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December 3, 2020

Toronto Catholic District School Board
80 Sheppard Avenue East
Toronto, Ontario M2N 6E8

Attention: Chair Martino

Re: Appeal of Michael Del Grande Pursuant to Section 218.3(6) of the Education Act

The written submission of Michael Del Grande, due December 4, 2020, is in two sections.

The first section consists of written submissions containing the Legal Arguments set out below.

The second section of the submissions is the Affidavit of the Appellant, Michael Del Grande, (Affidavit) sworn on December 3, 2020.

This Affidavit serves as evidence, as a record of the proceedings upon which these written submissions are based upon, the source of the documents referred to herein, and is the foundation upon which the factual narrative herein is based.

LEGAL ARGUMENT

Submissions of Trustee Del Grande to Revoke the November 11-12, 2020 Second Determination and Sanctions

Part I

Overview and Statement of Facts

1 Michael Del Grande (Appellant), an elected Trustee of the Toronto Catholic District School Board (Board) was alleged to have breached the Board's Code of Conduct, Policy T.04 (Code) for

what he stated at a public meeting of the Board on November 7, 2019, in the course of reading a motion to amend a motion that was in debate. The Board is part of Ontario's pre-Confederation Roman Catholic separate school system that is preserved by section 93 of the *Constitution Act, 1967*, and protected by s. 29 of the *Constitution Act, 1982*. Section 19(1) of Ontario's *Human Rights Code* preserves the rights and privileges of separate school boards or their supporters. The Board is a government actor that is subject to the limited direction or authority of the Minister of Education (Minister) as set out in the *Education Act* (Act). Significantly, the Minister is prohibited by s. 230.19 (1)(a) from interfering with or controlling the denominational aspects of the Board, which is a Roman Catholic board. The Act specifically states in s. 1(4) that "This Act does not adversely affect any right or privilege guaranteed by section 93 of the *Constitution Act, 1867"* and in s 1 (4.1) that "Every authority given by this Act, including but not limited to every authority to make a regulation, decision or order and every authority to issue a directive or guideline, shall be exercised in a manner consistent with and respectful of the rights and privileges guaranteed by section 93 of the *Constitution Act, 1867."* The Appellant is a Catholic Elector of the Board and personally possesses all the denominational rights any Catholic Elector has under the *Constitution Act, 1967*, In exercising his responsibilities, duties and obligations as an elected trustee of the Board, the Appellant is possessed of all the collective constitutional denominational rights of his constituents, and has a legal fiduciary duty to be the voice for his constituents who oppose any Ministry or Board requirement, policy or decision that conflicts to any extent with Catholic teachings and constitutionally guaranteed denominational rights. Affidavit, Para. 17, Ex. D.

2 A directive issued in August 2019 by the Ministry of Education in Policy/Program Memorandum 128 (PPM 128) that required all members of a school community to "respect and treat others fairly regardless of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability," to conform to the Ontario *Human Rights Code.* Renu Mandhane, Chief Commissioner of the Ontario Human Rights Commission sent a letter dated September 17, 2019 to trustee Rizzo and copied it to the Catholic Education and Living Our Catholic Values committee that was to first consider PPM 128. That letter stated it was "essential" and "necessary" for the Board to meet its legal duties and obligations, and urged that "members of the TCDSB community cannot be treated unfairly" and referenced the "extreme vulnerability of transgender students." Affidavit, Para. 17. Ex. E.

3 On October 30, 2019, a motion to amend the Board's Code of Conduct to expand the protected categories to include family status, marital status, gender identity, and gender expression was defeated by a vote of 4 to 1 by the Catholic Education and Living Our Catholic Values committee, a sub-committee of the Board, which the Appellant was a member. The proposed additions were viewed by the Appellant as contrary to the teachings of the Roman Catholic Church (Church), and was constitutionally exempt from government interference or control, as infringing upon the Church's teachings and the constitutionally guaranteed denominational rights of Catholic separate schools. Of particular importance is the Church's teachings, "*Male and Female He Created Them*," published on February 2, 2019 by the Vatican, found at: http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20190202_maschio-e-femmina_en.pdf

Affidavit, Para. 20, Ex. F.

This teaching encourages listening and dialogue, but affirms the right of Catholic trustees "... to go beyond all ideological reductionism or homologizing relativism by remaining faithful to their own gospel-based identity, in order to transform positively the challenges of their times into opportunities by following the path of listening, reasoning and proposing the Christian vision, ..." (at para. 54). "The culture of dialogue does not in any way contradict the legitimate aspirations of Catholic schools to maintain their own vision of human sexuality, in keeping with the right of families to freely base the education of their children upon an integral anthropology, capable of harmonizing the human person's physical, psychic and spiritual identity. In fact, a democratic state cannot reduce the range of education on offer to a single school of thought, all the more so in relation to this extremely delicate subject, which is concerned on the one hand with the fundamentals of human nature, and on the other with natural rights of parents to freely choose any educational model that accords with the dignity of the human person" (at para. 54). [Emphasis added]

The Appellant abided by this teaching to remain faithful to defending the Christian vision of the school community he represents and to resisting conformity to secular laws that impose a single school of thought that conflict with the safe zone of a constitutionally enshrined denominational school system.

4 In response to the decision of the subcommittee, Stephen Lecce, the Minister of Education, held a press conference on October 31, 2019 to voice his disapproval of the vote and announced his expectation that the Board will comply with PPM128 and the Ontario *Human Rights Code*. Trustee Maria Rizzo told the CBC that she and Minister Lecce spoke by telephone and that she hoped the Board would reverse the decision by the subcommittee. CBC News published an article on October 31, 2019, under the headline, "*Toronto's Catholic School Board should comply with human rights code, education minister says,*" and quoted the Minister: "My expectation is that every child, irrespective of their differences, will see themselves reflected in school, and more importantly, the human rights code." The article reported that "... trustee Maria Rizzo confirmed she and Lecce spoke on the telephone. 'I felt relieved,' said Rizzo, who has always maintained the board has to adhere to the human rights code. 'I'm hoping a sober second thought by my trustee colleagues will help in the deliberations." See: https://www.cbc.ca/news/canada/toronto/stephen-lecce-catholic-board-human-rights-1.5343532

Affidavit, Para. 33, Ex. M.

