

Bill 28, *The Strengthening Local Schools Act* *(Public Schools Act Amended)*

K E V I N A N T O N Y S H Y N *

I. INTRODUCTION

On 29 April 2008, the Government of Manitoba introduced Bill 28, *The Strengthening Local Schools Act (Public Schools Act Amended)*,¹ which effectively placed a moratorium on school closures. The effect of this bill is that no school can close in Manitoba without the approval of the Minister of Education. Bill 28 has subsequently been enacted into law. It served to amend *The Public Schools Act*.²

When Bill 28 was introduced, there were 13 schools in Manitoba that were under review by the Government of Manitoba for closure or consolidation by several school divisions and school boards.³ In a press release issued on the same day, the Honourable Peter Bjornson, Minister of Education, Citizenship and Youth, explained the reasoning behind and purposes for the bill. Minister Bjornson stated:

In anticipating ongoing enrolment challenges, we are moving now to protect the interests of students and parents and ensure communities benefit from sustainable infrastructure

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¹ Bill 28, *The Strengthening Local Schools Act (Public Schools Act Amended)*, 2nd Sess, 39th Leg, Manitoba, 2008 (assented to 12 June 2008), SM 2008, c 29, amending CCSM c P250 [*Act* or Bill 28 or bill].

² *The Public Schools Act*, CCSM c P250.

³ “Proposed law puts moratorium on Manitoba school closures” (29 April 2008), online: CBC News <<http://www.cbc.ca/news>>. The schools under review for closure or consolidation were: Disbrowe School (K–12), Frontier School Division (S.D.); Archwood School (K–8), Louis Riel S.D.; Dr. D.W. Penner School (K–6), Louis Riel S.D.; Ecole Henri-Bergeron (M–6), Louis Riel S.D.; Marion School (K–8), Louis Riel S.D.; Kenton School (K–8), Park West S.D.; Chapman School (K–6), Pembina Trails S.D.; Sherwood School (K–5), River East Transcona S.D.; Westview School (K–5) River East Transcona S.D.; Hedges Middle School (6–8), St. James-Assiniboia S.D.; Ness Middle School (6–8), St. James-Assiniboia S.D.; Ashern Early Years (K–4), Lakeshore S.D.; and Fisher Branch Early Years (K–4), Lakeshore S.D.

such as school buildings that are under-used. Options we will examine include using portions of current buildings for child-care centres and other resources that benefit the community. Having local public schools is vital to the quality of the total educational experience, especially for young children. Schools also play an important role in communities, especially in rural areas, as gathering places for social and cultural events, athletics, community meetings and adult education. To determine the most effective ways to use these buildings to serve their communities on a long-term basis, we will consult with school divisions about the regulations.⁴

In the background information to the press release it further explained that most school divisions in Manitoba have experienced decreasing enrolment for many years and that this trend is expected to continue at a faster rate. It was also explained that the number of public schools in Manitoba has been declining. Attention was drawn to the fact that Manitoba is the only province that does not have legislation governing school closures; instead, Manitoba has had policy guidelines in effect since 1982.⁵

This paper will explore Bill 28. In doing so, it will review the underlying pressures driving school closures, such as demographics and school costs, in the context of the conflicting interests of various stakeholders within the current legal environment, both statute and common law, both in Manitoba and in other provincial jurisdictions. Arguments will be advanced in summary form both for and against the bill and general overall conclusions will be drawn. Finally, as Bill 28 provides for the development of regulations related to school closures, this paper will end with recommendations for these pending rules.

II. CONTENT OF THE BILL

Bill 28 essentially focused on three areas that are all interrelated to and surrounding the issue of public school closures:⁶

- *School Closures*—Ministerial approval will be required for all school closures that are voted on by a school board after 1 January 2008. A school board may close a school only in accordance with the regulations yet to be made under *The Education Administration Act*,⁷ and only after having made reasonable efforts to expand the use of the school building for appropriate community purposes.

⁴ Government of Manitoba, News Release, "Bjornson Introduces Legislation that would place Moratorium on School Closures" (28 April 2008), online: Government of Manitoba <<http://news.gov.mb.ca/news>> [Government of Manitoba News Release].

⁵ Government of Manitoba, Policy Statement Regarding Guidelines for School Closure (1 October 1982) [Government of Manitoba Policy Statement].

⁶ *Act*, *supra* note 1.

⁷ *The Education Administration Act*, CCSM c E10.

- *Bus Transportation*—School divisions must use their best efforts to limit bus transportation of children to one hour at a time.
- *Community Schools*—The minister may establish a program to designate schools as community schools and provide grants for funding of the same.

III. ADVANCEMENT THROUGH THE LEGISLATIVE ASSEMBLY

A. First Reading

Bill 28 was introduced in the Manitoba Legislative Assembly on 28 April 2008. Minister Bjornson explained that the bill will allow for improved planning that will enable schools to remain viable and it will minimize the amount of time that students spend on buses.⁸ There was no debate on the bill, and the House adopted it at this stage.

B. Second Reading

Bill 28 received its second reading on 22 May 2008.⁹ There was no debate on the bill, and the House adopted the second reading.

C. Standing Committee on Social and Economic Development

Bill 28 was discussed during two meetings of the Standing Committee on Social and Economic Development. First, the committee met on 7 June 2008 for nearly seven hours and the vast majority of that day was spent on Bill 28 even though six bills were on the agenda for the day.¹⁰ Second, the committee met again on 9 June 2008 for just over an hour and once again the vast majority of the time was spent on Bill 28 although three bills were on the agenda for the day.¹¹ In total, the committee spent nearly eight hours in meetings on Bill 28. As will be discussed later in the paper, there were 48 submissions on Bill 28 made to the

⁸ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LX No 31 (28 April 2008) at 1195 (“Speaker, this bill will allow school divisions and communities to plan for better opportunities for their children, enabling schools to remain viable, for example, as centres for early childhood education where there is a demand in the community and capacity in the school. The community school is an important asset to all communities both urban and rural. Moreover this legislation will support our efforts to minimize the amount of time a student will spend on the bus to and from school”).

⁹ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LX No 45B (22 May 2008) at 2377.

¹⁰ Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 39th Leg, 2nd Sess, vol LX No 6 (7 June 2008) at 277–362 [*Committee* (7 June 2008)].

¹¹ Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 39th Leg, 2nd Sess, vol LX No 7 (9 June 2008) at 381–416 [*Committee* (9 June 2008)].

committee, consisting of 32 oral and 16 written submissions. Altogether, these submissions amounted to approximately 120 pages in *Hansard*.

In the closing minutes of the 9 June 2008 committee meeting, Minister Bjornson moved to amend clause 2 of the bill.¹² Section 41(1.4) exempted the school closure moratorium from applying to those pending school closures on which school boards had already voted their approval prior to 1 January 2008. The effect of this motion was to prohibit any school from closing in the future without ministerial approval regardless of whether the respective school board had already approved the closure.

Minister Bjornson explained:

After hearing from many of the presenters that attended today and yesterday regarding this bill, particularly on Saturday we heard from a number of presenters who felt that their voices hadn't been heard through the process, and the exemption clause would have allowed for schools to proceed with consolidations and amalgamations of schools in a couple of small communities, as well as the closure of a couple of schools where people felt that they hadn't been part of a legitimate process, notably Fisher Branch and the Ashern-Moosehorn presentation, but also parents from other communities that have made their voices heard. By eliminating the exemption clause, it means that all schools that were currently slated for closure would have to be approved by the minister for closure and for consolidation, so I think it would be reasonable having their voices and concerns expressed, that no school should be exempt and no school should be allowed to be closed without further discussion with myself as minister.¹³

The motion was immediately criticized in debate by two other members of the committee, who were members of the opposition. Mr. Ron Schuler, Progressive Conservative ("PC") MLA for Springfield, characterized the amendment as an example of the current government being "absolutely and totally disorganized" and unaware of problems in the province that should have been known. Mr. Cliff Cullen, PC MLA for Turtle Mountain, voiced dissatisfaction that the moratorium placed current school closure processes "up in the air" and that the government did not offer funding to school divisions who would be prevented from closing schools or for the community school program. The amendment was then voted on by eleven members of the committee and was passed.

The Chair of the committee presented the report of the committee to the Legislative Assembly on 10 June 2008. This report included three bills, including Bill 28. The committee reported Bill 28 with the amendment that section 41(1.4) be struck out. The Chair moved a motion that the committee's report be

¹² *Ibid* at 393 [emphasis in original].

¹³ *Ibid*.

received and the Chair's motion was seconded. There was no ensuing debate. The motion passed and the report was received.¹⁴

D. Third Reading and Royal Assent

Bill 28 received third reading in the Legislative Assembly on 12 June 2008.¹⁵ The Honourable Dave Chomiak, Government House Leader, moved that Bill 28, as amended by the Standing Committee on Social and Economic Development, be read for the third time and passed. The motion was put to a vote and was passed without debate. The bill received Royal Assent on the same day.

