



November 1<sup>st</sup>, 2018

Honourable Robert Fleming  
Minister of Education  
PO Box 9045 Stn Prov Govt  
Victoria, BC V8W 9E2

VIA EMAIL: [EDUC.Minister@gov.bc.ca](mailto:EDUC.Minister@gov.bc.ca)

**RE: Response to your letter of October 11, 2018 regarding the Conseil scolaire francophone de la Colombie-Britannique's ("CSF") 2019/20 Annual Five Year Capital Plan Submission**

Dear Minister Fleming,

The CSF has read your letter of October 11, 2018 regarding the CSF's 2019/20 Annual Five Year Capital Plan submission, which the CSF submitted to you on June 27, 2018.

The CSF wishes to start by clarifying certain misunderstandings that seem to have arisen between the CSF and the Ministry of Education ("Ministry") in relation to the CSF's Capital Plan submission, namely the title of the CSF's prioritization column, the courts' (both BC Supreme Court and BC Court of Appeal) conclusions that the CSF must continue to prioritize its project requests, and the BC Supreme Court's decision not to prescribe a specific dollar amount for the CSF's capital funding envelope. The CSF clarifies these three points in section 1 below.

The CSF would also like to raise three concerns it has regarding the Ministry's approach to the capital funding envelope, namely (i) that the Ministry appears to have created a limited and fixed capital budget to fulfill what is intended to be a rolling capital envelope, (ii) that the Ministry has refused to be flexible in considering new projects and site opportunities as they arise, and (iii) that the Ministry has failed to respect the CSF's jurisdiction to manage its project priorities. The CSF raises these three concerns in section 2 below.

**1. Initial points of clarification regarding the CSF's 2019/20 Capital Plan submission**

In paragraph 3 of your October 11, 2018 letter, it is written that "the title of the prioritized column 'Project Priority (MOE)' is not accurate; it wrongly suggests the Ministry was involved in those decisions [about how to rank the projects]." To clarify, this title was not intended to suggest that the Ministry was involved in prioritizing the CSF's projects, as the CSF recognizes that project prioritization is within its own jurisdiction. Rather, the CSF included a reference to the Ministry in the title of this column to reflect the Ministry's requirement to prioritize. As explained in the CSF's June 27, 2018 covering letter to its Capital Plan submission (page 2), this ranking does not reflect the CSF's own ranking of its projects (which is provided in the column "Project Priority (CSF)").

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In paragraph 4 of your October 11, 2018 letter, it is written that the BC Court of Appeal upheld the Ministry's "requirement to prioritize [projects] as constitutional." For now, the CSF does not dispute that it must provide the Ministry with a list of prioritized projects. However, the requirement to prioritize fails to recognize that the CSF has many equally urgent top-priority projects. The CSF continues to hope that the Ministry will amend its capital planning process to take into account this unique circumstance and to ensure the CSF is able to offer education that is substantially equivalent to that offered by English language school districts. For the time being, however, the CSF will rank its projects according to the Ministry's requirements.

As a last point of clarification, the CSF agrees that the BC Supreme Court's decision did not specify a dollar amount for the separate funding envelope. However, Justice Russell did provide guidance on what the capital funding envelope was intended to achieve, namely, to provide the CSF with "flexibility to acquire sites when opportunities arise"<sup>1</sup> and with "secure funding to address its need for capital projects across the Province."<sup>2</sup> To that extent, the capital envelope is intended to address "as many of the CSF's needs as possible."<sup>3</sup>

In the next section of this letter, the CSF raises three concerns over the Ministry's approach to the CSF's capital funding envelope.

## 2. The CSF's concerns with the Ministry's approach to the CSF's capital funding envelope

### (i) *The Ministry appears to have created a limited and fixed capital budget to fulfill what is intended to be a rolling capital envelope*

Again, the CSF acknowledges that the BC Supreme Court did not specify an amount for the CSF's capital funding envelope. Justice Russell explained that she did not do so, in part, because she did not have sufficient evidence before her regarding the cost of site acquisitions and school construction.<sup>4</sup>

Regarding the scope of the capital funding envelope, it is clear that Justice Russell intended for a separate CSF capital funding envelope to ensure that the CSF had access to secure capital funding on a rolling basis that could address "as many of the CSF's needs as possible."

As a result, I order as follows: a) The Province must exercise its legal powers to create a long-term, rolling Capital Envelope to provide the CSF with secure funding to address its need for capital projects across the Province.

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<sup>1</sup> *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, et al v British Columbia (Education)*, 2016 BCSC 1764 [CSFC-B, FPFBC, et al v BC] at paras 25 and 6756.

<sup>2</sup> *CSFC-B, FPFBC, et al v BC*, at para 6763.

<sup>3</sup> *CSFC-B, FPFBC, et al v BC*, at para 6765.

<sup>4</sup> *CSFC-B, FPFBC, et al v BC*, at para 6765.