5 At the Board meeting held on November 7, 2019, a motion was introduced to seek the Board's approval to direct the Board's Student Achievement and Well Being Committee to add family status, marital status, gender identity, and gender expression to the protected categories of the Code and well as to the Board's policies and all relevant documents. Heated debate ensued that lasted into the early morning hours of the next day. The Appellant questioned Kyle Ianuzzi, a speaker and member of the LGBTQ+ community about his support for extending protection to marital status, asking how teachers who were expected to be role models, when marital status could be interpreted to include polygamy, threesomes, and group marriage. Mr. Ianuzzi observed that the examples offered by the Appellant were illegal and that same sex marriage qualified for protection because it was legal. The Appellant said there was no point having a Catholic school system "if we can't teach our values." He "agreed to disagree" with Mr. Ianuzzi on the matter of Church teachings on that subject.

6 Later in the meeting, the Appellant was permitted by the Chair to move an amendment, seconded by Trustee Crawford. The Chair invited the Appellant to read aloud his motion, which was also displayed on a screen for public viewing. The Appellant's motion to amend sought to protect all medically defined categories of sexual attraction and sexual fetishes that are consistent with a very broad and liberal definition of sexual orientation, an already protected class. He further listed

medical categories of self-identification, which went beyond gender identification. The motion to amend was consistent with the requirements of s. 169.1(a.1) of the Act that "every board shall provide a positive school climate that is accepting and inclusive of all pupils, including ..." Note this law is not limited to the listed protected classes.

7 At the outset of his presentation, the Appellant communicated that his intention was to illustrate the logical conclusion to the slippery slope of moral turpitude the Board was venturing into, using his motion as a hyperbole to warn the Board it was in conflict with authentic Catholic doctrine which all Board members were obligated to preserve and respect. He made the point that since Jesus loves all people, whether sexual deviants or not, and that they needed to be recognized and protected. Over a growing disturbance that was caused by other trustees who disrupted his speech, the Appellant persisted, stating in between interruptions: "All these poor people are children of God. Or created in the image of God and need to be recognized;" "God made them all and you can take out what you want;" and "you wanted to add four terms, and my concern is that why stop at four terms because it doesn't cover everybody."

8 An unruly meeting developed. A point of order was called so that Rory McGuckin, the Director of Education (Director) could speak. He claimed that the authority of By-law 2.3.10 compelled him to tell the Board that the content of the Appellant's remarks "may result in, or could result in, a contravention of the Act or any policy guideline or regulation made under the Act. I am informing that even considering these terms, many of them are criminal, many of them would result in criminal charges." He added, "... for us to be considering these as part of the Act is something that would need to be brought to the Ministry of Education." Affidavit, Ex. CC (By-laws)

9 The Chair then pre-emptively ruled the Appellant's motion was out of order, and permitted the Director to explain why. The Director explained the motion was out of order because "this would result in a contravention of the Education Act, the policy, guideline or regulation ... completely contrary to PPM 128, it is contrary to the Human Rights Code, ... does not allow a body to give special rights of prohibited grounds of discrimination against many of these items which are against the Criminal Code of Canada." After a brief ensuing discussion, the Appellant accepted the invitation of the Chair to withdraw his disputed motion.

10 At no time did the Director tell the Board the source of his authority to venture an erroneous opinion as to the legality of the Appellant's comments with respect to the *Criminal Code*

and the Ontario *Human Rights Code*. This intervention was remarkable, because the Director is strictly limited by By-law 2.3.10 that reads, "any act or omission by the Board that in the Director's opinion may result in a contravention of the Education Act or any policy, guideline or regulation made under the Act." As already stated, the proposed amendment was in compliance with the Act. The By-law's language does not confer any authority to interrupt the free speech of an individual trustee introducing an amendment to a motion on the floor, which is not an "act or omission" of the Board. The Appellant did not contravene s. 319 of the *Criminal Code*, for the content of the Appellant's speech was within the scope of s. 319 (3) (b) and (c), granting the legal authority to the Appellant to express or attempt to establish by argument an opinion on an opinion based upon his Catholic beliefs, and that his statements were relevant to a subject of public interest, that was for the public benefit for his supportive constituents who are faithful Catholics with orthodox beliefs. Freedom of expression of opinion is protected under s. 13(2) of the *Human Rights Code*. This protection extends to the public display of the Appellant's motion that was projected at the Board meeting. The Director said nothing about the Appellant's constitutional rights guaranteed by the *Charter of Rights and Freedoms* (Charter). Affidavit, Para. 35, Ex. O (Transcript of November 7, 2019 meeting).

11 The Archdiocese of Toronto issued a statement on November 11, 2019 in response to inquiries relating to the Board conflicts over church teachings and the fostering of a safe environment for all students. The statement said, "Ministry of Education policy, PPM 128, directs that the prohibited grounds of discrimination found in the Ontario Human Rights Code be included in updated Codes of Conduct for all school boards in Ontario. While the archdiocese recognizes that terms such as gender identity are included in the Code, we do not accept the view of the human person which underlies this terminology, since that view is not compatible with our faith. We note that the revised TCDSB Code of Conduct includes additional provisions to ensure that it is interpreted according to Catholic faith … in doing so, it is exercising a right that is referenced in the Ontario Human Rights Code itself." Affidavit, Para. 40, Ex. P.

12 Following the Board's meeting of November 7, 2019, Education Minister Lecce stated, "I find the comments made by the trustee (Appellant) to be quite unacceptable and quite disturbing, actually." He went on to say that not including gender identity and expression as prohibited grounds for discrimination "… is not an item that is for discussion, … I just add my voice in condemnation

of that language" https://www.thestar.com/politics/provincial/2019/11/25/education-minister-stephen-lecce-condemns-motion-by-toronto-catholic-trustee-to-add-pedophilia-bestiality-to-debate-on-inclusivity.html *"Education Minister Stephen Lecce Condemns Motion by Toronto Catholic trustee to add pedophilia, bestiality to debate on inclusivity.*" Affidavit, Para. 41, Ex. Q.

13 Several complaints made by Carina Gabriele, Sara DeVito, Carla DeSantis and Joanne Murphy about the Appellant's conduct were brought before the attention of the entire Board by trustee Rizzo pursuant to s. 218.3(1) of the Act. The law firm of Rubin Thomlinson was hired to conduct a "Private and Confidential" investigation into the conduct of the Appellant.

14 Michelle Bird (investigator) assumed conduct of the investigation that was begun by Cory Boyd and completed the report of her investigation on May 29, 2020. She states in her report that her firm were retained by the Board on February 24, 2020, with a mandate to conduct an investigation into complaints about comments made by the Appellant at the Board's November 7, 2019 meeting. She states, "We were asked to review the complaints and determine whether Mr. Del Grande's comments violated the Trustees' Code of Conduct." Affidavit, Para. 43, Ex. K (Bird Report).