IV. CHANGING DEMOGRAPHICS—THE ROOT OF THE PROBLEM

Over the past 60 years there have been distinct patterns in Canadian age demographics. Labels such as “baby boomers”, “Generation X”, and “echo boomers” have been commonly used to describe such patterns. These labels reflect various age groups or generations within our society.

For the most part, the size of each generation has been driven by two factors. First, there has been a decline in fertility rates over the years.¹⁶ These rates measure the number of children that are born per woman. Fertility increased dramatically following the Second World War, commonly referred to as the “baby boom”, but dropped significantly during the 1960s and early 1970s.¹⁷

From the early 1970s to the late 1990s, fertility experienced a significantly slower but constant decline. Since the late 1990s, fertility rates have been relatively stable. Fertility rates are now and have been below replacement levels for the past 30 years. In other words, couples are not having enough children to replace themselves.

The second factor that has impacted on the size of recent generations is that women are deferring having children until later years.¹⁸ During the 1960s, a woman was most likely to give birth at an age of 25–29. In 2005, a woman was most likely to give birth at an age of 30–34.¹⁹

¹⁴ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LX No 55B (10 June 2008) at 2825–2827.

¹⁵ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 2nd Sess, vol LX No 57B (12 June 2008) at 1250.

¹⁶ Statistics Canada, *Canadian Demographics at a Glance* (Ottawa: StatCan, 2008) at 7 [*Canadian Demographics at a Glance*].

¹⁷ Senate, Standing Committee on Banking, Trade and Commerce, *The Demographic Time Bomb: Mitigating the Effects of Demographic Change in Canada* (June 2006) at 1405 (Chair: Jeremiah Grafstein) [*The Demographic Time Bomb*].

¹⁸ *Canadian Demographics at a Glance*, *supra* note 16.

¹⁹ *The Demographic Time Bomb*, *supra* note 17 at 10.

This decline and ageing of fertility over the past 40 years have had significant impacts on the size of recent generations. Of key importance to the public school system is that the number of school age children has been declining.

A. Changing Demographics—Impact on School Enrolment

The stated demographic trends have translated into declining school enrolments across Canada. To cite a recent Statistics Canada study, enrolment in public schools across Canada declined 3% over the five year period 1999–2000 to 2005–2006.²⁰ During this period, all provinces except Alberta showed a decline in enrolment. The decline varied amongst the provinces and the rate of decline was not the same in urban and rural environments. The largest declines occurred in small, rural, and remote school districts.²¹

Enrolment in Manitoba peaked during the early 1970s as the vast number of “baby boomers” simply flooded all grades of the school system. Enrolment declined rapidly from that time until the early 1980s as last of the “baby boomers” left the public school system. During the period from the early 1980s to about 1999 enrolment persisted on a steady but constant decline. However, since the late 1990s total enrolment has once again started to rapidly decline.

The enrolment decline since the late 1990s was arguably driven by two factors. The first factor is the impact of the “echo boomers” starting to leave the school system. “Echo boomers” were born between the early 1980s and late 1990s, and they are the children of the “baby boomers”. The first of these children began to graduate from high school in the late 1990s.

The second factor is that the generation that is following the “echo boomers” is smaller in number.²² This smaller generation has translated into fewer and fewer children

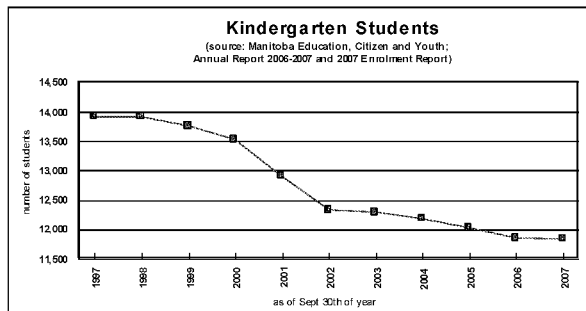


Figure 1: Number of Kindergarten Students (1997–2007)

²⁰ Statistics Canada, Summary Public School Indicators for the Provinces and Territories, 1999/2000 to 2005/2006 by Patric Blouin (Ottawa: StatCan, 2008) at 6 [Summary Public School Indicators].

²¹ “Lessons in Learning: Enrolment Trends in Canada”, online: Canadian Council on Learning, <<http://www.ccl-cca.ca>> [Enrolment Trends in Canada].

²² Enrolment Trends in Canada, *supra* note 21.

entering the public school system. During the ten year period from 1997–2007, the number of kindergarten students entering the public school system in Manitoba has declined by 10%. Figure 1 illustrates this trend.

Immigration has had some effect on declining enrolment trends, but has not reversed the overall decline in Manitoba. Immigration of children under the age of 15 years has increased dramatically over the past nine years.²³ There has been a 428% increase in such immigration to Manitoba during these years, from 727 children in 1998 to 3 114 children in 2007.²⁴ A significant portion of this increase has occurred over the past five years. Nevertheless, despite this substantial increase in the number of children immigrating to Manitoba, the decline in student enrolment in Manitoba public schools has not stopped. It is, however, decreasing at a slower rate, particularly over the past five years.

Enrolments in many jurisdictions across Canada are not expected to increase in the short run and declining enrolments seem inevitable.²⁵ There does not appear to be any reason why Manitoba will escape this trend. Even if the current decline in new kindergarten enrolment stops immediately, the impact on total enrolment in the public school system will be dramatic as fewer children from recent smaller kindergarten classes make their way through grades one to twelve in the schools and ultimately replace historically larger classes in those grades.

Simple projections of future enrolment can be undertaken. In one simplistic scenario, if the current level of kindergarten enrolment remains unchanged, one can project that total enrolment will decline from current levels of approximately 181 200 students to approximately 154 800 students within ten years.²⁶ This first scenario amounts to a 15% decline in total enrolment from current levels. However, in a second simplistic scenario, if the current five year trend in kindergarten enrolment continues, which is a decline of about 100 students per year, one can project that total enrolment will drop to approximately 149 500

²³ Manitoba Labour and Immigration, *Manitoba Immigration Facts 2003 Statistical Report* (Winnipeg: Manitoba Labour and Immigration, 2003) at 19; Manitoba, Department of Labour and Immigration, *Manitoba Immigration Facts 2006 Statistical Report* (Winnipeg: Manitoba Labour and Immigration, 2006) at 19; Manitoba Labour and Immigration, *Manitoba Immigration Facts 2007 Statistical Report* (Winnipeg: Manitoba Labour and Immigration, 2007) at 13.

²⁴ *Ibid.*

²⁵ Enrolment Trends in Canada, *supra* note 21.

²⁶ Estimate was arrived at using data contained in Manitoba Education, Citizenship and Youth, *Annual Report 2006-2007* (Winnipeg: Manitoba Education, Citizenship and Youth, 2007) at 105 [*2006-2007 Annual Report*]. Data was also used from Manitoba Education, Citizenship and Youth, *Enrolment Report 2007* (Winnipeg: Manitoba Education, Citizenship and Youth, 2007) at 3. Estimate assumed enrolment of 11 856 students for grades K–10, 11 873 students for grade 11, and 12 463 students for grade 12.

students within ten years.²⁷ This second scenario amounts to an 18% decline in total enrolment from current levels. This modeling suggests that total enrolment in Manitoba could decline by approximately 15–18% over the next ten years. These estimated rates of decline significantly exceed the rate of decline of 7% that Manitoba has experienced over the last ten years.

V. DECLINING ENROLMENT AND SCHOOL CLOSURES

There are many potential challenges that arise from declining enrolment. When many of the “baby boomers” left the school system during the 1970s and early 1980s, the results were school closures, teacher layoffs, hiring freezes, and service reductions.²⁸ It is likely that the same challenges will repeat with the departure of the “echo boomers” from the school system that is now occurring.

Generally, schools face three general problems from declining enrolment. These include funding, program delivery, and staffing.²⁹ Funding of schools becomes an issue as the funding formulas allocate funds on a per student basis. This process results in individual schools receiving less funding as their respective enrolment declines despite the fact that their fixed operational costs remain constant. Program delivery is affected as smaller schools must focus their resources and decrease the breadth of their course and program offering. Staffing issues also result as teachers are forced to carry heavier workloads teaching

several subjects. Retention, recruitment, and quality of service become issues.

There is evidence that the school divisions in Manitoba respond to these pressures by closing schools. As Figure 2 illustrates, there appears to be a strong relationship between the total number of schools and total enrolment during the eight year period from 1999–2000 to 2007–2008.

