



July 31, 2020

BY EMAIL

Honourable Rob Fleming
Minister of Education
PO Box 9045 Stn Prov Govt
Victoria, BC V8W 9E2
Email: educ.minister@gov.bc.ca

Dear Minister Fleming:

**RE: Conseil scolaire francophone de la Colombie-Britannique
2021/22 Capital Plan submission**

Please find attached the Conseil scolaire francophone de la Colombie-Britannique's ("CSF") 2021/22 Capital Plan submission (the "CSF's Capital Plan Submission"), approved by the CSF's Board of Regional Trustees ("Board"). The attached Capital Plan Submission sets out the CSF's facilities plan over a 10-year period (as opposed to a 5-year period), and consequently serves as to complement and update the CSF's 2015 School District Facilities Plan and 2016 Long Range Facilities Plan

The CSF's Capital Plan Submission has been prepared in accordance with the *Capital Plan Instructions for 2021/22*, dated April 10, 2020 and reflects the Supreme Court of Canada's June 2020 decision,¹ which confirms that many of the projects that the CSF has been requesting for over a decade must be funded without delay in order to ensure compliance with s. 23 of the *Canadian Charter of Rights and Freedoms* ("Charter"). The CSF's Capital Plan Submission also includes projects that were not directly targeted by the litigation initiated in 2010, but which nevertheless require immediate funding pursuant to the Supreme Court of Canada's framework for evaluating s. 23 obligations. To that extent, the projects identified in the CSF's Capital Plan

¹ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, et al v British Columbia (Education)*, 2020 SCC 13 [CSFCB, *Fédération des parents, et al v BC*, SCC].

Submission is crucial to ensuring the equitable delivery of French-first language education services in British Columbia and must be realized as quickly as possible.

A. Certain impacts of the June 2020 Supreme Court of Canada decision on the CSF's Capital Plan Submission:

i) Section 23 *Charter* breaches must be remedied vigilantly and in a timely manner

The Supreme Court of Canada reiterated the importance of remedying s. 23 *Charter* rights vigilantly as the likelihood of assimilation and of cultural erosion increases with each passing school year if preventative action is not taken.²

To assist in redressing s. 23 violations in a timely manner, the Supreme Court of Canada clarified how s. 23 should be applied to ensure that “future claimants are not forced to undertake interminable judicial proceedings in order to have their rights protected, recognized and enforced”, which undermines access to justice and slows progress towards the equal partnership of the two official language groups in the context of education.³ Indeed, the Supreme Court of Canada emphasized that the ten years of litigation the plaintiffs endured resulted in two generations of students being denied minority language education, contributing to the erosion of British Columbia’s French-speaking community.⁴

ii) Adopting an approach that promotes the development of French-language communities across the Province: creating a CSF-dedicated team at the Ministry of Education

The CSF is looking forward to continuing the work that has been undertaken by its representatives and those of the Ministry of Education (“Ministry”) over the last few years. However, more must be done to implement the Supreme Court of Canada’s June 2020 decision, and other related decisions,⁵ and prevent future s. 23 *Charter* breaches from arising or enduring.

The Province’s capital planning process must promote the development and autonomy of the French speaking community.⁶ Moving forward, the Province and the CSF must keep in mind that s. 23 *Charter* obligations have three purposes: preventative, remedial, and unifying.⁷ As such, the Ministry and the CSF must work together to prevent the erosion of French-language communities in British Columbia, to redress past injustices and promote the development of those communities, and to ensure that s. 23 rights are respected across the province. In

² CSFCB, *Fédération des parents, et al v BC*, SCC at para 16.

³ CSFCB, *Fédération des parents, et al v BC*, SCC at para 20.

⁴ CSFCB, *Fédération des parents, et al v BC*, SCC at para 56.

⁵ *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie--Britannique, et al v British Columbia (Education)*, 2016 BCSC 1764; *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21.

⁶ CSFCB, *Fédération des parents, et al v BC*, SCC at para 5.

⁷ CSFCB, *Fédération des parents, et al v BC*, SCC at para 15.

particular, eligible parents can no longer fear abandoning their language and culture when they move to British Columbia.