15 Section 218.3 (2) of the Act requires the Board to make "inquiries" and "based on the results of the inquiries" to "determine" "whether the member has breached the board's code of conduct." There is nothing in the Act that permits the Board to delegate to an investigator the legal authority to render a legal opinion as to whether the Appellant violated the Code. That determination can only be legally made by the Board. The purpose of an inquiry is to ascertain the facts, not to answer the ultimate question of guilt or innocence, because that determination is reserved by statute exclusively to the Board, and may not be delegated. The function of the inquiry is to establish an evidentiary record upon which the Board, acting like a jury, can make findings of facts, and make a judicial determination by identifying the specific section of the Code that is alleged to be violated. The Board need not have a legal opinion to make a determination, because s. 218.3 (2) grants the exclusive authority to the Board to make its determination. This responsibility may not be usurped or delegated to an agent. The process embarked upon by the Board was unfair and flawed, for a general allegation that the Code was violated is unfair to the Appellant, who does not know what case he has to meet. The Appellant was not disclosed the letter of instruction from the Board to the law firm of Rubin Tomlinson, and deprived the Appellant from knowing which specific part of the Code that he allegedly breached, and the mandate of the investigator. Adding to the unfairness of

the process was the fact that the investigation was neither balanced not thorough, for while three complainants provided their version of events, the investigator did not interview any independent or impartial witnesses who were not complainants of any witnesses who supported the accused trustee's comments. Adoption of an agent's opinion, is an unlawful exercise of the Board's statutory role.

16 The investigator only interviewed three complainants, Carina Gabriele, Paolo De Buono, and Kyle Ianuzzi. The Appellant was interviewed before the complainants. Everyone was instructed to keep all the communications private and confidential by the investigator. The investigator found the Appellant to be credible and accepted his explanation that his impugned comments were an argument *ad absurdum* and a use of hyperbole in order to make his case.

17 The investigator made a finding that the Appellant violated the Code: "I find that the inflammatory language that Mr. Del Grande included in his motion, and the flippant (to use his own word) manner in which he addressed concerns about that language, is what crossed the line. Mr. Del Grande made his remarks knowing that members of the LGBTQ+ community were present at the meeting and that others not present would be able to access his remarks after the meeting; to do so was disrespectful, not inclusive and lacking in compassion… I note that Mr. Del Grande's actions are exacerbated by the fact that he chose to suggest that including criminals – such as cannibals and rapists – in the Code of Conduct was somehow similar to including members of the LGBTQ+ community …. he created an unwelcoming and harmful environment for certain members of the Catholic school board community."

18 The investigator made this finding without any discussion of the applicability of the defences raised by the Appellant: his constitutional rights under s. 2, 7, 15(1) and 29 of the Charter; his rights under s. 19(1) of the *Ontario Human Rights Code*, that the content of his comments did not say anything derogatory about gay or transgender people, and his manner of expression did not degenerate into vocal excesses such as yelling, screaming or shouting. The investigator further failed to discuss the Appellant's right to present an opposing viewpoint from an authentic Catholic perspective faithful to Church teachings that offends others whose feelings are hurt by public debate on topics of controversy, the oath taken by the Appellant to faithfully exercise the duties of his office to ensure that the denominational rights of the Catholic Electors are not infringed or denied, and the fiduciary duty of the Appellant. In short, the investigation report was subjective, shallow,

and incomplete, rife with unfairness and unfounded assumptions, well below the standard of the reasonable investigation that was needed for this matter.

19 While the investigator did not cite the specific section of the Code that she says was violated, her opinion rests upon paragraph 3 that mandates "civil behavior" that makes trustees responsible for "creating a positive environment that is safe, harmonious, comfortable, inclusive and respectful." This paragraph suggests the Appellant is compelled to give up his constitutional rights to boldly state his opinion, his religious beliefs, his thoughts, his conscience, and the manner in which he expresses himself, once he is sworn in as a trustee of the Board. This cannot be so. An elected trustee is not muzzled to use only politically correct speech and to self-censor any comments, imagery, or literary aid that might cause discomfort to a member of an "inclusive" community in order to create a "safe space" that is respectful and creates a harmonious feeling of well-being. This kind of politically correct imposition invades the "safe space" the Appellant enjoys by virtue of s. 93 of the *Constitution Act, 1867* and s. 2 and 7 of the Charter. This narrow-minded opinion of the investigator became the foundation of the case against the Appellant.

20 On August 20, 2020 the full Board met for the purpose of making a Determination whether or not the Appellant violated the Code. The investigator's report was considered and a motion was made to find the Appellant in violation of the Code. Paragraph 10 of the Code required that "a vote on any resolution of Determination must be made by a 2/3 majority of all trustees on the Board not including the accused Trustee." The ensuing vote resulted in a "Determination" pursuant s. 218.3 (2) of the Act that the Appellant did NOT breach the Code, the motion failed by one vote. The Determination was recorded in the minutes, and approved by the Board on September 17, 2020.

21 Paul Matthews, General Legal Counsel of the Board, wrote a letter on September 8, 2020 to Carly Thomson, an investigator for the Ontario College of Teachers, who was previously assigned to investigate the conduct of the Appellant for his alleged breach of the Code, as he was in jeopardy of losing his teaching license. Mr. Matthews stated, "Further to your request in your role as an investigator for the Ontario College of Teachers, please be advised that at the regular Board Meeting held on August 20, 2020 in public session, the Board of Trustees made a determination that pursuant to sections 218.3(2) and s. 218.3 (11) Trustee Del Grande did not breach the Trustee Code of Conduct Policy T.04 with respect the complaint titled "by various stakeholders" and further that he did not breach the Trustee Code of Conduct with respect to the complaint made against him by student Trustee Dallin." Affidavit, Para. 51, Ex. U.

22 Sophia Harris, Recording Secretary for the Board, advised in an email dated October 20, 2020 sent to the Appellant, that "As the Recording Secretary of the Toronto Catholic District School Board, I can confirm that the Minutes of August 30 [20], 2020, relating to the Code of Conduct which affirmed that Trustee Del Grande did not breach the Trustee Code of Conduct Policy T.04 with respect to the complaint titled 'by various stakeholders" and further that he did not breach the Trustee Code of Conduct with respect to the complaint made against him by Student Trustee Dallin, were approved by the Board at its meeting held on September 17, 2020." Affidavit, Para. 51, Ex. V.

23 There is no procedure set out in s. 218.3 of the Act for the Board to conduct another vote if the original Determination resulted in the finding by the Board that an accused trustee did not breach the Code. Only if an accused trustee is found to be in violation of the Code by the requisite 2/3 majority, may the Determination and any Sanctions imposed be reviewed by the Board, in accordance with the procedure set out in s. 218.3 (6)(7)(8)(9) of the Act. The language of s. 218.3 (9) provides that when a sanction is varied or revoked, it is effective as of the date of the original determination. Whether the Appellant was found in violation of the Code, or acquitted of this allegation, the date of the Original Determination is August 20, 2020.