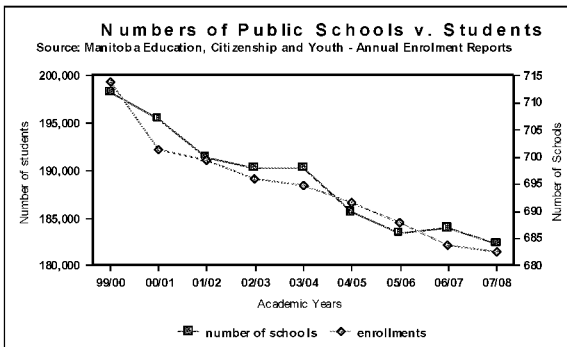


Figure 2: Number of Students vs Number of Schools
and total enrolment during the eight year period from 1999–2000 to 2007–2008.

²⁷ Estimate was arrived at using data from the *2006-2007 Annual Report*, *ibid*. Estimate assumes that current enrolment of 11 856 students will decline by approximately 96 students per year. Enrolment for each of grades K–10 will range from 10 892 to 11 856 students. Estimate also assumes 11 873 students for grade 11 and 12 463 students for grade 12.

²⁸ Enrolment Trends in Canada, *supra* note 21.

²⁹ *Ibid*.

Simple statistical regression analysis shows a very high correlation coefficient of 0.93 between the number of schools and enrolment over this period

Therefore, if enrolment can be projected to decline by 15–18% over the next ten years, and if the school divisions continue to respond to declining enrolment pressures by closing schools, it is conceivable that as many as one in five schools may be closed in Manitoba during the next ten years.

VI. SCHOOL CLOSURES AND THE COST OF EDUCATION

A. School Division Cost Pressures: An Overview

On an inflation-adjusted basis, the total expenditures by school divisions increased over the four years between 2002–2003 and 2006–2007 by an amount in excess of \$100 million or by 7.5% over that period. On a per student basis, due to this increased total spending and the impact of declining enrolment, constant dollar costs per student increased from \$8 163 to \$9 113 or by 12% over that same period. Figure 3 illustrates these trends.

Although total enrolment declined by approximately 4% over the past four years, the number of schools in Manitoba only declined by approximately 2% over the same period.³⁰ As a result, there was a reduction in the average student population per school. Overall, the average school size declined from 271

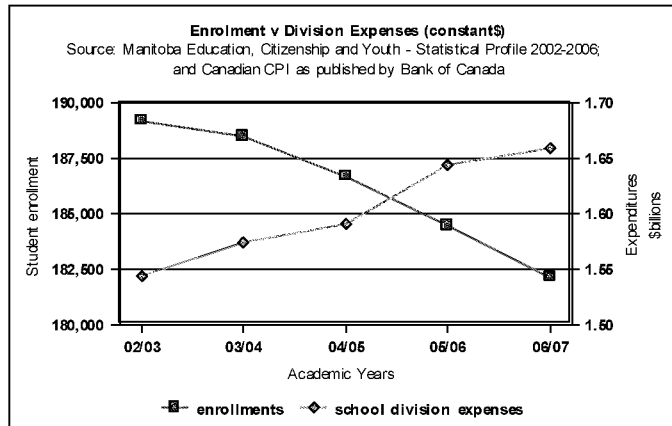


Figure 3: Enrolment vs Division Expenses

students in 2002–2003 to 265 students in 2006–2007. However, this decline was not constant over all schools. Over the past four years the number of small schools (≤ 150 students) increased, whereas the number of upper-middle sized schools (375–599 students)

³⁰ Manitoba Education, Citizenship and Youth, *A Statistical Profile of Education in Manitoba September 2003 to June 2008* (Winnipeg: Manitoba Education, Citizenship and Youth, 2008) at 2 [*A Statistical Profile of Education in Manitoba*].

decreased. The number of large schools (600 or more students) and lower-middle sized schools (151–374 students) essentially remained the same.

During the same four year period, the absolute number of teachers increased. There were approximately 11 548 teachers in 2002–2003 and 11 688

in 2006–2007.³¹

This was the case even though the average student population per school declined. The student-teacher ratio thus decreased as the number of teachers per school increased.

Therefore, given the greater number of

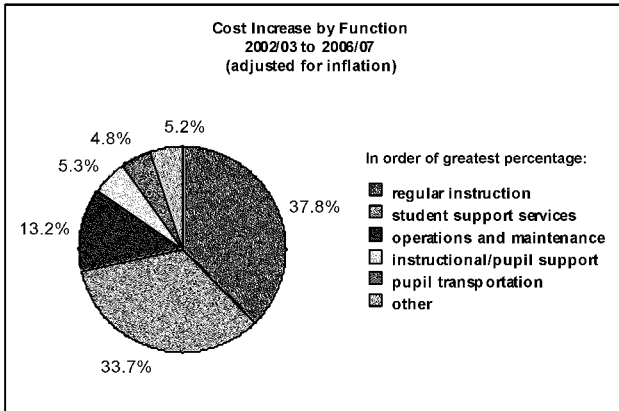


Figure 4: Cost Increase by Function

teachers, it is not surprising that school division expenses would increase on an inflation adjusted basis even though total enrolment declined, as salaries amount to approximately 75% of school division expenses.³² However, the inflation-adjusted \$100+ million increase in expenditures cannot be explained merely by the rise in teachers alone, as the number of teachers rose by only 1.2% and total inflation-adjusted costs increased 7.5%.

A closer analysis was therefore undertaken on the inflation-adjusted cost increase. Figure 4 provides a breakdown of this cost increase by school division

³¹ *Ibid.*

³² Manitoba Education, Citizenship and Youth, *Frame Report 2002/03 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2003) at 3; Manitoba Education, Citizenship and Youth, *Frame Report 2003/04 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2004) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2004/05 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2005) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2005/06 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2006) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2006/07 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2007) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2007/08 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2008) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2008/09 Actual* (Winnipeg: Manitoba Education, Citizenship and Youth, 2009) at 15; Manitoba Education, Citizenship and Youth, *Frame Report 2009/10 Budget* (Winnipeg: Manitoba Education, Citizenship and Youth, 2010) at 15; Manitoba Education, *Frame Report 2010/11 Budget* (Winnipeg: Manitoba Education, 2011) at 15.

function.³³ The two largest increases were in regular instruction and in student support services. Regular instruction consists of costs directly related to the classroom, including teachers and supplies. Student support services consists of costs specifically related to students who have exceptional learning needs, as well as counselling and guidance and resource costs for all students.

With respect to regular instruction, the vast majority of this increase can be attributed to pay raises for teachers and administration that exceed the rate of inflation. It would appear that teacher salaries have increased at a rate that is 30% faster than the rate of inflation.³⁴ Administration salaries for executive, managerial, and supervisory functions have gone up even faster. It would appear these salaries have increased at a rate that is nearly 700% faster than the rate of inflation.³⁵

Nearly one-third of the inflation-adjusted greater than \$100 million increase in expenditures can be attributed to student support services. These expenditures increased by nearly 17% during this four year period (2002–2003 to 2006–2007) when measured in inflation-adjusted dollars.³⁶ Student support services is an increasingly important financial consideration and cost driver for the school divisions, both in magnitude and in relative terms. Although this function includes some costs that are applicable to the general student body, such as general resources, student support services is primarily responsible for the exceptional learning needs of students. It is worth noting that the number of students who received special needs funding increased by 35% during the same four year period.³⁷

The function with the third largest absolute increase in inflation-adjusted expenditures is operations and maintenance, which accounted for about 13% of the total increase in expenditures. This function consists of the non-capital costs of maintaining all school division buildings and grounds. Although there are

³³ *A Statistical Profile of Education in Manitoba*, *supra* note 30 for data source. Data was adjusted for inflation based on CPI rates as published by the Bank of Canada.

³⁴ *Supra* note 32 for data source. Total non-inflation adjusted expenditures for teacher salaries increased by 11.4% between 2002–2003 and 2006–2007. Because the number of teachers increased by 1.2% and the rate of inflation for this period of time was 7.5%, the total expenditures for teachers would have been expected to increase by approximately 8.7%.

³⁵ *Ibid* for data source. Total non-inflation adjusted expenditures for executive, managerial and supervisory salaries increased by 24.1% between 2002–2003 and 2006–2007. Because the number of administrators decreased by 4% (assume same proportional decline for management and secretarial/clerical, which intuitively makes sense if there are fewer schools) and the rate of inflation for this period of time was 7.5%, the total expenditures for executive, managerial and supervisory positions would have been expected to increase by approximately 3.5%.

³⁶ *A Statistical Profile of Education in Manitoba*, *supra* note 30.