In order to provide the Ministry with the information that is required to address or avoid future breaches, the CSF has prepared its 2021-22 Capital Plan submission not only to reflect the required 5-year planning period (2021/22 – 2026/27), but also the following 5-year period (2027/28 – 2031/32). The CSF hopes that the addition of an extra 5 years will help the Ministry to think further into the future. The CSF would also be delighted to discuss how this information can be used going forward and to work with the Ministry to improve the provided information in order to assist the Ministry as much as possible.

To that end, the CSF recommends that an Assistant Deputy Minister or Executive Director be appointed to work exclusively with the CSF on matters related to capital planning. Such a person could also assist the CSF with matters unrelated to capital planning, such as operational funding (including transportation), recruitment, availability of French-language resources, etc., that need to be addressed to ensure that French-first language education is available and substantively equivalent to that offered to the English-language majority.

With respect to capital planning, the CSF also recommends the creation of a dedicated working group within the Ministry to assist the CSF in implementing the numerous court declarations in a timely manner and preventing future s. 23 *Charter* breaches from arising or enduring. The creation of such a team would help minimize further delays in respecting the rights guaranteed by s. 23 of the *Charter* and ensure that students eligible to attend a CSF school can receive the quality of education to which they are entitled. The Ministry would also be demonstrating to the CSF and the French-language community that it is committed to respecting the court declarations and preventing the need for future litigation regarding the implementation of s. 23 rights in British Columbia.

iii) Prioritizing CSF project requests

As in prior years, the CSF's Capital Plan Submission relies on several principles to prioritize projects. However, despite prioritizing its project requests, the CSF must continue to advance multiple projects at once. While the Supreme Court of Canada confirmed that requiring the CSF to prioritize its project requests does not violate s. 23 of the *Charter*, this cannot be taken to mean that the Province can delay remedying s. 23 *Charter* breaches, or that it is only required to fund a certain number of top ranked priorities. To the contrary, *Charter* infringements must be remedied with as minimal delay as possible:

[139] The appellants contend that the Province may not, as a solution for clear infringements of s. 23 of the Charter, compel the CSF to prioritize the capital projects the latter submits. This prioritization obliges the CSF to accept that some infringements of s. 23 will persist longer than others. The Province counters that the government has a limited budget and that it is up not to the Province but to the CSF to prioritize projects in exercising its right of management. In the current situation, the Province would have to be a sort of mind reader when it comes to the CSF's projects. I agree with the Province on this point.

[140] In my view, the prioritization required by the Province does not infringe the right of management guaranteed by s. 23 of the Charter. On the contrary, the Province is furthering the exercise of that right in asking the CSF to indicate where funds should be invested on a priority basis.

[141] The real question instead relates to the timeframe for a remedy. In other words, the appellants are asking this: How much time does the Province have to remedy the infringements of s. 23? This will have to be addressed on a case-by-case basis. The Province's ability to pay and the CSF's ability to manage multiple projects will have to be taken into account.

[142] The infringements must nonetheless be remedied in a timely fashion. This requirement is in keeping with the unique and distinct nature of s. 23. Section 23 rights are particularly vulnerable to foot-dragging by public authorities because of the "numbers warrant" requirement in that section. The force of assimilation is such that the number of children of rights holders could fall irreversibly below the number needed to warrant the provision of services in a linguistic minority community while the authorities delay fulfilling their constitutional obligations [citation omitted]. As this Court recently noted, "there is a critical need both for vigilant implementation of s. 23 rights, and for timely compliance in remedying violations" [citation omitted].⁸

Thus, even though the requested projects have been prioritized, it is necessary that the Ministry fund much more than one project at a time, when it is possible to advance those projects in parallel, which will be the case more often than not.

iv) The Ministry must be flexible when it comes to funding CSF projects

Given the number of projects included in the CSF's Capital Plan Submission and the Supreme Court of Canada's warning that *Charter* infringements must be remedied with as minimal delay as possible, the Province must be flexible when it comes to funding CSF project requests.

