Lambton Board of Education, 1982; Funk v. Board of Education of Wellington County, 1994; Fratia v. Toronto District School Board, 2000). Nevertheless,

such strategy is more likely to lead to more intractable legal and political conflicts if and when communities uncover the boards' deceptive tactics.

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