³⁷ *Ibid*.

some exceptions, operations and maintenance can be directly associated with the total number of schools.

Lastly, while the cost of pupil transportation appears to be increasing at a faster rate than inflation, it does not appear to be a significant driver of the total inflation-adjusted cost increase that school divisions are facing.

B. The Impact of School Closures on School Division Costs

As already stated, there can be very little debate on the relationship between expenditures for operations and maintenance and the number of schools. Having fewer schools will, for the most part, reduce these costs. However, the potential for significantly reducing total school budgets by cutting operations and maintenance expenses is limited. This is so because operations and maintenance only accounts for just over 10% of the total costs of the school divisions. Furthermore, these costs may be offset, partially or otherwise, by the additional costs of student transportation, particularly in rural environments, that will result from school closures. Fewer schools will mean that students will need to travel further to their school, both in urban and rural settings. These increased transportation costs will increase school division costs unless, of course, such costs can be pushed onto parents or the community.

With respect to the two largest contributors of increased costs, regular instruction and student support services, the relationship between these functions and the number of schools is not as clear.

As was explained, the number of teachers in Manitoba has increased despite the fact that the number of schools has declined. This increase in teachers seems to run counterintuitive to the trend of fewer schools. It would seem more intuitive that fewer schools would need fewer teachers as teaching efficiencies are realized. At the very least, it would seem reasonable that the number of teachers would remain constant while students simply change buildings. Accordingly, when taken together, an increase in the total number of teachers while closing schools does not support the proposition that teaching efficiencies are being realized from school closures.

The demand for student support services is increasing substantially. However, it is not immediately obvious as to how a reduction in the number of schools will impact these costs. The resources required for exceptional learning needs will, for the most part, be independent of the number of schools. In other words, eliminating buildings will not reduce the number of students who have exceptional needs. There may, however, be some economies of scale associated with the concentration in fewer locations of resource specialists with specific technical skills, but ultimately the demand for counselling and resource specialists is driven by the number of students.

In summary, it is not clear as to the precise impact that school closures are having or will have on school division costs. For example, it is not clear that the

closure of well maintained school buildings, which buildings will now require fewer repairs, will significantly reduce operations and maintenance costs, other than by reducing direct utility costs. Yet, it is clear that costs for student support services are rapidly escalating and these costs are pressuring school division budgets.

VII. LEGISLATIVE/REGULATORY SCHOOL CLOSURE PROCESSES

A. School Closure Process in Manitoba Prior to Bill 28

Prior to Bill 28, a legislative or regulatory process did not exist in Manitoba for school closures. Instead, the Manitoba Department of Education had school closure guidelines in place.³⁸ These guidelines were in effect since 1982 and largely depended on voluntary compliance by the school boards and divisions. The guidelines dealt with procedural fairness issues and not on the merits of closure decisions. They effectively deferred decisions of school closures to school boards as long as the school boards prepared an informational report for the parents/community, a public meeting was held with parents/community having a reasonable opportunity to present recommendations, and certain other timelines were met. The minister would only become involved if the community consultation process as set out in the guideline was not followed. In such event, however, the minister would only cause the matter to be referred back to the local school board. The general content of this policy is summarized in the jurisdictional comparative table that follows.

B. School Closure Processes in Other Jurisdictions

A review was conducted of nearly all school closure processes across Canada, with the exception of Québec. This review consisted of telephone interviews of representatives of the various provincial departments of education and by reference to applicable provincial legislation, regulation, and education websites.

The school closure regimes in the various provinces are accomplished by combinations of legislative provisions, regulations, and ministerial orders, guidelines, and policies. The regimes vary considerably from one end of the spectrum of strong provincial control to the other end of the spectrum of almost complete deference to the closure processes and decision of the school boards.

For the most part, the school closure processes in the other provinces are directed at matters of procedural fairness, such as notice, disclosure of information, and opportunity to make representations. The discretion and responsibility for closures are generally left to school boards. Only two provinces require ministerial approval for a school closure. In New Brunswick, the

³⁸ Government of Manitoba Policy Statement, *supra* note 5.

ministerial approval power is limited because such approval can only be withheld if the school board does not comply with the duty of fairness owed to affected stakeholders. In Prince Edward Island, ministerial approval is required unless the closure is due to a significant health and safety risk. A third province, Alberta, formerly required ministerial approval for closures but this requirement was dropped in 2004.

Only two provinces, Saskatchewan and Nova Scotia, have policies and procedures in place that give consideration to issues related to student transportation that may arise as a result of school closures. Three provinces, British Columbia, New Brunswick and Nova Scotia, give consideration to alternative community uses of schools, including sharing of school facilities for community purposes.

The use of school closure moratoriums varies amongst the provinces and such moratoriums generally appear to be of short-term duration.³⁹ Nova Scotia was currently under a moratorium through 2009 to allow the province to create closure guidelines. Ontario lifted a moratorium in 2006. Saskatchewan had a school closure moratorium in 2005–2006, but it was lifted as well. Saskatchewan now has a new “school of opportunity” program for 2009 and later years, where a school, once designated by the minister, can stay open for two years despite any decision of a board to close the school. The minister may then provide funding to the board for that school. This allows time for socio-economic development of the local community and opportunity for an increase in student enrolment. Chart A on page 32 provides a comparison of school closure policies across Canada.

VIII. THE COMMON LAW AND SCHOOL CLOSURES

There have been several school closure disputes that have gone before the courts in recent years, primarily in British Columbia, Saskatchewan, Ontario, and Nova Scotia.⁴⁰ There have not been any recent cases dealing with school closures in Manitoba.

³⁹ Les Perreux, “School’s out forever”, *The Globe and Mail* (1 September 2008) A3.

⁴⁰ *Hanna v Sun West School Division No 207* (2008) SKQB 315; *Comox Valley Citizens for Better Education v Comox Valley School District No 71* (2008) BCSC 1071 [Comox]; *Christianson v Chinook School Division, No 211* [2008] SJ No 403 [Christianson]; *Cook v Coquitlam School District No 53* (2007) BCJ No 1801 [Cook]; *Löffler v Prairie Valley School Division No 208* (2007) SKQB 321; *Metz v Prairie Valley School Division No 208* (2007) SKQB 269; *Kelly v School District No 63 (Saanich)* (2005) BSSC 1273; *Civitarese v Kootenay-Columbia School District No 20* (2003) BCSC 1275 [Civitarese]; *Mercer v Greater Victoria School District No 61* (2003) BCSC 1998 [Mercer]; *Potter v Halifax Regional School Board* (2002) NSCA 88 [Potter]; *Schreiber (Township of) v Superior-Greenstone District School Board* [2002] OJ No 3303; *Vecchiarelli v Toronto Catholic District School Board*

The courts have shown a great reluctance to intervene in the substantive decisions of school boards and divisions related to school closures. In other words, the courts have not been quick to consider the merits of closure decisions.⁴¹ In fact, the courts have recognized that decisions to close schools are inherently political⁴² and that school board decisions should not be second-guessed by the courts.⁴³ The courts also acknowledge that school boards have been delegated the responsibility for managing the school system and as long as they undertake to pursue school closures in a fair manner then deference should be given to school board decisions. In *Christianson v Chinook*, the court explained:

Major consolidations of school divisions have occurred. Boards of education of the consolidated school divisions have been given extensive duties, authorities and responsibilities to ensure the delivery of the best and highest quality education services that can be provided to students and communities geographically located within these consolidated school divisions. The school division boards of education are assisted in this process by the input received from members of local community school councils....This structure ensures that both at the local community and district school level[s], decisions are made in the best interests of the students having regard to available opportunities and resources. Where necessary, rationalization must take place and this may result in some school closures....So long as a school division board follows proper and appropriate procedural safeguards including, most importantly, its consultations with local school community councils and members of the community affected and the decision made is one made in good faith and consistent with the range of options which the board has the statutory right, duty and obligation to make and is rationally supported by the information presented in support of the criteria applied, the court should and must respect the decision made and give it proper deference. It is for the district school boards in consultation with the representatives of the local school community councils and members to make these important decisions and not for the courts to do so.⁴⁴

[2002] OJ No 2458; *MacGregor v Halifax Regional School Board* (2002) NSSC 181; *Ross v Avon Maitland District School Board* (2000) 45 Admin LR (3d) 178 (Ont SCJ) [*Ross*]; *Elliot v Burin Peninsula School District No 7* [1998] NJ 128 (NF CA) [*Elliot*].

⁴¹ *Civitarese, ibid* at para 37.

⁴² *Cook, supra* note 40 at 43. "School board decisions involving school closures are inevitably difficult and controversial. They are also inherently political and their merits are not the business of the courts."

⁴³ *Ross, supra* note 40 at 2. "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."