24 Once the Original Determination was made by the Board on August 20, 2020 the Board was required by s. 5 (b) of the Code to uphold the Original Determination resulting in the acquittal of the Appellant. While the language of s. 5 (b) and 4 (e) state, "uphold the implementation of any board resolution after it is passed by the Board," the trustees of the Board are required by s. 4 of the Code to "comply with the letter and spirit of all laws of Canada and the Province of Ontario…" The laws of Canada and Ontario include the inherent jurisdiction of a superior court to decide questions of *res judicata*, estoppel, abuse of process, Charter violations and the duty to act fairly.

25 Accordingly, a failed resolution to convict the Appellant of misconduct operates as an acquittal and by operation of law the Board becomes *functus officio*, and must be honoured by the Board as a final decision. The Board is legally obliged to uphold its original Determination, in the same way as a resolution that was passed. This is a statutory requirement set out in s. 218.1(e) of the Act.

26 The Integrity Commissioner of the Board, Sandhya Kohli, in a letter written to the trustees of the Board, dated August 10, 2020, stated "Once the Board has reviewed and come to a decision,

[whether or not a Code of Conduct violation has occurred], further recourse for judicial review is only available to the Divisional Court of Ontario." This opinion is consistent with the Appellant's position that the original Determination of an acquittal is final and binding upon the Board. Any further proceedings would need to be by way of judicial review. Affidavit, Para. 52, Ex. W.

27 Political, public and media pressure influenced the Board members to find a way to reverse the original Determination to quell inflammatory opinions fueled by the LGBTQ+ community that labeled the Appellant as homophobic. Kathleen Wynne, former Premier and member of the LGBTQ+ community at the Legislative Assembly questioned how and why the Appellant was exonerated by the Board for using "vile and bigoted language." Minister Lecce stated that the Appellant's comments were "unacceptable and deeply disturbing" and that he "looks forward to accountability for those students who were offended by the comments made." Wynne urged Lecce to make the investigator's report public. Change.org "*Topic moves to Queen's Park.*" October 28, 2020. Affidavit, Para. 53, Ex. X.

28 On November 4, 2020 the Board decided at a private meeting to release the confidential Bird report to all the complainants and to the Minister of Education. There was no requirement imposed to sign a non-disclosure agreement. Prior to this date, only the trustees, the Director of Education, the Assistant Director of Education, and counsel were in possession of the confidential Bird report. A special meeting of the Board was called for November 11, 2020 for a new vote on the Board's Determination of August 20, 2020 for the purpose of reversing the acquittal of the Appellant.

29 Twitter was then used to make public confidential portions of the Bird report. A teacher and complainant, Paolo De Bueno identified the author of the report. Trustee Markus De Domenico tweeted "In a private meeting of the Board, a decision was made by the Trustees to release a report on a Code of Conduct matter to the complainants and to direct the Chair of the Board to send a copy of the report to the Minister of Education." On November 7, 2020 Mr. De Bueno tweeted, "In Aug. 2020, 4/11 trustees ignored a report that said a trustee's words were hurtful to its LGBTQ+ students" and "What's the point of spending tens of thousands of $ on an expert's report if it's not followed? An opportunity was wasted on Aug. 20. Let's not waste the opportunity on November 7 to stand up for our LBGTQ+ students & families." He then made public the list of trustees who voted against the resolution to make an adverse Determination against the Appellant, and in doing so, disclosed some of the contents of the private and confidential Bird report that he was required

not to make public. The Bird report was soon leaked to the general public by either a trustee, a complainant or a staff member. On November 6, 2020 Kristin Rushowy tweeted, "A damming outside report said a Toronto Catholic trustee broke the rules by linking LGBTQ issues to bestiality and pedophilia." Patricia Minnan-Wong, tweeted the following statement on November 7, 2020: "An independent investigator found that the trustee breeched the TCDSB Trustee Code of Conduct in a scathing 15 page report. His hurtful and offensive comments crossed the line. The action of these four trustees reject [sic] the findings is shameful." These two tweets were posted on Mr. De Bueno's twitter account, which suggested Mr. De Bueno leaked the confidential Bird report to them. Affidavit, Para. 56-58, Ex. Y (Tweets)

30 On Sunday November 8, 2020, the Appellant was told by Board Chair Trustee Martino that Minister Lecce, who was in possession of the Bird report, had called him and issued an ultimatum: "If you don't fix this, I will." Chair Martino further informed the Appellant that Director Browne got a similar message from Deputy Education Minister Nancy Naylor that there was an expectation that the investigator's report would be made public and that the Board would vote to reverse the original Determination. Trustee Tanuan informed the Appellant that Chair Martino disclosed to him that Minister Lecce telephoned Chair Martino and told him "fix" the situation or he would "get involved," implying he could place the Board under his supervision. The Appellant believed that the Minister would exercise his statutory powers to impose supervision upon the Board unless there was a "fixed" vote to find the Appellant in violation of the Code. These actions by the Minister, if accepted by a court of law to be true, constitute unfairness and an abuse of Ministerial discretion designed to influence the Board to illegally abandon its Original Determination and to appease LGBTQ+ political activists who were engaged in a "witch hunt" to silence and harm the Appellant, who stood up to these activists in defence of denominational rights. In proceeding as he did, the Minister acted outside the scope of his powers, infringing and violating the s. 93 rights of the Board, all Catholic Electors, and the Charter rights of the Appellant. The Minister abused his power, acted outside the scope of his legal authority and "bullied" the Board into harming the Appellant and violating his legal and constitutional rights and intruding into the s. 93 constitutional rights of the Toronto Catholic Board and all the stakeholders. Affidavit, Para. 59, Ex. Z.

31 On November 11, 2020 the Board held a "special" meeting," that is limited by Board By-law 1.1.24 to "any matter of a time-sensitive nature which may result in financial loss of other harm to the Board and the Board of Trustees, an employee or student, if the matter is not dealt with before

the next scheduled meeting." The first part of the meeting was held in the absence of the public. At the special in camera Zoom board meeting, at its outset, a point of order was raised by the Appellant and supported by a written legal opinion submitted to the Board, that it had no jurisdiction to proceed and to continue would be an abuse of process. The Appellant was represented by legal counsel, Dr. Charles Lugosi, SJD, who attended the meeting by Zoom and was allowed a timed three minute supplementary submission. He incorporated by reference into his comments his 46 page written legal opinion that was previously sent to the Board by the Appellant the day before the special meeting. He suggested that the Board consider an adjournment to get its own considered opinion, as the meeting was not truly exigent. Affidavit, Para. 61, Ex. AA (Lugosi Legal Opinion).