The British Columbia Supreme Court ordered the creation of a CSF-dedicated rolling capital envelope to "provide the CSF with some financial security and flexibility".⁹

The provincial nature of the CSF's service delivery model is unique. There are many challenges associated with this model, including that the CSF's needs are not considered in any municipal planning processes; municipal requirements and processes differ greatly from region to region; the CSF often relies on and must build relationships with English-language school districts where it operates, or hopes to operate, a French-first language program; English-language school districts are often unable or unwilling to accommodate the CSF's needs; and the list goes on. It is also often the case that opportunities that are unknown to the CSF (or to the Ministry) at the time it prepares its Capital Plan Submission only arise later, and thus outside of the Ministry's annual capital budgeting process. In recognition of the unique obstacles and situations faced by the CSF, flexibility is required to permit the CSF to advance projects concurrently. For example, the CSF expects that if a site acquisition or leasing opportunity arises outside of the Ministry's annual capital approval process, but is deemed a high priority by the

⁸ *CSFCB, Fédération des parents, et al v BC*, SCC at para 139-142.

⁹ *CSFCB, Fédération des parents, et al v BC*, BCSC at para 1221.

CSF's Board, Ministry officials will work with the CSF to review and approve the business case of the emerging project.

The Ministry has advised the CSF that one of the key obstacles to flexible implementation of the CSF's Five-Year Capital Plan is the dollar amount that has been allocated to the CSF-dedicated rolling capital envelope. Respectfully, if the CSF's Board decides that there is a priority project that can be acted on immediately, and wishes to pursue this project over a project that has been previously supported by the Ministry, such a decision should rest with the CSF Board. The amount allocated to the CSF-dedicated rolling capital envelope must allow for flexibility in advancing projects as opportunities become available or risks are identified. For example, if there is an opportunity to purchase a school site in an area where land is at a premium and difficult to come by, it is the CSF Board's expectation that the Ministry will work with the CSF to purchase such a property, regardless of whether the community in question has been identified as a *Charter* breach by the courts.

The Ministry has indicated to the CSF on several occasions that available capital funding should be focused directly on the priority communities identified by the courts. While the CSF agrees that it is important to remedy the breaches in those communities, the Ministry must also recognize that the CSF's operational priorities are not static; additional urgent priorities have developed since the court claim was filed in 2010, and countless opportunities have been missed as a result of the Ministry's inflexible focus on priority communities as identified by the courts. For instance, in 2018, the CSF missed out on an opportunity to purchase Crown land being disposed of by BC Hydro in the CSF's Victoria (east) catchment area because capital funding was to be focused on communities in which the British Columbia Supreme Court identified *Charter* breaches in its 2016 decision, which did not include Victoria (east). In June 2020, a *Charter* breach and a right to a school in Victoria (east) was recognized by the Supreme Court of Canada.¹⁰ Regrettably, a *Charter* breach could have been remedied years ago, but persists because of the Ministry's short-sightedness and inflexibility.

It is the CSF's position that, for all the communities listed in the first three years of the CSF's Capital Plan Submission, the CSF's Board must be able to make decisions about whether an immediate opportunity in a community not the subject of a court declaration should be considered for funding given current operational realities, and that these decisions can be taken outside the Ministry's annual capital planning submission and within the parameters of the CSF-dedicated rolling capital funding envelope.

B. Structure of the CSF's Capital Plan Submission

The CSF Capital Plan Submission is structured to reflect the different funding categories identified by the Ministry in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*, as well as certain categories that the Ministry has informally recognized as specific to

¹⁰ *CSFCB, Fédération des parents, et al v BC, SCC* at para 183(m): "Rights holders living in the proposed East Victoria catchment area are entitled to have their elementary school age children receive instruction at a homogeneous minority language school with space for 275 students (or such other number as the parties agree to) that provides an educational experience that is substantively equivalent to the experience at nearby majority language schools."

the CSF (i.e. judgments and leases). The CSF's Capital Plan Submission includes the following lists:

1. Judgment (*Charter* violations - CSF-specific category): project requests in communities where the courts have concluded (or the Ministry has recognized) that there is a *Charter* violation.¹¹
2. High priority projects based on opportunities and/or risks (CSF-specific category):
 - a. project requests in communities where the CSF identifies an opportunity (i.e. to lease space, buy a site, etc.) that is likely to disappear, resulting in consequences for the French-language community (i.e. a *Charter* violation); or
 - b. project requests where the CSF identifies a risk that needs to be addressed as soon as possible to prevent a *Charter* violation.
3. Existing leases (CSF-specific category): funding for space that is currently being leased by the CSF to continue providing French-first language programming.
4. New lease requests (CSF-specific category): funding for new leased space in communities where the CSF does not yet offer French-first language programming or where a catchment area is to be subdivided to reduce overcrowding or travel times for students.
5. Seismic Mitigation Program (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.
6. Expansion Program – Site Acquisition Project (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.
7. Expansion Program – Construction Project (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.
8. Expansion Program – Expansion Project (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.
9. Replacement Program (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.
10. Rural Districts Program (EDUC category): as described in the *Capital Plan Instructions: Five-year Capital Plan Submission for 2021/22*.

Projects identified in each of the lists have been prioritized according to considerations such as:

1. Confirmed or imminent *Charter* breaches (i.e. communities that were directly targeted by the court declarations or communities where a *Charter* breach exists or is imminent);
2. CSF student potential and growth in a community (i.e. Census data indicates significant student potential, population is projected to increase, etc.);

¹¹ The “*Charter* violations” category includes projects that were identified as “judgment” projects in the CSF’s 2021/22 Capital Plan Submission and those identified as breaches on June 12, 2020 by the Supreme Court of Canada.

3. Building condition (i.e. seismic deficiencies, health and safety, building envelope problems, etc.);
4. Insecurity of tenure (i.e. short-term leases, loss of space, etc.);
5. Shared space (i.e. homogeneous program in a shared facility or heterogeneous programming);
6. Overcrowding (i.e. operating over capacity); and
7. Project timeline (i.e. the project can be commenced in the first three years of the CSF's Capital Plan Submission).

In prior years, the CSF has submitted Project Request Fact Sheets (PRFS) or Project Identification Reports (PIR) for each of the priority capital projects detailed in the annual Five-Year Capital Plan submissions. The CSF has been advised by the Capital Management Branch that it is not necessary to resubmit or revise the PRFS submissions supporting the prior year's Five-Year Capital Plan submissions, and to only submit a PRFS if there is new information or where the CSF has prioritized a new project. As the CSF is working on many projects simultaneously, it will submit updated versions of a PRFS when information changes or as requested by the Ministry throughout the year, as it has done in previous years.

C. Size of the CSF-dedicated rolling capital funding envelope

The CSF expects that the CSF-dedicated rolling capital funding envelope will be adequately funded in order to remedy current breaches – including those that have not been recognized by a court – and to prevent future breaches. Proper implementation of the 2016 order from the British Columbia Supreme Court for the creation of a “long-term, rolling capital envelope to provide the CSF with secure funding to address its need for capital projects across the Province”¹² will ensure that, as the Supreme Court of Canada stated, “future claimants are not forced to undertake interminable judicial proceedings to have their rights protected, recognized and enforced”.¹³

The Ministry and the CSF continue to make progress in securing sites for many of the CSF's project requests. Once secured, the CSF will require funding to build new schools or expansions, or to renovate existing facilities. Therefore, it is imperative that the Ministry obtain approval to adopt a substantial CSF-dedicated rolling capital envelope, with additional funds allocated for every year of the Ministry's capital funding envelope. This approval must also be reflected in the Government of British Columbia's 2021/22 Fiscal Plan, as adopted by Treasury Board.

¹² *CSFCB, Fédération des parents, et al v BC*, BCSC at para 6836. Justice Russell makes it clear that this envelope is not only meant to remedy breaches as declared by the Court, but to ensure prevention of future breaches: “I will not go further to delineate how much funding should be devoted to the CSF's projects or what projects must be funded using the Capital Envelope. The CSF's needs are malleable. It has the jurisdiction to create many new programmes, and it is impossible to know at this point where the need will be greatest and where opportunities will arise. It is within the CSF's jurisdiction to make those decisions.” (*CSFCB, Fédération des parents, et al v BC*, BCSC at para 6765).

¹³ *CSFCB, Fédération des parents, et al v BC*, SCC at para 20.