⁴⁴ *Christianson, supra* note 40 at paras 45–46.

The only exception to judicial non-intervention in the substantive decisions of school boards concerning school closures is the fact that school boards in making their decisions must take into account all relevant considerations “which go straight to the heart of the decision.”⁴⁵ The school boards, therefore, must consider all relevant information or their decisions can be overturned.

The courts have, however, concerned themselves with matters of procedural fairness. The courts have said that school closure decisions require a duty of procedural fairness because such decisions are for the most part administrative and not legislative in nature, at least with respect to individual school closures.⁴⁶ Closure decisions can also significantly impact on children and families.⁴⁷ Accordingly, “[T]he rights and legitimate expectations of those affected by school closures must be fully and carefully protected.”⁴⁸

Although the courts have said that the content of procedural fairness is variable and depends on the specifics of the circumstances as per *Baker*,⁴⁹ certain general principles can be extracted from the case law with respect to school closure decisions:

- Owing to the doctrine of legitimate expectations, a school board can have duties of procedural fairness that flow from its own school closure policies.
- Stakeholders are entitled to reasonable disclosure of information on a timely basis that will enable them to fully develop and present their viewpoint. However, reasonable disclosure does not necessarily mean full disclosure.⁵⁰
- Consultation with stakeholders must be meaningful in the sense that they must have at least some opportunity to participate in and influence the outcome of a decision. The consultative process cannot be simply undertaken in a mechanical manner with indifference for the sake of meeting a procedural fairness duty.

⁴⁵ *Cook*, *supra* note 40 at 53.

⁴⁶ *Potter*, *supra* note 40 at para 20.

⁴⁷ *Mercer*, *supra* note 40.

⁴⁸ *Cook*, *supra* note 40 at 47.

⁴⁹ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

⁵⁰ *Elliot*, *supra* note 40 at 47. “...may not necessarily require full disclosure of all background material and every scrap of relevant paper (in the traditional natural justice sense of knowing the full case one has to meet), sufficient of such information and material would generally have to be made available, at least in summary form, so that the persons affected will have a context in which to make their input, so that their representations can be directed to the real issues under active consideration by the board.”

- The procedures in place need not approach perfection, but only need be adequate according to the factors set out in *Baker*.

Despite the concern by the courts for procedural fairness, there is a heavy burden on the party that challenges a school closure decision on procedural grounds. The courts have said that not every defect in procedure will be fatal to the closure; the defect must be of such a nature that the board's decision would be impacted by the defect.⁵¹

Although the courts have generally found that school closure processes have complied with the owed duty of procedural fairness, the British Columbia Supreme Court in *Comox* recently overturned a school closure decision on the basis that the local school district did not comply with its duty of procedural fairness. This court characterized the closure review process that was undertaken by the local school district as a "sham".⁵²

IX. CONFLICTING STAKEHOLDER INTERESTS

As was evident in the submissions that were made to the Standing Committee on Social and Economic Development on Bill 28, the stakeholders involved have conflicting interests with respect to school closures. The various stakeholders include the school divisions and school boards, parents and parent groups, and the respective local communities. The school division and school boards generally desire to have unrestricted ability to manage the provision of educational service within their respective boundaries, including the closure of schools when necessary for financial reasons that may stem from changing demographics. Parents and parent groups are generally concerned with local access to quality education for their children, which may include maintenance and continued operation of local schools. Finally, the affected communities are generally concerned both with the level of taxation that is required to support the school system and with the potential negative impact on that community that may result from a school closure. These varying stakeholder interests create opposing pressures with respect to school closure decisions.

⁵¹ *Cook, supra* note 40 at 52. "A petitioner seeking to set aside a school closure decision on an application for judicial review based on procedural unfairness bears a heavy burden. To succeed, he or she must establish not only that there was a procedural defect in the consultation process, but also that any such defect was so fundamental that it affects the very basis of the board's decision."

⁵² *Comox, supra* note 40; *Valley, supra* note 40 at 74. "The breach was serious, and those interested and affected by the decision to close Cape Lazo were not only denied a fair opportunity to influence the closure decision, they were presented with a process that appeared to be a sham."

The presentations and submissions made to the committee on Bill 28 can be categorized as being received from five general groups: school divisions, parent groups, private citizens, education industry associations, and other interested groups. Twenty of the presentations and submissions were made by school divisions.⁵³ Seventeen were made by parents or representatives of parent advisory councils or groups.⁵⁴ Five were made by non-parent private citizens. Three were made by education industry associations.⁵⁵ Two were made by Municipalities/Districts.⁵⁶ One was made by the Canadian Taxpayers Federation which purports to represent taxpayers.

Presentations and submissions for and against the bill were reasonably balanced in number. The school divisions, two education industry associations, the Canadian Taxpayers Federation, and private citizens were against the bill, while the parent and parent groups, private citizens, and a local municipality and district supported the bill. One industry association took no strong position for or against the bill.

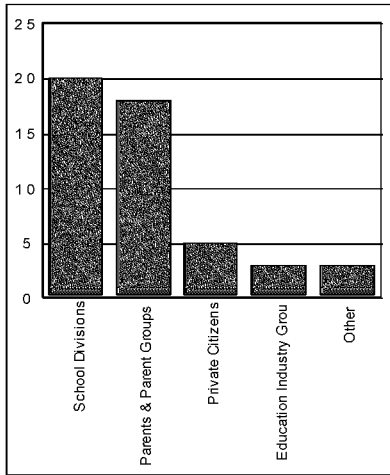


Figure 5: Committee Presenters

⁵³ St. James-Assiniboia; Pembina Trails; River East Transcona; Louis Riel; Park West; Mountain View; Brandon; Evergreen; Sunrise; Frontier; Prairie Spirit; Prairie Rose; Flin Flon; Garden Valley; Seine River; Kelsey; Portage la Prairie; Winnipeg; Interlake; Lakeshore (Lakeshore was actually made by Ms. Margaret Anderson, private citizen, but she is a trustee and argued from trustee perspective).

⁵⁴ Argyle Community Action Group (two speakers); Fisher Branch Parent Advisory Council; Ashern-Mooschorn Parent Advisory Council; Pierson Advisory Council; Kenton Community School; Strathclair Community School Advisory Council for School Leadership; Miniota Parent Council Advisory; Chapman School Review Committee; Westwood School Parent Council (Westwood was actually made by Ms. Shannon Forest, private citizen, but she is a member of the council); Strathclair Community School Catchment Area Committee.

⁵⁵ Manitoba Association of School Trustees; Manitoba Association of School Superintendents; Manitoba Teachers' Society.

⁵⁶ Birtle and District Community Development Corporation; Rural Municipality of Miniota.

A. In Favour of the Bill

1. Parents and Parent Advisory Groups

There were 17 presentations in favour of the Bill that were made by parents or representatives of parent advisory councils or groups. Although in some cases their presentations revolved around specific local issues, there were a number of general themes and concerns that were evident from their submissions. The following summarizes the collective positions of the parents and parent groups:⁵⁷

- There is no parental or community support for the school closures.
- School closures negatively affect the surrounding community and have a large impact on families. Parents and the community are in the best position to understand the consequences of closing a school and to look after the interests of children.
- There seems to be pressure to close schools despite the fact that school funding continues to rise. Increased funding together with declining enrolment means that there is more money per student. Some schools proposed to be closed have had recent upgrades and renovations. Closing schools also results in larger class sizes, but studies show that smaller sizes are preferable for teaching.
- Closing classrooms and putting children on buses is not a viable long-term approach to the current challenges. Longer bus rides raise safety issues and are not appropriate for younger children.
- The current process for school closures is flawed. Often, community ideas are rejected and parent representatives participating in the Manitoba school closure guideline process are manipulated and used as “pawns” by divisions to force closures.
- The conduct of the divisions is cause for concern. The divisions are unwilling participants in the Manitoba school closure guideline process, not being very co-operative or collaborative. They do not listen to ratepayers and parents and instead pursue their own agenda with minds made up. They do not discuss future plans for the school building after its closures, arguing that the school was not yet closed so no plans have been made. They do not do anything to improve the school’s situation. They bully parents and the community to achieve their objectives. They misrepresent that the Parent Advisory Councils and communities

⁵⁷ The positions were summarized from their oral presentations and written submission to the committee. See: *Committee* (7 June 2008), *supra* note 10; *Committee* (9 June 2008), *supra* note 11.

agree with the closure. In general, the divisions do not work for or with parents and the community.

