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G.M. JACKS
A. M. MUJTABAH
J. A. BLOOMENTHAL

*Denotes Personal Law Corporation †Denotes Associate Counsel

REPLY ATTENTION OF: Dr. Charles I M Lugosi SJD, LLM, MBE, JD
EMAIL: dr.charles.lugosi@crease.com
FILE NO.:

LOCATED AT:
800-1070 DOUGLAS STREET
VICTORIA, B.C., CANADA
V8W 2C4

MAILING ADDRESS:
P.O. BOX 997
VICTORIA MAIN PO
VICTORIA, B.C., CANADA
V8W 2S8

TELEPHONE: (250) 388-5421
FAX: (250) 388-4294
WEBSITE: www.crease.com; www.lugosi-law.com
Mobile: +519.761.7000

December 14, 2020

Toronto Catholic District School Board
80 Sheppard Avenue East
Toronto, Ontario M2N 6E6

Attention: Chair Martino

Reply Submissions of Trustee Del Grande to Board's Response

Introduction

1 On behalf of the Board, Eric M. Roher, of the law firm of BLG submitted a Response on December 11, 2020 to the Written Submissions of Trustee Del Grande, prepared by Charles I. M. Lugosi, of the law firm of Crease Harman, LLP.

2 The following is Trustee Del Grande's Reply to matters raised in that Response.

Res Judicata

3 Without reference to any legal authority, the Response alleges that the legal principles of *res judicata* and double jeopardy are criminal law principles that do not apply in the present circumstances. This is a mistaken interpretation of the law, contrary to established binding legal precedent set by the Supreme Court of Canada.

4 The Supreme Court of Canada recently adopted a revised framework to determine the standard of review when a decision of a state actor, including a school board, is the subject of a judicial review: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65. The standard of correctness applies in the case of Trustee Del Grande, falling into the category of general questions of law that are of fundamental importance, and broad applicability, with significant legal consequences for the justice system as a whole or for other institutions of government.

5 The following paragraphs from *Vavilov* clearly establish that in civil matters, including this case, wherein Trustee Del Grande contends that further proceedings by this Board after its Determination of August 20, 2020 were barred by the legal doctrine of *res judicata* and abuse of process, in civil matters:

> 58 In *Dunsmuir* , a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.
>
> 59 As the majority of the Court recognized in *Dunsmuir* , the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir* , para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)* , at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.), at para. 20; *Canadian National Railway* , at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.), at para. 17; *Saguenay*, at para. 51; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), at para. 22; *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29 (S.C.C.), at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications

for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary* , at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

60 This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)* , at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary* , at para. 20); and the scope of parliamentary privilege (*Chagnon* , at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

6 In all these passages, the Court cites to the civil case of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, for the authority that in civil cases, like this one, where a Determination is made, whether or not adverse to the accused trustee, that verdict is final, and may not be reconsidered, for to do so would be an abuse of process, and a violation of *res judicata.*

7 Once the Board exercised its authority and voted on whether or not to find Trustee Del Grande in violation of the Code of Conduct on August 20, 2020, it was bound by its decision. To claim there was no Determination on that date is pure fiction, contrary to actual facts set out in paragraphs 50 and 51 of Trustee Del Grande's affidavit dated December 3, 2020, and exhibits T, U and V, attached to that affidavit. The Board itself confirmed on September 17, 2020 that the Determination made on August 20, 2020 did not find that Trustee Del Grande was not in violation of the Code of Conduct, and its own counsel, Paul Matthews, informed the College of Teachers on September 8, 2020, that the Board made a Determination pursuant to sections 218.3(2) and s. 218.3(11) that Trustee Del Grande did not violate the Code of Conduct.

8 By deciding to hold a new vote on November 11, 2020, the Board violated the doctrines of *res judicata* and abuse of process, by failing to comply with the "letter and spirit of all laws of Canada and the Province of Ontario," as set out in section 4 of its Code of Conduct.

9 Subjecting Trustee Del Grande to a fresh vote not authorized by s. 218.3 of the governing statute, the *Education Act*, put him into "double jeopardy." While s. 11(h) of the *Charter of Rights* (*Charter*) prohibits double jeopardy in criminal and penal cases, that is not the end of the matter. The Board is subject to the *Charter*, and must abide by all the *Charter* values, including the prohibition against double jeopardy. The Board is a state actor and is subject to the *Charter*. It failed to consider *Charter* value of double jeopardy. The dissenting judgment of Sachs, J *Elementary Teachers Federation of Ontario v. York Region District School Board,* 2020 ONSC 3685 (Ont. Div. Ct.) is correctly sets out the law on this point:

> ***The Charter applies to school boards and school officials***
>
> 122 Counsel for the York Region District School Board agreed in oral argument that the *Charter* applies to school boards.
>
> 123 Counsel's position is consistent with the relevant case law. Both *Cole* and *R. v. M. (M.R.)* [1998] CarswellNS 346 (S.C.C.)] apply the *Charter* to school boards and school officials. These two cases were the focus of the Arbitrator's decision. However, neither case directly addressed the issue. Both cases applied the *Charter* to the actions of school officials, declined to specifically address the issue, and noted that the Crown had conceded that the *Charter* applied in the prior decisions (*Cole*, at para. 38; *M. (M.R.)*, at paras. 24-25). While the issue was not expressly considered, the Supreme Court of Canada did apply the *Charter* to school officials and did not consider it necessary to distance itself from that analysis.
>
> 124 In *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 (S.C.C.), the Supreme Court held at para. 22 there was "no question" that the *Charter* applied to a Quebec school board's council of commissioners. In *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (S.C.C.), Gonthier J. wrote at para. 121 (dissenting, but not on this point, which the majority found unnecessary to consider) that there was "no doubt" that a school board was subject to the *Charter.*