32 The Board's outside counsel, Eric M. Roher, a partner of the law firm Borden Ladner Gervais LLP, (BLG) also attended by Zoom. It should be noted that BLG is a proud advocate for LGBTQ+ rights, aggressively promoting LGBTQ+ rights. The firm states on its website: "BLG's robust Transgender Accommodation and Inclusivity Policy provides guidance on supporting, respecting, and accommodating trans individuals, and preventing harassment and discrimination on the basis of gender identity and expression." See: https://www.blg.com/en/about-us/our-story/diversity-and-inclusion. The Linked in Blog for BLG promotes LGBTQ+ legal education: See

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BLG's The Legal Listen is a podcast series exploring key issues in law and business. In our second episode, BLG's Lucas Kilravey welcomes Mekhala Chaubal, Brian Reigh and Martine Roy for a candid discussion of LGBTQ2+ perspectives in law and business. #BLGLegalListen #BLGPodcast #LGBTQ https://lnkd.in/dHYveDx

Affidavit, Para. 62, Ex. BB (Various sources of BLG's promotion of LGBTQ+ educational, social, legal and political agendas)

Given that the controversy at the heart of allegations against the Appellant stemmed from his vigorous opposition to inclusion of LGBTQ+ rights as incompatible with Catholic doctrine and theology, the Board's decision to engage BLG in this case was highly prejudicial and unfair to the Appellant. BLG was in an apparent conflict of interest. It could not provide independent neutral

advice since BLG actively advocates and promotes the legal, political, social and educational agenda of the LGBTQ+ community, which is an alliance that it is publicly proud of. When Mr. Roher gave his verbal opinion that By-law 10.11 was sufficient jurisdiction for the Board to reconsider any matter, including a prior determination, made under s. 218.3 of the Act, he did not disclose to the Board his firm's bias in favour of LGBTQ+ advocacy that opposes the underlying opposing viewpoint held by the Appellant.

33 A reply from Dr. Lugosi to Mr. Roher's submission was not permitted by the Chair. No questions were asked by any Trustee of Appellant's counsel. The Chair ruled against the point of order as did the Board on an immediate seconded appeal. It was clear the forthcoming adverse vote was pre-determined and biased against the Appellant, and this special meeting was called for the sole purpose of reversing the Original Determination. The meeting then went public and the Zoom connection to the Appellant's counsel was abruptly terminated by a person unknown, effectively removing counsel from the rest of the meeting, leaving the Appellant without legal representation to speak on his behalf, contrary to the procedure set out in paragraph 10, page 13 of the Code, which states, "A trustee who is subject to a Board inquiry to determine whether the trustee has breached a Code of Conduct has a right to retain and be represented by legal counsel throughout the process."

34 The exclusion of Appellant's counsel from the rest of the meeting, the denial of a right to reply, the denial of meaningful time to make a full submission and an opportunity to be heard with the assistance of counsel, are all violations of the rules of natural justice. The public phase of the meeting extended into the early morning hours of November 12, 2020. During the public session, the Board made a second Determination that reversed the Determination and imposed sanctions upon the Appellant. After this meeting, selected portions containing the opinion of the confidential and privileged Bird report were released to the general public.

35 On November 12, 2020 the Appellant was sent a letter from Chair Martino, setting out the Board's version of facts and the findings made against the Appellant. After referring to the Board's in camera meeting of August 20, 2020, Chair Martino stated, "At that meeting, there was no determination by the Board of a breach of the Code of Conduct." If he means that there was a Determination, but it was adverse to the complainants, then the statement is true. But if he means that there was no Determination at all, then his statement is misleading. The Appellant had earlier at the November 11/12 meeting, given the trustees his written submissions that the Board had already made its Determination on August 20, 2020, and that to hold a new vote was unlawful, because the

matter was *res judicata*, barred by the doctrine of estoppel, and an unfair abuse of process, and any new Determination would be null and void *ab initio*. Affidavit, Para. 67-68, Ex. GG.

36 The last page of Chair Martino's letter reveals that he is perpetrating a fundamental mischaracterization of the August vote, likely in anticipation of future legal proceedings. He states, "Please note that if the sanction is varied or revoked, the variation or revocation shall be deemed to be effective as of November 12, 2020, the date the original determination of the alleged breach was made by the Board." [Emphasis added] Chair Martino's revisionist version of the result of the August 20, 2020 meeting is completely contradicted by the Board's own counsel, by the Board's recording secretary, and by the confirmation of her minutes by the Board at its September 17, 2020 meeting, as previously stated in foregoing paragraphs 21 and 22, which find that the original date of the Determination was August 20, 2020. The question arises why, in the face of such strong evidence, would the Chair put his credibility on the line so that public confidence in him can be seriously eroded?

37 Chair Martino's letter confirms that the Board relied exclusively upon By-law 10.11 for jurisdiction to reconsider the question previously determined. That By-law states, "Any matter which has been decided upon by the Board … may be reconsidered by the Board …" Affidavit, Ex. CC.

38 In its public meeting that began on November 11, 2020, and concluded on November 12, 2020, the Board passed the following motion: "That we reconsider the Board's decision of August 20, 2020, in the matter of the Public vs. Trustee Del Grande on the decision made that there was no breach of the Code of Conduct." The Board then passed a motion finding the Appellant in breach of the Code of Conduct. The Board did not inform the Appellant which precise section or language of the Code was violated. The Board's Second determination was based upon exactly the same opinion expressed in the Bird report, upon which the Original Determination was made. The only new consideration came from outside pressure exerted by Minister Lecce and representatives of the LGBTQ+ community who were permitted to make their views known just prior to the taking of the second vote in the previously dismissed charges.

39 The Board then passed motions imposing various sanctions: 1) the Board censure Trustee Del Grande "for behaviour which was disrespectful to the LGBTQ community as a whole, as well as the TCDSB community"; 2) the Board "requests" that Trustee Del Grande present a public apology; 3) That the Board "refrain" from appointing Trustee Del Grande to any representative

position or role on behalf of the Board for a three month period; and 4) That Trustee Del Grande "immediately undertakes and completes an Equity Training program within a month to be recommended by the Board's Human Rights Equity Advisor."

40 Section 218.3 (3) permits only the following sanctions: 1) censure; 2) barring the member from meetings of the Board, committee meetings, or both; and 3) barring the member from sitting on one or more committees of the Board for a specified period of time. No jurisdiction is conferred upon the Board to impose any other sanction. Chair Martino's letter did not explain the statutory authority upon which the Board relied upon to apply sanctions that are not authorized by law.

41 The Appellant was given until December 4, 2020 to make written submissions to the Board in respect of the determination or sanction.

