

LEGAL VIEW

# School Closures: Some Common Questions Answered

*Insights to help boards navigate the process*

BY MICHAEL HINES

**S**CHOOL CLOSURE DEBATES AND decisions are rarely easy. Occasionally, affected stakeholders will seek legal recourse to try to prevent the implementation of a decision with which they disagree. Here are six commonly asked questions about legal challenges to school closure decisions.

## 1. How can the decision of a school board to close a school be overturned?

The process involves a court proceeding called an application for judicial review. This proceeding places the dispute before a court, usually a panel of three judges of the Ontario Divisional Court (a court placed structurally between the Superior Court and the Ontario Court of Appeal). The reviewing court has the legal power to “quash” (i.e., nullify) the closure decision.

You may also hear of another mechanism, involving the Minister of Education, called an

administrative review. Under this process, the Minister appoints an investigator, often a retired director of education, to assess the process followed by the board. However, there is no power under an administrative review to disturb the board’s decision. Rather, the investigator will produce a report that may suggest ways in which

the process followed by the board could be improved in future cases.



## 2. Is a “judicial review” the same thing as an “appeal”?

There is a subtle but important difference between the two processes. “Appeal” usually refers to a situation where the decision of one decision-making body is referred to another tribunal that

can substitute its decision and/or judgment for that of the original decision-maker. In a judicial review, the reviewing court is typically more concerned with ensuring that the original decision-maker made its decision according to a process that was fair to all stakeholders. The

reviewing court will not substitute its opinion on the matter, but will review the sequence of events to ensure that due process was followed. In school closure cases, the courts have invariably stated that it is not their function to second-guess the wisdom of the decision.

### 3. What is the reviewing court looking for?

Given the importance of schools to their communities, Ontario courts have held that members of those communities are entitled to a *transparent* process that provides an opportunity for *meaningful community input*.

In Ontario, transparency is promoted by three requirements. First, according to the *Education Act*, each school board is required to establish and follow a detailed board policy that describes how accommodation reviews are to be conducted. Ad hoc processes are not lawful. This policy must itself conform, at least in spirit, to Ministry-issued guidelines on accommodation reviews. Second, the board's decision-making process must be open to public scrutiny through the use of meetings held in public session. The use of in camera meetings, or informal, private sessions where the decision-making process is materially advanced, can lead to a decision being quashed. Third, transparency is promoted not only by making the information used by the board to decide the issue available to members of the public, but also by satisfying reasonable requests for information upon which community members might wish to rely in advancing their points of view.

At the time of writing, Ministry guidelines encourage public input through a structured process involving these features,

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among others: (1) a mandatory accommodation review committee (ARC) composed of representatives from the affected schools and business communities, and (2) a minimum of four public board meetings at which individual community members have opportunities to address the board directly. The ARC can make non-binding recommendations to the board.

Despite their commendable objectives, the current guidelines have been the subject of extensive criticism. They are regarded by many as inflexible and creating a timeline that is too protracted, failing to achieve necessary municipal input while at the same time creating frustration among some community members who question how meaningful their input really is. The Ministry is reviewing the guidelines in light of these and other concerns, and revised guidelines have been promised.

More generally, Ontario courts have repeatedly emphasized that no disappointed applicant has a right to have their views endorsed by the board or to have a “perfect procedure” so long as they have been provided with a meaningful opportunity to influence the outcome by the end of the process.

### 4. How easy is it to get a court to overturn a school closure decision?

Statistically speaking, it is extremely difficult. Out of over 30 cases of challenges to school closure decisions in Ontario, only four have been successful. In two of those cases, trustees conducted meetings in secret and were found to have prejudged the outcome without public input. In another case that occurred before Ministry guidelines prohibited such behaviour, the board made its decision to close schools without public notice or input, agreeing to hear from community members only after protests were raised and then rubber-stamping the original decision. The fourth case involved a “perfect storm” of procedural irregularities: refusal to provide clearly relevant information, provision of inadequate time for input and creating area committees that included some communities but not others.

While the Divisional Court has stated repeatedly that the right to meaningful community input must be “jealously guarded,” the combination of guidance from the Ministry regarding closure policies and the increasing awareness of boards concerning their procedural obligations have typically led to

acceptable (if not always perfect) consultative and deliberative procedures. This has led the Divisional Court to observe on more than one occasion that judicial review applicants bear a heavy burden of proof in showing that a material procedural defect occurred.

**5. If a judicial review is successful, is the board prohibited from closing the school?**

Yes and no. The board will not be able to implement its decision immediately. However, because the defect (if any) will likely have been procedural in nature – for example, failing to disclose requested relevant information – and because courts never determine whether a school closure decision is right or wrong, wise or unwise, the remedy, in all but the most obvious cases of bad faith, will be to send the matter back to

the board for decision (if it wishes to revisit the issue) in accordance with a “corrected” process. In the “perfect storm” case described above, the board corrected the defect and reached the same decision the second time around. A judicial review of that second decision was unsuccessful, despite allegations that the board had prejudged the matter.

**6. How can boards avoid judicial review of their school closure decisions?**

That is a challenging question, since school closure decisions often evoke strong feelings irrespective of the process followed. Obviously, a board should ensure that its accommodation review policy conforms to Ministry guidelines and is followed. It should not deny requests for arguably relevant information without good reason.

It should identify at the outset the critical priorities that the accommodation review is intended to address so that community members will have a context for their involvement – while avoiding statements that suggest outright prejudgment of any issues.

A discussion of revised pupil accommodation review guidelines that were released March 2015 is planned for the Fall 2015 issue of *Education Today*. ▲

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# STEP OUTSIDE: INTO THE OUTDOOR CLASSROOM



Thinking about outdoor education there is an association with the phrase “stepping outside the classroom.” On the surface this concept is true. Often our image of a classroom fashions itself as an enclosed space with desks and chairs, things that do not generally exist outside. Yet by exploring this idea further, it seems to diminish the outdoors as a classroom space and suggests *leaving* a traditional space of learning. In reality it’s not a matter of stepping outside the classroom, but stepping into a *different* classroom, one that focuses on models of adventure-based learning and intentionality.

Outdoor education integrates experiential learning, active participation, stewardship, and self-reliance to challenge students. In this environment, educators use nature and fluctuate between leadership styles to teach hard skills, but more importantly, to help students learn about themselves. Activities such as tag or canoeing transcend simple recreation and evolve into programs that help students discover facets of leadership and teamwork that connect with their everyday lives. In fact, participating in these outdoor activities illuminates what is done in the traditional classroom.

At Bark Lake Leadership Centre these are core ideas that form the foundation of our programming. As an outdoor education facility, there is a focus on leadership and teambuilding through activities such as canoeing, hiking, and high ropes. Our classroom is over 500 acres, and it is one that emphasizes experiential learning. By offering opportunities that would not be possible without trees, a lake, and expansive grounds there is a chance for students to push themselves out of their comfort zones, into their learning zone, while being safe and responsible.

Bark Lake invites both teachers and students to “step outside” their regular classrooms and try something different in our larger, boundless classroom. To find out more about what Bark Lake offers, or to book a Bark Lake Adventure for your school, e-mail [sales@barklake.com](mailto:sales@barklake.com) or call 1.888.517.9999. Mention the promo code “STEP OUTSIDE” to save up to 15%. ▲



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