125 Ontario courts have directly considered this issue. In *Gillies (Litigation guardian of) v. Toronto District School Board,* (Ont. S.C.J.), Justice Himel considered whether a mandatory breathalyzer test at a high-school prom violated the students' s. 8 *Charter* rights. Justice Himel first assessed, at paras. 35-40, whether the *Charter* applied to the school board and the principal under s. 32 of the *Charter.* She found, at para. 39 that "the *Charter* applies to the TDSB, and the actions of the principal, whose powers and duties are derived from the *Education Act* and its regulations."

...

Conclusion regarding whether the Doré framework is applicable in this case?

130 In a case involving *Charter* rights and an administrative decision-maker, *Doré* applies. Labour arbitrators are administrative decision makers. *Doré* held at para. 35 that discretionary decisions should consider *Charter* values: "[A]dministrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise."

131 This approach was reiterated and applied in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.). *Loyola* also explained the procedure on a judicial review such as this, at para. 37: "On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate."

10 For the above reasons, the doctrines of *res judicata* and double jeopardy are not confined to the realm of criminal law, but apply with full force and effect in this proceeding.

Board By-law Number 75, Section 10.11

11 On November 11, 2020, Mr. Roher advised the Board that judicial review was unavailable to Trustee Del Grande, as it was precluded by s. 218.3(14) of the Education Act, and further advised that s. 10.11 of By-law 75 permitted the Board to reconsider any matter already decided by the Board. On December 11, 2020, Mr. Roher now concedes that judicial review is available to Trustee Del Grande, but has not changed his position as to s. 10.11 of By-law 75.

12 Board By-law Number 175, including s. 10.11, is inferior to the statutory scheme set out in s. 218.3 of the *Education Act*, and cannot be used to "reverse engineer" a desired outcome.

13 The Board acted unreasonably by justifying its reconsideration of the original Determination made on August 20, 2020 by relying upon s. 10.11. The Board did not have any discretion to hold a new vote for the purpose of achieving an adverse Determination against Trustee Del Grande. It is an error in law to rely upon a section of a by-law to hold a new vote, when the governing statutory scheme does not permit a fresh vote to achieve a desired outcome. The Board is not permitted to go beyond the scope of its authority set out in s. 218.3 of the *Education Act*. The By-law may not substitute for a power that was not granted to the Board by the Legislature in s. 218.3 of the *Education Act*. Section 10.11 was identified as available and expedient to "reverse engineer" a desired outcome that was not possible under the statutory scheme. The advice received by the Board from Mr. Roher is precisely the kind of legal maneuvering that was identified and expressly rejected by the Supreme Court of Canada in *Vavilov*:

> 108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* , at paras. 15 and 25-28; see also *Green* , at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) , at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427 (S.C.C.), at paras. 32-33; *Nor-Man Regional Health Authority* , at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)* , at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paras. 38-40. The statutory

scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines* , at para. 18.

109 As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

...

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not

to "reverse-engineer" a desired outcome.

14 The Board did not have the authority under s. 218.3 to reconsider its Determination that resulted in the acquittal of Trustee Del Grande. The Board's reliance upon an inferior By-law to substitute for lack of statutory authority to reverse engineer a previous politically unacceptable outcome, was unreasonable, based upon an erroneous understanding of the law.

15 Resorting to s. 10.11 of this By-law to reconsider "any matter which has been decided upon by the Board of Trustees" plainly means that there was previous Determination made on August 20, 2020. If the legal fiction that there was no Determination made on August 20, 2020 is assumed to be true, then there was no reconsideration needed, and consequently there was no need to invoke By-law 10.11.

16 To summarize, s. 10.11 was not available to be read into the statutory scheme set out in s. 218.3 of the *Education Act*, and s. 10.11 assumes that the Board made a prior Determination that it sought to reverse. The Board has abused its discretion and acted unreasonably.

Judicial Review

17 Mr. Roher contends that the Board has a strong case to defend its actions in Divisional Court. He does not cite to any legal authority to justify his opinion.

18 In reply, Trustee Del Grande contends that binding legal authority from the Supreme Court of Canada establishes that law respecting *res judicata* and abuse of process applies to the Board, and further that the Board unreasonably departed from the limits of its authority under the *Education Act* and used an inferior By-law to unlawfully reverse engineer its desired outcome.

All of Which is Respectfully Submitted, this 14th day of December, 2020.

CREASE HARMAN LLP

Per:

Dr. Charles I M Lugosi, SJD
Doctor of Juridical Science
Barrister-At-Law (Ontario, BC) Attorney-At-Law (Michigan, Washington)
Admitted to the Bar of Supreme Court of the United States