42 Following the Board's Second Determination, the Ontario College of Teachers re-opened its previous investigation into the conduct of the Appellant, the result of which could result in administrative proceedings that may deprive the Appellant of his license to teach, and destroy his livelihood. The College's investigator, Carly Thomson wrote to the Appellant on November 18, 2020 advising the Board provided additional information to the College, as did the Complainant, Kevin Welbes Godin. The Appellant was invited to make an additional response to that the matter before the College would move forward and be scheduled for review by the Investigative Committee of the College. Affidavit, Para. 70, Ex. HH.

Part Two

Appellant's Position on Key Issues

43 The Appellant contests the legal validity of the Second Determination made on November 12, 2020 on the following grounds:

A The Second Determination is null and void *ab initio*, on the basis that the Board no longer has jurisdiction to reverse its original Determination of August 20, 2020, when it acquitted the Appellant of all complaints. The Board, by proceeding in the manner it did, decided a matter that was *res judicata*, barred by the doctrine of estoppel, and constituted an abuse of process. By proceeding as it did, the Board violated the constitutional rights of the Appellant, violating his s. 2(a), 2(b), 7, 11(d), 11(h), 12, 15(1) rights under the Charter, and his original freedoms of speech and religion, guaranteed without limitation by the unwritten Constitution of Canada, which is incorporated into the written Constitution, by s. 26 of the Charter.

B The Board does not have untrammeled absolute discretion to re-open a Determination because some members desired a different result. When it rendered its Original Determination, the Board acted in its judicial capacity, exercising a judgment whether or not, the Appellant, violated the Code. The Board may not utilize By-law 10.11 to re-open a judicial Determination, only a decision made in the course of exercising its corporate responsibility on business matters. The statutory scheme set out in s. 218.3 of the Act, does not provide for a re-vote of a Determination when no violation was Determined.

C Even assuming the Board had jurisdiction to make Second Determination, the Board unlawfully breached its duties of procedural fairness and the rules of natural justice, violated the Charter, the Constitution of Canada, and committed an abuse of process, thus rendering its Second Determination of November 12, 2020 null and void *ab initio*;

D Alternatively, the Appellant did not violate the Trustee Code of Conduct. His constitutional rights, his oath of office, his fidelity to Roman Catholic doctrines and teachings, his fiduciary duties, and his statutory duties as an elected official of a s. 93 protected school board, required him to be a fearless advocate and to bravely represent his constituents who are faithful to the teachings of the Church, and to boldly proclaim his faith, through his positions in political debate, even if his comments and the manner of speech offended members of the LGBTQ+ community, who continuously exhibit hostility towards him and his authentic Catholic beliefs;

E The acts of the Minister of Education that pressured the Board to reconsider its Original Determination of August 20, 2020, constituted an unlawful intrusion upon the autonomous functions of a statutory body and constituted a breach of an implied public duty to the Appellant, whose position as an elected Trustee and livelihood as a licensed teacher is now in jeopardy. The Minister further breached of his duties not to infringe upon the denominational character of the Board, which is protected by the entire Constitution of Canada, the laws of Canada, and the laws of Ontario. The Minister's actions constituted misfeasance in public office, and were *ultra vires* of the Province of Ontario. Accordingly, the resulting Second Determination is an abuse of process that is contrary to the rule of law.

44 The Appellant contests the legal validity of the Sanctions imposed as a consequence of the Second Determination made on November 12, 2020 that are not explicitly authorized by s. 218.3 (3) of the Act to be of no force and effect.

Part Three

Jurisdiction

45 The Superior Court of Ontario has inherent jurisdiction to hear an appeal of this case notwithstanding s. 218.3(14) of the Act which states, "(14) The *Statutory Powers Procedure Act* does not apply to anything done under this section."

46 The Board's actions are not immune from judicial review. It does not matter whether or not a school board's decision is a statutory power of decision or not, for a court will review a decision on the basis of the fairness doctrine. *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3rd) 737 (C.A.) at para. 50. A school board may not claim it is immune from judicial scrutiny, as its decisions may be declared to be null and void by a court:

> 10 The cumulative effect of the decisions of the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), 88 D.L.R. (3d) 671 (S.C.C.); *Martineau v. Matsqui Institution (No. 2)* (1979), 106 D.L.R. (3d) 385 (S.C.C.); and *Cardinal v. Kent Institution* (1985), 24 D.L.R. (4th) 44 (S.C.C.) is that an administrative tribunal or other decision-maker, even though not carrying out functions traditionally classified as judicial or quasi-judicial, is generally subject to a duty of procedural fairness to those persons whose rights, privileges or interests, are or are likely to be affected by the decision, and that the remedy of judicial review, particularly certiorari, is available to quash any such decision that is arrived at without providing a level of procedural fairness that is appropriate to the particular circumstances.
> 11 There is now a coincidence between the circumstances when a duty of procedural fairness arises and the grounds where certiorari is available to enforce that duty. Neither the right nor the remedy is constrained any longer by the former requirement that the decision-maker must be performing a quasi-judicial function affecting the strict legal rights of the person complaining.
> *Elliott v. Burin School Board District No. 7*, [1998] 166 Nfld. & P.E.I.R. 73 (C.A.) at para. 10-11.

47 A court will intervene in an administrative decision made by the Board if it exceeded its jurisdiction or failed to comply with the rules of natural justice and procedural fairness. The Board's duty to comply with the rules of natural justice will vary depending upon the nature of the issue being decided. In the context of an issue as fundamentally important as the exercise of a trustee's constitutional rights to preserve the denominational constitutional rights of the Roman Catholic school system, the right of the Appellant to fairness is crucial and must be jealously guarded. This is a "high duty" imposed on the Board that extends beyond compliance with the rules of natural justice and procedural fairness, for "justice must not only be done, but be seen to be done." See:

Vecchiarelli (Litigation Guardian of) v. Toronto Catholic District School Board, [2002] O.J. No. 2458 (C.A.) at para. 2.

Duty to Act Fairly

48 The Board is under a general duty to act fairly to the Appellant. A "determination" is in the nature of a judgment as to guilt or innocence in relation to a charge of violating the Code. The Appellant is a member of the Board, which votes in "determinations" as a 12 member jury of peers, except the accused member is prohibited from voting. In this case, the finding of a breach of the Code by the Second Determination resulted in severe sanctions, including disgrace, expulsion, ostracization, banishment, social stigma, forced indoctrination, compelled speech, inability to serve his constituents by being deprived of his right to participate in debates and vote, and the likely future loss of his livelihood as a teacher. There can be no doubt that a "determination" of guilt or innocence made by a board is significant and has an important impact on the accused trustee. These circumstances satisfy the test for judicial review set out by the Supreme Court of Canada in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 28:

> 28 The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This court has stated in *Cardinal v. Kent Inst.* that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the court at p. 653).