- School divisions have the ability to use loopholes or other indirect means to close schools. Divisions can manipulate closures and viability of schools through staffing decisions, narrowly defining school “catchment” areas and creating uncertainty about a school’s survival. In short, school divisions can influence whether a school stays open or closes.
- School divisions and school boards should not have the power to close schools. There needs to be more of a balance of power in school closing decisions. Stronger parent and community input and provincial oversight is needed.
- More time and information is needed to explore the concept of community schools, to address the issues that surround closures, and to encourage growth. School facilities should be made available for community use. However, it is recognized that the moratorium will and cannot last forever.

2. *Municipalities/Districts*

There were two submissions made by municipalities/districts.⁵⁸ Both submitted that the moratorium will allow for needed time for review of proposals and to address concerns regarding school closures. Some criticism was directed at school divisions for disregarding community concerns. Concern was also expressed that school closures will cause people to leave communities, and this was a particularly important issue in rural environments. There was, however, some recognition that the school system cannot remain as is forever.

3. *Private Citizens*

The private citizens who spoke in favour of the bill were two school trustees who acted for themselves and not for their school boards. Both of these citizens painted school boards in a negative light and suggested that meaningful consultation with communities regarding school closures is very limited,⁵⁹ as school boards aggressively pursue their own agendas.⁶⁰ It was suggested that school boards are unduly focusing on school closures compared to other

⁵⁸ *Supra* note 56.

⁵⁹ *Committee* (9 June 2008), *supra* note 11 at 390 (George Marshall). “Over time, school boards have hijacked the minister’s intent and reduced meaningful public input to the legislated need to have three community people elected to a nine member review committee.”

⁶⁰ *Ibid* at 400 (Ed Lelond). “This Bill 28 needed to be developed because of School Boards like Park West, who was going to ramrod an idea through whether people liked it or not.”

alternatives that address declining student enrolment issues; and boards even have attempted to eliminate local trustee representation in local communities as a means to eliminate schools in those communities.⁶¹ Finally, it was suggested that Bill 28 addresses a power imbalance between school boards and communities, and restores duly needed ministerial oversight. One of these citizens, a current school trustee who was also a former president of Manitoba Association of School Trustees (“MAST”) and a former Winnipeg City Councillor who sat on the Executive Policy Committee, warned that if school boards continue to ignore their public, they will do so to their own detriment.⁶²

B. Against the Bill

1. School Divisions

There are currently 36 school divisions in Manitoba, with six being located in Winnipeg and 30 elsewhere in Manitoba.⁶³ Of these 36 divisions, 20, or approximately 55%, made presentations or submissions to the committee. A greater proportion of divisions in Winnipeg (83%) provided input to the committee versus those divisions that are located outside of Winnipeg (50%).

The positions of the school divisions that presented to the committee ranged from expressing concern about the bill, including proposing amendments, to opposing the bill and outright requesting that it be defeated. Overall, the divisions were fairly consistent in their positions, although there was some suggestion that rural-urban issues may be different and that separate rules may be required for each. The following summarizes the collective positions of the school divisions:⁶⁴

- The school divisions were not aware that the bill was coming as there was no consultation with them.

⁶¹ *Ibid.* “With declining enrolment being a Provincial wide situation, I wondered why instead of finding ways to close schools we didn't work together to find ways to keep schools open. ...Park West School Board was set to eliminate two more Trustees leaving more small schools without representation.”

⁶² *Ibid.* at 390 (George Marshall). “School boards which flaunt their publics flaunt the very reason for their existence, the delivery of educational services which is closer to the people. School boards which continue to ignore their publics run the risk of becoming less relevant, to disappear, perhaps, but more likely become something much less than they presently are. Should this future outcome occur, an objective person could reasonably conclude that school boards will have brought this unintended and unwanted consequence upon themselves.”

⁶³ Manitoba Education, *Schools in Manitoba* (Winnipeg: Manitoba Education, 2011) at 13, online: [Manitoba Education <http://www.edu.gov.mb.ca/k12/schools/2011_mb_schools_book.pdf>.](http://www.edu.gov.mb.ca/k12/schools/2011_mb_schools_book.pdf)

⁶⁴ The positions were summarized from their oral presentations and written submission to the Committee as published, *supra* note 53.

- Demographics are forcing declining enrolments and that trend will continue. The bill undermines the role of school boards and will make them less effective in dealing with demographic changes to balance education's needs with taxpayer concerns.
- Local school boards should retain authority to determine school closures as they are accountable to the community. Community consultations are already undertaken as part of existing provincial school closure guidelines. School boards should also be final authorities on transportation issues.
- Increased funding is necessary as the bill does not address additional costs. Small schools are expensive to operate.
- The bill places the final decision with the minister, but does not identify the specific process that the minister should take to reach a decision. The bill does not define consensus, so does this mean that one person may unilaterally stop a closure? The regulations to the bill, as provided for in section 41(1.5), should be developed as soon as possible through a consultative process involving the divisions.
- The section 41(1.3) criteria that need to be met by a school board for the minister to approve a closure should be amended to only include the closure impact on education services, financial operations of the division, and the community. This would drop the requirement for consensus for the closure among parents and residents of the area, and the requirement that the board be unable to expand the use of the building for appropriate community purposes.
- The bill should not apply retroactively to closure processes that were started before the first reading of the bill on 28 April 2008.
- The concept of community schools should be disassociated with closure decisions. These community schools raise issues related to operations and maintenance costs, renovation costs, and acceptable alternative uses.
- It is not possible in all circumstances to meet the one hour bus limitation. Direct drives can exceed one hour as there are road and geographic realities. The one hour limitation may also prevent vocational programming. There is concern that the bill could be used to force divisions to purchase more buses at the expense of providing education.
- In short, the bill will not strengthen schools, but instead will weaken them.

2. Education Industry Groups

The positions of MAST and the Manitoba Association of School Superintendents (“MASS”) were very similar. Both stated that boards should be allowed to continue with closure processes that have already been initiated. Both also expressed concern that many of the terms used in the bill were vague and both requested that regulations be developed in short order to clarify the provincial closure policy and end the moratorium. Both also expressed concern that the bill would have financial consequences on the divisions resulting in a negative impact on quality of education, and both indirectly raised funding issues.

Although MASS argued that the bill removed decisions from locally elected authorities (school boards), MAST interestingly did mention the issue. MAST did, however, argue that school boards have to balance education needs with community resource availability. MASS requested that section 41(1.3) be amended to include only three criteria for ministerial approval of a closure: impact of school closure on education services, impact on closure on the financial operations of the division, and the impact of closure on the community. MAST requested that the bill should be amended so that boards remain the final appeal body on transportation matters.

3. Private Citizens

There were two private citizens who spoke against the bill. The first argued that the one hour bus transportation limit will remove opportunities that students have to participate in programs and services outside of the school division. The second argued that the bill is a “Band-Aid” and makes little commitment to deal with the underlying problems causing school closures: i.e., demographic trends, particularly in rural Manitoba. This citizen also argued that, although student enrolment and cost per student are relevant, the most important issue must be quality of education.

4. Canadian Taxpayers Federation

The Canadian Taxpayers Federation simply argued that the bill removes local taxpayer control and supports high taxes through maintenance of uneconomic schools. It thus disadvantages taxpayers. They also argued that school consolidation can be a positive thing.

C. Neutral on the Bill

1. Manitoba Teachers Society

The Manitoba Teachers Society appeared to take no position for or against the bill, and instead simply expressed several concerns. First, they were concerned about the lack of prior consultation with industry groups in relation to the bill. They also expressed concern that something must be done to deal with the

public school issues arising from changing demographics in Manitoba. They explained that their members are most concerned about class sizes and composition of the classes. As costs rise with small student populations, alternatives shrink and several issues come to the forefront: multi-grade classrooms and limited access to specialist services. They simply said that the solution must be found in consultation.

X. THE CASE FOR AND AGAINST BILL 28

A. Summary of the Case for Bill 28

School closures have the potential to significantly affect students, families, local communities, and taxpayers. Such being the case, there are strong policy reasons to ensure that proper checks and balances are in place in connection with the school closure process.

Even though most provinces in Canada have felt the need in recent years to readdress school closure policy, Manitoba's school closure process has not changed since 1982. The changes made by the other provinces have for the most part focused on establishing mechanical rules for procedural fairness and for encouraging community consultation by school divisions/boards. Notwithstanding these changes, school closure disputes continue to persist across the country with allegations, both in and out of court, of a failing or failed process. From April 2008 to April 2011, there were several news items concerning school closures in news media across the country.⁶⁵ There have also been several court challenges in 2008 to school closures, 1988 in total, but the courts have shown a great reluctance to intervene in the substantive decisions of school boards regarding school closures.