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[...]

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. The evidence falls short of proving how expensive sites and new schools will be. The Ministry and the CSF will need to work together to ensure that the Capital Envelope addresses as many of the CSF's needs as possible.<sup>5</sup> [Emphasis added]

Thus, while the BC Supreme Court did not specify an amount for the funding envelope, it certainly intended for the envelope to be generous enough to provide funding security, to be a continuous stream of funding, and to support the CSF in taking advantage of opportunities as they arise, even if those opportunities arise outside of the Ministry's regular capital planning timeline.

This brings us to the CSF's second concern with the Ministry's approach to the capital funding envelope.

***(ii) The Ministry has refused to be flexible in considering new opportunities as they arise***

Even if the BC Supreme Court did not find the Ministry's prioritization requirement to be unconstitutional, Justice Russell was very cognizant of the fact that inflexibility in the Ministry's funding process disadvantages the CSF. Indeed, she acknowledged that the CSF missed opportunities in many communities (Richmond<sup>6</sup> and Abbotsford<sup>7</sup>, for example) because the Ministry's rigid funding process did not permit the CSF to seize those opportunities in a timely way. Justice Russell was therefore quite clear that a separate capital funding envelope should be implemented to redress the disadvantages of the Ministry's rigid process:

The Ministry must craft a rolling Capital Envelope specific to the CSF. Creating that type of an envelope will ensure funding is available for the CSF, and give it some flexibility to acquire sites when opportunities arise.<sup>8</sup>

Later in the judgment, she went on to say:

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.<sup>9</sup>

The CSF appreciates that changing priorities during a funding cycle may complicate the Ministry's funding process. This is precisely why the CSF has asked to be exempt from the requirement to prioritize for many years now; it imposes restrictions that prevent the CSF from taking advantage of capital opportunities as they arise, which has in turn prevented some of the CSF's much needed

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<sup>5</sup> CSFC-B, FPF CB, et al v BC, at paras 6763 and 6765.

<sup>6</sup> CSFC-B, FPF CB, et al v BC, at paras 3474-3476.

<sup>7</sup> CSFC-B, FPF CB, et al v BC, at paras 5119-5121.

<sup>8</sup> CSFC-B, FPF CB, et al v BC, at para 25.

<sup>9</sup> CSFC-B, FPF CB, et al v BC, at para 6765.

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projects from moving forward. Indeed, the Ministry itself has, in the past, requested that the CSF amend its priorities in order to take advantage of opportunities in certain communities.<sup>10</sup>

Now, even with the availability of a separate capital funding envelope, the Ministry continues to apply a rigid approach to the CSF's capital project requests, by actively working on, and considering funding only for, projects in communities where the BC Supreme Court has concluded that there is a unjustified breach of s. 23 of the *Canadian Charter of Rights and Freedoms* ("Charter") (the "judgment communities"). The Ministry refuses to be flexible. For example, earlier this fall, the CSF identified a site (the BC Hydro site in Saanich) that would satisfy its capital project request for a Victoria east elementary school (listed as CSF project priority no. 1, and MOE project priority no. 19 in its Capital Plan submission). The CSF brought this opportunity to the Ministry's attention in September 2018. In response, the Ministry dismissed this opportunity because it was not located in a "judgment community" and because it was not one of the CSF's highest priorities in its Capital Plan submission:

The Ministry is not in a position to support CSF capital projects that are not identified as high priorities in your capital plan. As there is limited amount of annual capital funding for CSF projects we must all remain focused on the very highest priority sites and schools.

As you know your prioritization of projects is critical to help us plan and allocate funds. Since we are already working on a number of priorities in other communities purchasing a site for a school in Victoria/Saanich would result in another project being delayed as we must manage within the funding prescribed for the fiscal year.

The Victoria area is not a community where there is an order by the court to do remedy, and it is not listed as a high priority in your 2019/20 capital plan submission, therefore Victoria is not being treated as a higher priority for capital funding than other communities such as Vancouver West, Abbotsford, Penticton, Sechelt, Squamish, etc."<sup>11</sup> [Emphasis added]

The Ministry's response to the opportunity in Victoria east illustrates the problem with having a limited and fixed budget (discussed above), as well as with taking an inflexible approach to the CSF's Capital Plan. Although the CSF listed an elementary school in Victoria east as no. 19 in the MOE project priority column in its 2019/20 Capital Plan submission, and even though the BC Supreme Court did not find an unjustified breach of s. 23 *Charter* in this proposed catchment area, the CSF has been trying to find an appropriate site in this location for many years now – and the Ministry is well aware of that. In fact, in May 2017 and more recently in August 2018, CSF and Ministry officials met with the Secretary Treasurer for the Victoria School Board in an effort to find school site solutions for the CSF. Yet, when an opportunity arose that the CSF believed would meet its needs, the Ministry refused to support it because it is not listed as a high priority and is not a judgment community. This approach is contrary to the purpose of the BC Supreme Court's

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<sup>10</sup> *CSFC-B, FPFCB, et al v BC*, at para 6498, 6484 (Powell River and Prince George), 6485 (Campbell River and Comox), 6487 (Richmond), 6488 (Vancouver (East)).