49 The principles of natural justice and the duty of fairness apply to every administrative hearing. *Blencoe v. BC (Human Rights Commission)*, [2000] 2 S.C.R. 307 (SCC) at para. 102. There is general duty of fairness resting upon all public decision-makers. *Blencoe*, para. 105.

Abuse of Process

50 The common law principle of abuse of process is not restricted to procedural unfairness. Abuse of process is a broader concept that includes oppression. In this case, compelling the Appellant to be subjected to an oppressive and vexatious Second Determination violates the fundamental principles of justice that underlie a community's sense of fair play and decency. The Board's actions to re-open its Original Determination made on August 20, 2020 is tainted to such a degree that it tarnishes the integrity of the Board. The remedy of abuse of process to quash unfair, oppressive and unconstitutional proceedings extends to all administrative hearings governed by statutory decision-makers, including the Board. *Blencoe*, para. 116-120.

51 A court vested with inherent jurisdiction has an inherent and residual discretion to prevent an abuse of the judicial process, when a proceeding is unfair to the point of being contrary to the interests of justice. Abuse of process may be established where: 1) the proceedings are oppressive or vexatious; and 2) violate the community's sense of fair play and decency. There is public interest component that seeks to properly administer justice in a fair and just process. See: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 35. The envisioned environment of a community composed of objectively reasonable people imagined by the Court is distinguishable from a vocal politically empowered strident sub-community, whose idea of justice is akin to lynch mob, whose quest is to purge an enemy who offends them and results in their reckless abandonment of the rule of law and the presumption of innocence.

52 The doctrine of abuse of process applies to this proceeding. While strict application of the doctrine of estoppel also applies, the following explanation of the law sheds light why these proceedings that re-litigated the original Determination undermine the very integrity of the Board:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:
> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.). *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.* [Emphasis added.] As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-625).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-348):
The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

...

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *McIlkenny* [H.L.], *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *McIlkenny* [H.L.], *supra*, and *Demeter*, *supra*) the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle. *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (SCC) at para. 37, 38, 42, 43

53 The Board is urged to seize this opportunity to revoke its Second Determination and re-recognize the Original Determination as final and conclusive. The result of this re-litigation is opposing verdicts that bring this Board into disrepute and fatally destroy all semblance of credibility. The decision to re-litigate to reverse a democratic earlier vote not influenced by political pressure and the decision made prior to the Second Determination to cast a vote against the Appellant mocks the judicial function of the Board to act impartially and with integrity. At stake is not just the personal jeopardy of the Appellant, nor the future of the denominational character of the Catholic school system governed by the Board, but its credibility, authority and faithful adherence to the rule of law, and the oath attested to by every trustee upon assuming public office. The Board needs to

appreciate what is at stake is much bigger than appeasing the Minister of Education or pandering to the LGBTQ+ community at the cost losing the confidence of the faithful authentic Catholic voters, who placed their trust in the Board trustees to be true to their fiduciary duty to them. Two questions arise: 1) Did the individual trustees of the Board who voted against the Appellant in the Second Determination violate their fiduciary duty to their respective Catholic Electors? and, 2) Did these same trustees commit misfeasance in public office? The finality of the Original Determination of August 20, 2020 must be affirmed, as the first step to restoring public confidence and integrity:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
> 52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80. *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (SCC) at para. 51, 52.

The Board Failed to Comply with the Charter

54 The Charter is binding upon the Board, as it is an independent body exercising statutory authority, and the Charter applies to action taken by the Board. *Eldridge v. BC (AG)*, [1997] 3 S.C.R. 624 (SCC) at para. 21; *Blencoe v. BC (Human Rights Commission)*, [2000] 2 S.C.R. 307 (SCC) at para. 34-40. The Board is a government actor, and its actions are not immune from judicial review. Just as the Board's Determinations are subject to Charter scrutiny, so are the actions of the Minister to pressure the Board to hold a new vote to "fix" a Determination that was politically unacceptable. Neither the Minister not the Board are "above the law."

55 The particulars of the s. 2(a), 2(b), 7, 11(d), 11(h), 12, 15(1) Charter violations made by the Board include: 1) punishing the Appellant for exercising his fundamental freedoms of conscience, religion, thought, belief, opinion, and expression; 2) depriving the Appellant of his liberty to serve in his full capacity as an elected Board trustee and inflicting harm to his psychological integrity that consequentially harms his physical health, violating his security of the person; 3) unfairly judging the Appellant at the Second Determination when it was not able to be independent and impartial, because of the influence and interference levied by the Minister of Education and prominent members of the LGBTQ+ community that had the effect of corrupting procedural due process, as this pressure led to the leakage of the confidential Bird report, the unprecedented decision to "reconsider" a final decision of exoneration, and the transformation of the special Board meeting of November 11-12, 2020 into a "show trial" intended to appease others that resulted in a pre-determined adverse verdict for the Appellant, ignoring any presumption of innocence; 4) placing the Appellant into "double jeopardy" by re-trying and convicting him for the identical matter that he was previously acquitted of by the Original Determination of August 20, 2020; imposing penalties that are designed to indoctrinate him to LGBTQ+ ideology and gender theory intended to "re-educate" him to conform to politically correct speech that will not offend the sensitivities of others who are intolerant of opposing viewpoints and beliefs, or alternatively to compel him to abandon his advocacy for authentic Catholic teachings in order to complete his term as an elected trustee; and 5) the unequal treatment by the Board of the Appellant, which in all of its previous determinations involving Code complaints against other trustees, never before re-considered any prior determination for the purpose of overturning an original determination that found a trustee not guilty of a Code violation, constitutes discrimination against the Appellant, contrary to s. 15(1) of the Charter, just because the Appellant's fearless proclamation of his authentic Catholic faith offended others.

56 The common law doctrine of abuse of process is subsumed into the principles of the Charter. There is an overlap between abuse of process and Charter remedies. *R. v. O'Connor*, [1995] 4 S.C.R. 411 (SCC); *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (SCC) at para. 36.