Many stakeholders in Manitoba have argued that the current school closure process is not working. They presented examples of how the process is being manipulated by school divisions in several ways to the advantage of the division's school closure agenda. It was suggested that true meaningful consultation with

⁶⁵ Kristin Rushowy, "School closings on table", *Toronto Star* (16 April 2008) A1; Nick Martin, "Rural divisions sort through school closings", *Winnipeg Free Press* (30 April 2008) A5; Nick Martin, "St. James proceeds with school closings", *Winnipeg Free Press* (7 May 2008) B2; "School's out", *Ottawa Sun* (25 May 2008); "School closures remain a possibility in Nanaimo", *Nanaimo Daily News* (27 August 2008); "School closings hot-button issue after Glen Lake", *Times-Colonist* (12 November 2008) A3; Larissa Cardey, "Committee presents options for possible school closings", *The Ottawa Citizen* (22 April 2009) D6; Louise Brown, "GTA parents fight school closings", *Toronto Star* (7 May 2010) A2; Kate Hammer, "Debate over school closings in Toronto about to heat up", *The Globe and Mail* (9 November 2010) A1; Brenda Branswell, "School closings issue looms once more", *The [Montreal] Gazette* (18 December 2010) A4; Brenda Branswell, "EMSB tackles school closings again", *The [Montreal] Gazette* (5 April 2011) A6; see also *supra* note 39.

parents and communities by the school divisions/boards is lacking, and that community concerns are often disregarded. This suggestion is supported by the very words to the committee of the Louis Riel School Division, which sought to close four schools: “[W]e ask for the most serious consideration as to the degree to which consultation can or should influence the decision about any specific educational matter.”⁶⁶ It was even suggested by stakeholders that school divisions/boards have it within their means to ultimately determine the viability of any school.

It should not be automatically assumed that school boards are always truly independent of their respective school divisions. School divisions may have substantial informal control of their school boards. Therefore, school trustees may not in all cases make balanced decisions that are independent of division desires. This is not to suggest that closure decisions are usually made in bad faith or that there usually is a lack of independence between boards and school divisions.

There is a need for a balance of power between stakeholders in school closure decisions. School divisions, through their respective boards, should not have unilateral power to close schools contrary to parent and community input. Bill 28 can serve to restore a power imbalance between school boards and communities by requiring ministerial approval for school closures. It can allow for the viability of target schools to be duly explored and tested by all stakeholders within the community context before a school is permanently closed.

B. Summary of the Case Against Bill 28

Stakeholders against Bill 28 have argued that it is merely a political reactionary bill designed to pacify a vocal group of disgruntled parents who face closure of their local school, even though the school may not be viable. These stakeholders stated that there was no consultation by the provincial government with the school boards and divisions or with any other industry association before the bill was tabled.

Further, stakeholders argue that the bill does not address the underlying demographic problems that are resulting in declining enrolments and forcing school closures, particularly in rural Manitoba. Stakeholders also argue that there is an excess capacity of school buildings relative to current levels of enrolment, so school consolidation can be a very positive thing for the education system since small schools are expensive to operate. It is further argued that in rural Manitoba it is not always possible to meet the one hour bus limitation. Accordingly, it is argued that the overall effect of Bill 28 will be negative

⁶⁶ *Committee* (7 June 2008), *supra* note 10 at 324.

financial consequences on school divisions. As school divisions have practical financial constraints within which they must operate, these negative financial consequences will in turn negatively impact on the quality of education in Manitoba.

It is also argued by stakeholders that the bill may undermine the role of school boards and may make them less effective in dealing with demographic challenges as they strive to balance education needs with taxpayer concerns. These stakeholders also argue that local school boards should retain authority to determine school closures because they are elected bodies that are already accountable to communities. As well, these stakeholders point to the fact that local community interests are currently considered by school boards through community consultations as part of existing provincial school closure guidelines. Whether a school remains open, they say, should be a local educational matter and not be driven by non-educational community purposes. For these reasons, these stakeholders say that boards should be allowed to continue with closure processes that have already been initiated in compliance with existing policy.

In addition, these stakeholders argue that, although the bill places the final decision regarding a school closure with the minister, it does not specify the process that should be taken to reach a decision. While the bill seeks consensus among stakeholders, achieving consensus may not be realistically possible in school closure decisions; there may always be one party who disagrees.

In summary, stakeholders argue that a moratorium on school closures will not strengthen schools, but will weaken them instead. It is argued that regulations should be developed in short order to clarify the provincial closure policy and end the moratorium because some schools are unviable and they need to close.

XI. A NEED FOR A BALANCED APPROACH TO SCHOOL CLOSURES

Given the practical budgeting pressure that all school divisions are facing today in efforts to keep property taxes down,⁶⁷ a reasonable concern may exist that, as divisions desperately and practically strive to control expenses,⁶⁸ the financial pressures resulting from rapidly escalating costs for student support services may indirectly pressure school divisions through their budgeting processes to close

⁶⁷ See *supra* note 26 for data source. School Division revenue from local taxation increased by 5.6% during the four years from 2002–2003 to 2006–2007, but their costs increased by 16.5%. This minimal increase in revenue from local taxation has forced divisions to apply for and place greater reliance on provincial government support.

⁶⁸ *Committee* (7 June 2008), *supra* note 10 at 305. MASS expressed concern about the practical budget realities of operating divisions and that trade-off during the budgeting process must be undertaken.

schools that might otherwise be viable. This is not to suggest that school divisions are closing vibrant and growing schools, but merely that smaller schools may be budget targets for potential cost savings.

The preceding concern, legitimate or otherwise, raises public policy issues related to the appropriate funding mechanism for student support services and to determinations of unviable schools. It may be argued that, as a matter of public policy, several of the social functions currently being undertaken by school divisions under support services are not education per se and more appropriately should fall under and be financed by existing or newly created provincial social programs. In other words, the financing of these social functions should be decoupled from the budgeting decisions of local school divisions. However, this topic is beyond the scope of this paper. This paper is concerned with the public policy issues in connection with determinations of “unviable” schools and the school closure process.

Although from analysis it is not clear as to the precise impact that school closures are having or will have on school division costs, it is clear that there may be a need to close some schools in the future. The underlying demographic changes driving decreasing enrolment are very powerful and are expected to continue. Therefore, with or without a moratorium on school closures, enrolment will continue to decline and schools will likely become increasingly vacant. Although something has to be done, a moratorium on closing schools is not a permanent solution to the political issues surrounding school closures. Other provinces, such as Ontario, Saskatchewan, and Alberta, have tried moratoriums but ultimately lifted them. This was the case perhaps because it is perfectly reasonable that certain schools in certain circumstances should be closed for the benefit of both students and taxpayers.

Notwithstanding the need for some school closures as a means to address the problems resulting from changing demographics, it is not sound public policy that school divisions should be able to proceed unchecked without appropriate controls. There is suggestion and evidence, both from the submissions to the Standing Committee on Bill 28 and in recent court challenges to school closures in other jurisdictions, that schools boards may aggressively pursue their school closure agendas with “closed minds” to parent and community issues. This suggestion and evidence exists despite provincial guidelines, regulations, and legislation that are designed to ensure procedural fairness during the closure process. Therefore, a provincial focus on procedural fairness is arguably not sufficient to keep school boards in check. Boards can learn to manage procedural fairness rules in a manner that allows strict mechanical compliance with the rules but avoids true consultation and collaborative solutions.

The courts have been of limited assistance to parents and communities who wish to save local schools. Although the courts have recognized problems in certain cases, they have generally been reluctant to intervene. Where the courts

have intervened, it has been for the failure of a board to comply with procedural fairness. The courts have not intervened in substantive decisions of the boards on whether closure decisions themselves are right or wrong.

In view of this non-intervention approach of the courts, school divisions are quick to say that school closure decisions should be left to locally elected boards.⁶⁹ One could speculate that this may be so because school division senior management have a great deal of influence, if not informal control, on their school boards. Their power arises from their superior knowledge and background in education as well as their greater access to information and resources. Division management are also employed to focus full-time on education issues, whereas many school trustees serve part-time and have other full-time careers. The practical effect is that in some cases a school board can be a mere extension of the school division from which independence issues may arise. Accordingly, for public policy reasons, it may not be appropriate to allow school board/divisions to have unbridled discretion on school closure decisions.

On the other hand, there are potential problems with stakeholder positions on the other side of the issue. In some cases parents and local communities may not wish to accept the realities that face the future of their local school. Their opinions, while well intended, may be clouded by the emotion of losing their child's school or they may simply be self-interested in minimizing inconvenience from practical transportation and child care issues that may arise, directly or indirectly, from closure of their school. They may even be self-interested in maintaining the operation of a local school because that school may have much smaller class sizes than the school to which the students will be transferred. A local community may also not wish to lose its local school for socio-economic reasons, particularly in rural centres. Finally, if consensus is deemed a necessary prerequisite for a school closure to proceed, some parents or communities may simply not agree under any circumstances, no matter what evidence is present, as an effective means to stop the closure process and accomplish their objective of saving their school.