The projects identified in years 6 through 10 have been included to indicate to the Ministry that the CSF foresees considerable additional future needs in current and proposed catchment areas based notably on enrolment in its operating schools, 2016 Census data, projections, as well local knowledge. These projects may be moved up or pushed further into the future, as more information becomes available. The CSF expects that the information provided will assist the Ministry and Treasury Board in planning for future allocations to the CSF-dedicated rolling capital envelope.

D. Focus on community, growth, and long-term planning

The CSF's mandate is to provide elementary and secondary French-first language education in a homogeneous environment, where numbers warrant such instruction. A homogeneous environment is the most suitable way to achieve the CSF's mandate. The Supreme Court of Canada stated that "homogeneous schools are linguistic islands in a minority environment" and serve "as a gathering place for the extended community."¹⁴ Shared (heterogeneous) facilities or heterogeneous programs cannot fulfill these roles, as they make it more difficult to achieve the objectives of s. 23.¹⁵

The CSF's Capital Plan Submission reflects its mandate to offer elementary and secondary programming and to ensure that its schools play a vital role in the community, notably by providing space for early childhood programming. A CSF school must be a "centre scolaire communautaire" (community school centre), accessible and available to the community.

The CSF's Capital Plan Submission is also focused on growth and long-term planning. As we discussed, Statistics Canada will be adding questions to the 2021 short- and long-form census to gather better data on linguistic minorities across Canada. The addition of these questions is specifically designed to assist minority language school districts assess their student potential and improve access to constitutionally guaranteed minority-language education. The Ministry's support was vital to securing the addition of these questions to the Census. As a result, by 2022, the CSF will have access to more accurate data to support its project requests. In any event, the CSF must now plan for the acquisition of sites that are large enough to allow it to accommodate growth, both in the short term (portables) and in the long term (permanent additions).

The CSF would like to reiterate that it is in the interests of the Ministry, English-language school districts, and British Columbians with school age children, that the CSF's infrastructure needs be resolved. Currently, many parents with children that are eligible to attend a CSF school are unable, or choose not, to have their children attend those schools due to lack of space, programming that is not equivalent to that offered by the English-language school district, or because a CSF programme is not available in their community. When adequate facilities are available such that eligible children can attend a CSF school, it is safe to assume that space will be freed up in English-language immersion classes, which are currently in very high demand.

¹⁴ CSFCB, *Fédération des parents, et al v BC*, SCC at para 74.

¹⁵ CSFCB, *Fédération des parents, et al v BC*, SCC at para 74.

Furthermore, by increasing the number of secondary school graduates from CSF programmes, the Ministry is creating a pool of French-speaking students that may choose to enter into a teaching career in British Columbia, thereby alleviating some of the pressure to recruit French-speaking teachers for growing immersion programmes.

Conclusion

In summary, the CSF's Board would like to reiterate three key points:

1. The CSF expects the Ministry to comply with the letter and the spirit of the Supreme Court of British Columbia's order by allocating sufficient funds in the CSF-dedicated rolling capital funding envelope;
2. The CSF expects the Ministry to allow for flexibility in implementing the CSF's projects, recognizing that priorities will shift and that breaches need to be remedied vigilantly and in a timely manner; and
3. The CSF expects the Ministry to assist the CSF in achieving the objective of meeting the long-term needs of its current and future students, through homogeneous elementary and secondary instruction where numbers warrant.

The CSF is looking forward to this new decade, guided by the framework established by the Supreme Court of Canada. The CSF is hopeful that the Supreme Court of Canada's decision will act as an incentive leading to the adoption of legislation and policies that favour the promotion and development of British Columbia's French speaking communities.

On behalf of the CSF, I thank you and your team for the time you took on July 27th, 2020 to meet with me, the CSF's Superintendent, Michel St-Amant, and the CSF's Secretary Treasurer, Lucie Pineau, to continue our discussions regarding the CSF's capital planning process and unique and pressing needs. The CSF looks forward to resuming those discussions with you – as informed by the contents of this letter and the attached Capital Plan submission – at our meeting to be held in August.

Sincerely,

Marie-Pierre Lavoie, Chair

Copy: Michel St-Amant (Superintendent), Lucie Pineau (Secretary Treasurer)

Enclosed: Attachment: *CSF 2021/20 Capital Plan*