<sup>11</sup> See email from Rachele Ray to Sylvain Allison, RE: Following Up: Potential BC Hydro Surplus Land in Saanich, dated October 3, 2018.

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remedy, specifically intended to provide the CSF with flexibility to take advantage of opportunities as they arise.

There are many ways in which the Ministry can build flexibility into the CSF's capital funding envelope. One way could be to allocate more funding overall. Another could be to ensure the existence of contingency funds that could be used to support project opportunities, if and when they arise, and if there is no funding available in the CSF's dedicated yearly capital funding allocation. Concretely, surplus funding – or a contingency fund in every year of the five-year capital plan – would have permitted the CSF to take advantage of at least one of the opportunities in Victoria east, or in South Surrey (discussed below), without sacrificing judgment community projects. In addition, a contingency fund would allow the CSF to amend its priorities if certain judgment community projects are not advancing as scheduled.

For example, both the Ministry and the CSF expected that the sale of the McNicholl school site and facility from SD 67 (Penticton) to the CSF would occur in the 2018-19 fiscal year. However, the sale process has slowed due to the appointment of a new Secretary Treasurer, who is familiarizing himself with SD 67's capital requirements before finalizing the sale. The cost to purchase the McNicholl site will be in the range of \$7.5 M to \$10 M. As this purchase will not go ahead in this

fiscal year, this money could be used to purchase a site in another community without compromising the Penticton project from moving forward in a later year. However, the Ministry has refused to consider this kind of flexibility with the CSF's capital funding envelope and has chosen to focus almost exclusively on the judgment community projects.

This brings us to the CSF's third concern with the Ministry's approach to the capital funding envelope.

**(iii) The Ministry has failed to respect the CSF's jurisdiction to manage its project priorities**

It is clear that it is within the CSF's jurisdiction to decide how to prioritize its capital projects, and given the flexible nature required for the CSF's capital funding envelope, it follows that it is within the CSF's jurisdiction to continue to manage those priorities even after submitting its Capital Plan to the Ministry. Indeed, Justice Russell acknowledged this in her judgment:

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.<sup>12</sup>  
[Emphasis added]

However, the CSF has found the Ministry's approach to the CSF's prioritization paternalistic. Despite it being within the CSF's jurisdiction to manage its priorities, the Ministry is making decisions about when and for what non-judgment communities the CSF can consider site opportunities.

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<sup>12</sup> *CSFC-B, FPFCB, et al v BC*, at para 6765.



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For example, in October 2017, the Ministry provided the CSF with many site options in Surrey (despite Surrey not being in a judgment community). Similarly, the Ministry has sent the CSF information on potential sites in Kamloops and Prince George (despite none of these projects being in judgment communities).

However, in the instances where the CSF has identified sites of interest in non-judgment communities and brought those sites to the Ministry's attention, the Ministry has been unwilling to assist the CSF, citing the need to focus on the judgment communities. The situation in Victoria east is a prime example, as is the CSF's recent efforts to take advantage of an opportunity in Surrey. In both instances, the Ministry was unwilling to be flexible with the funding envelope, and to let the CSF exercise its jurisdiction to manage its priorities.

The CSF expects to be made aware of all site opportunities in communities where it seeks a capital project, regardless of where that project ranks in the CSF's Capital Plan. As the CSF has stated before, it has ranked its projects because the Ministry requires it, but maintains the position that projects in all its communities are a priority. As such, the CSF must be given the opportunity to make decisions and manage these priorities.

### **Conclusion**

In summary, the CSF would like to reiterate the need for the Ministry to take a more flexible approach to the capital funding envelope, both in terms of the allocated funding and in terms of the CSF's "priorities." While Justice Russell did not specify an amount to be allocated to the funding envelope, her remedy of a separate capital funding envelope for the CSF was intended to address the CSF's unique circumstances, and to provide the CSF with flexibility to ensure that it can take advantage of opportunities as they arise across the Province. This will in turn ensure that the Province and the CSF are able to maintain compliance with their obligations under section 23 of the Canadian Charter of Rights and Freedoms.

The CSF looks forward to continuing to work with the Ministry to implement the CSF's 2019/20 Capital Plan, and would be happy to meet with you and your officials to discuss the matters set out in this correspondence.

Yours truly,

A handwritten signature in black ink, appearing to read 'M. Lapierre', written in a cursive style.

Marie France Lapierre  
President



Copy: Sylvain Allison, Secretary-Treasurer, CSF  
Scott MacDonald, Deputy Minister, Ministry of Education  
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