Despite the conflicting interests and potential misuse of power on both sides of school closure decisions, there is a need for a meaningful and collaborative process involving all stakeholders to address the significant issues that confront the school system from declining enrolment. A single stakeholder should not be able to unilaterally control outcomes. There is a need for a balance of power between stakeholders to ensure that all interests are duly considered.

⁶⁹ *Ibid* at 304. "Bill 28 would remove the decision from the locally elected authority, which is in the best position to judge the educational benefit or impact on students."

A new process is needed: one that allows the system to move forward in a manner where all interests are duly considered in a balanced way in the best interests of children's education and the economic realities of our society.

As the provincial government has yet to develop the regulations that are provided for in Bill 28, the author recommends that the provincial government use this opportunity to go beyond simply establishing mechanical rules for procedural fairness and instead establish a new process that changes the power dynamics of closure decisions to allow the school system to evolve in a balanced way.

XII. GENERAL RECOMMENDATIONS FOR PENDING REGULATIONS

Although it is recognized that the school closure process can be difficult for all stakeholders involved, the moratorium on school closures cannot last forever. The challenge is to find a process that allows the school system to evolve in a manner that takes into account the interests of all stakeholders. Once this process is encapsulated into regulations, it is reasonable that the moratorium should end.

The pending regulations should go beyond simply establishing mechanical rules for procedural fairness and instead should establish a new process that changes the power dynamics of closure decisions. This is not to say that strict and detailed rules designed to ensure procedural fairness should not be included in the regulations. There should be such prescribed rules related to notice, public meetings, opportunity to present, and the like. Although these rules will be paramount over individual school board closure policies, these rules would not preclude individual boards from having their own policies in place that serve to provide additional protection to local parents and community. To further ensure compliance with procedural fairness, the minister should reserve the discretion to stop a school closure if a specific rule is not followed or if there is a failure to comply with procedural fairness in a way that is not contemplated by the rules. This discretion would serve to encourage a fair process rather than mere mechanical compliance with and manipulation of fairness rules.

There should also be a process to fast-track school closures if all stakeholders involved in the specific local closure decision agree. When all agree, it should not be necessary to undertake a lengthy process that was designed to protect the procedural fairness rights of stakeholders who have conflicting interests. There should also be a fast-track closure process if there is a significant health and safety risk involved.

As well, there should be a comprehensive analysis and multiple reporting process for review of all school closure decisions. Reporting at various stages of the review process, similar to that done in Nova Scotia, would allow for better understanding of issues and for challenge of facts and assumptions. This process

should be open and public. Such an approach would serve to ensure proper disclosure of all relevant information as well as facilitate an open and public detailed understanding, analysis, and debate of the potential impact of the school closure, including the impact on school division costs and staffing, student education, school bus transportation, parents and families, and the community. Consideration of alternative uses of school facilities, in whole or part, would also be part of this process.

In addition, there appears to be a need for a re-balancing of power between stakeholders in school closure decisions in order to ensure independence of decision making and to ensure that meaningful consideration is given to parent and community issues. In short, this re-balancing means that school boards should no longer have the unilateral power to close schools. This closure power should be removed by way of statute or regulation to a newly created provincially appointed board. This provincial board would make the decision on a particular school closure. It would have responsibility to review the published comprehensive reports pertaining to a particular school and to hear any other written or oral submissions made by various stakeholders, including the school division, parents and the community. The decisions of this provincial board would be binding on school divisions and school boards.

Finally, even if a school has been deemed unviable by the provincial board, except if the closure resulted from significant health and safety concerns, there should be some program, similar to that of Saskatchewan, that allows a community a fixed period of time to save a school by increasing enrolment through socio-economic development of the local community or by meeting any other criteria established by the provincial board. After the fixed period of time has elapsed, the provincial board will review the matter once again and if enrolment targets and/or other criteria are not met as determined by that board, the school will be closed at the end of the then-current school year. This program to defer closures should be financed by the province to remove any immediate financial burden on the school division.

XIII. CONCLUSION

The problem of declining enrolment is national in scope and is driven by changing demographics. The consequence of this decline is that school closures are increasingly becoming an issue in Manitoba and other provinces. Due to conflicting stakeholder interests, the school closure process can be very difficult for all parties involved. Bill 28, *The Strengthening Local Schools Act (Public Schools Act Amended)*, was enacted in response to these pressures.

This paper has explored Bill 28 by reviewing and analyzing the underlying dynamics and factors related to school closures, including changing demographics, school division costs, conflicting stakeholder interests, the current

legal environment, and school closure processes both in Manitoba and in other jurisdictions. Arguments both for and against Bill 28 were carefully analyzed. Based on this analysis, a new school closure process for Manitoba is deemed necessary by the author to replace an existing 26 year old regime that, in the opinion of the author, appears to be failing. Since Bill 28 provides for yet undeveloped regulations related to school closures, this paper offers general recommendations for these pending regulations. In that regard, a new process is recommended that will end the moratorium, ensure procedural fairness, increase analysis and reporting surrounding school closures, and transfer school closure decisions from school boards to a newly created provincial board. This new process will allow the school system to move forward in a manner where all interests are duly considered in an independent and balanced way in the best interests of children's education and the economic realities of our society.

As the issues surrounding school closures are complex, problematic and at times emotionally charged, some stakeholders may not fully agree with all recommendations in this paper. Notwithstanding this potential for disagreement, it is very likely that most stakeholders would still agree that there is a pressing need for change of the closure process and for finalization of the pending regulations. Given this pressing need, this paper has strived to provide pragmatic recommendations for change or, at the very least, to make a meaningful contribution to a productive dialogue on the school closure process.

Chart A: Comparison of School Closure Policies in Canada⁷⁰

Province	Man		BC	Alta	Sask	Ont	NB	NS	PEI	NFLD
	Old Policy	Bill 28								
Last Policy Change	1982	06/2008	09/2008	2004	07/2008	2006	2006	04/2008	1998	1997
Governing Legislation	-	<i>Public Schools Act</i> , ss 41, 31.1, 196.1	<i>School Act</i> , ss 73 and 168(2)(p)	<i>School Act</i> , s 58	<i>Education Act</i> , ss 87.1, 87.2, 370(1)	<i>Education Act</i> , s 8(1)	<i>Education Act</i> , ss 3.1, 6(b.2), s.6.1(a)	<i>Education Act</i> , ss 89, 145	<i>School Act</i> , s 147	<i>Schools Act</i> , s 75(2)
Applicable Regulation	-	Provided for, but not yet developed	-	238/97 M320/02	Education Regulations 1986 (amended 07/2008)	-	-	80/97 as amended by 240/2008	School Closure Regulations (Ch S-2.1)	-
Other Policy Applicable	Education Department Guidelines	Not known	Ministerial Orders M194/08, M320/02	-	-	Pupil Accommodation Review Guidelines	Policy 409 and Policy 407	-	-	-
Responsibility for Closure	School Boards	School Boards	School Boards	School Boards	School Boards	School Boards	School Districts	School Boards	School Boards	School Boards

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Adapted from Nova Scotia Department of Education, *School Closure Process Review: Review Committee Report and Recommendations*, (Halifax: School Closure Process Review Committee, 2007) at 13. Information was compiled in fall 2008.

Ministerial Approval Required for Closure?	No	Yes	Not for school closure. Required for disposal of building	No	No	No	No	Yes. Approval may be withheld if procedural fairness not applied	No	Yes, unless due to significant health or safety risk	No
School Board Closure Policy Required?	No	?	Yes. Must be public.	No, but board may develop	No, but must be public if one exists	Yes	Yes	Yes	No	Yes	No
Report Required?	Yes. Informational report to community	?	No, but board must report closure decision to minister	No, but notice to public meeting must provide details	Yes. Boards must provide report to school review committee	Yes. Boards must present plan to Accommodation Review Committee	No, but districts must provide relevant docs to public	Yes. Three required: Identification; Impact Assessment; Response to Impact Assessment	No	Yes	No
Community Consultation Required?	Yes	Yes. Board must demonstrate "consensus" for the closure	Yes	Yes	Yes. Must establish a school review committee	Yes. Must establish an Accommodation Review Committee	Yes	Yes. A study committee must be appointed with parent and community reps	Yes	Yes	No, but parents can make presentations

Consideration of Alternate Community Uses Required?	No	Yes. Community School designation available	Yes	No	No	No	No, but allowed and incented via Policy 407	Yes, in impact Assessment report	No	No
Busing Rules?	No	Yes. Busing limited to 1 hr	No	No	School division bears cost of busing	No	No	No, but busing impact must be in Impact Assessment Report	No	No