Res Judicata

57 The doctrine of *res judicata* applies. An acquittal must be respected as final. Otherwise an accused trustee who has been acquitted of a violation may end up being placed into jeopardy

repeatedly until the defeated persecutors of the accused trustee by sheer persistence and political pressure force other trustees to change their votes to convict. This is not justice: it is bullying. The courts will not support such oppressive conduct. The interests of justice is concerned with the promotion of finality of litigation and the prevention of multiple proceedings that place an accused individual into jeopardy more than once on the same charge, on the same facts, and before the same decision-making body:

> 40 The policies underlying the *res judicata* doctrine are the promotion of finality of litigation and the prevention of a multiplicity or fragmentation of proceedings so that "[a] person should only be vexed once in the same cause": *Danyluk v. Ainsworth Technologies Inc.*, 20 01 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) per Binnie J. at para. 18; *Quinlan v. Newfoundland (Minister of Natural Resources)* (2000), 192 Nfld. & P.E.I.R. 144 (Nfld. C.A.), per Green J.A. at para. 6. In *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 (S.C.C.), Cromwell and Karakatsanis JJ., writing for the majority, elaborated on the rationale as follows:
>
> > [28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative regime. For these reasons, the law has adopted a number of doctrines to limit relitigation.
>
> 41 In deciding whether a discretion not to apply the *res judicata* doctrine should be exercised, the potential promotion or hindering of these policies of putting an end to litigation and prevention of unnecessary harassment of individuals through multiple litigation should be taken into account in deciding whether to exercise the discretion. *Guardian Insurance Co. of Canada v. Roman Catholic Episcopal Corp. of St. John's* (2013) 343 Nfld. & P.E.I.R. 68 at para. 40, 41.

***Autrefois Acquit*, Estoppel and Section 11(h) of the Charter**

58 The Appellant was charged with an offence by the Board, a government actor. The Board held a vote and made its Original Determination pursuant to its statutory authority to find the Appellant not guilty of a violation of any portion of the Code, given the absence of specific allegation of a specific part of the Code. No reasons were given, in the same way a jury that renders a not guilty verdict does not give reasons, nor are its deliberation made public.

59 The Second Determination relied upon the same evidence, was before the same parties, and decided the same question that was previously determined and confirmed by the Board. This amounts to a re-litigation of concluded matters, placing the accused trustee into double jeopardy, with opposite verdicts. These fact fit precisely into the legal doctrine of issue estoppel. The

importance of issue estoppel is that it serves the ends of justice to ensure fairness. An accused trustee must not be re-tried in a process that already resolved in his or her favour. To do so puts into disrepute the integrity of the Board and the values of finality and economies of time, energy and money. To require the Appellant to face a Second Determination, and to launch appeals violates the principle of res judicata, and offends against the Charter value of the prohibition against double jeopardy. The Supreme Court of Canada has developed an extensive body of jurisprudence on these issues, which arise in all proceedings, whether in criminal, civil or administrative law.

60 In this case, all the conditions of establishing issue estoppel have been satisfied:

> 37 Taking the principle of issue estoppel as a principle against relitigation of concluded issues, as advocated in these reasons, the question is whether, on the trial of an accused for an offence, the Crown can lead evidence capable of contradicting facts previously found in the accused's favour at an earlier trial. In my view, the principle prohibiting such relitigation remains essential to a fair, effective and respected criminal justice system.
> 38 Like most principles of criminal law that have been repeatedly endorsed by the Court, issue estoppel has been sustained over the years because, whatever its problems, it serves the ends of justice. Issue estoppel serves three purposes, all integral to a fair criminal justice system: (1) fairness to the accused who should not be called upon to answer questions already determined in his or her favour; (2) the integrity and coherence of the criminal law; and (3) the institutional values of judicial finality and economy. While these three purposes have strong counterparts in the civil law context, they take on particular nuances in the criminal sphere. ....
>
> 49 The requirements of issue estoppel, whether in civil or criminal law, are: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies: *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at p. 254, *per* Dickson J. (as he then was), adopting a statement by Lord Guest in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.), at p. 935.
> *R. v. Mahalingan*, [2008] 3 S.C.R. 316 (SCC) at para. 37, 38, 49 [emphasis added]

61 Issue estoppel applies in this case, because it is an administrative proceeding:

> 28 Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.
> 29 The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party

may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

30 The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at paras. 52-53.

31 Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." *Penner v. Niagara Regional Police Services Board*, [2013] 2 S.C.R. 125 (SCC) at para. 28-31. [emphasis added]

62 The question arises, "What is the real injustice in this case?" The vote on the Original Determination was fairly conducted. Those who voted to reverse the determination in favour of the Appellant will argue that the trustees who voted on the side of the Appellant committed a real injustice to the LGBTQ+ community, because the accused trustee offended them by the content of his speech. But this assumes that the accused trustee had no legal right to do what he did. The real injustice are the failures to recognize the Appellant's legal and constitutional rights that are paramount to feelings of hurt from perceived offensive speech, the denial of natural justice, and the ensuing abuse of process. That is why the Second Determination is the real injustice here.

63 The Supreme Court is divided on the question whether there remains a residual discretion exception to the doctrine of issue estoppel:

75 The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.) [hereinafter Figliola]. This is the precedent, therefore, that governs the application of the doctrine in this case.

76 The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), which enunciated a different test for the discretionary application of issue estoppel in the context

of administrative tribunals. In so doing, *Danyluk* said that the approach should be "fairness" and set out a number of factors for assessing how "fairness" applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court's subsequent jurisprudence starting with *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.). The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.)).
77 The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.
78 The "twin principles" which underlie the doctrine of issue estoppel — "that there should be an end to litigation and ... that the same party shall not be harassed twice for the same cause" (*Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation.* This, as the majority said in *Figliola*, is the case whether we are dealing with courts or administrative tribunals. Our colleagues' approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into "fairness" and "injustice" for administrative tribunals and revives an approach that our Court refused to apply in *Figliola.*
Penner v. Niagara Regional Police Services Board, [2013] 2 S.C.R. 125 at para. 75-78
(Dissent)

64 The statutory scheme set out in s. 218.3 of the Act permits only "one bite at the cherry" and further proceedings demanded by the losing side unjustly harasses the winner. There is no room in the context of this proceeding for discretion to be exercised to re-litigate a determination that by law is final. Unlike a court, the Board does not possess legal discretion. By-law 10.11 is not derived from s. 218.3 of the Act, and was never intended to apply to determinations in that section. The Board pursued its own version of "forum shopping" in order to achieve a different result, at the cost of fairness and integrity. The following jurisprudence supports this position:

> 94 Although initially developed in the context of prior court proceedings, issue estoppel has long been applied to judicial or quasi-judicial decisions pronounced by administrative boards

and tribunals. In the administrative law context, "the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided" (*Danyluk*, at para. 21).

95 Consistent with the principles underlying issue estoppel, the fairness to the parties is focused on preventing parties from undergoing the burden of duplicative litigation — the objective of fairness is linked to the principle of finality. Indeed, in *Danyluk*, Binnie J., writing for the Court, focused on the importance of finality in litigation:

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [para. 18]

96 In other words, Binnie J. stated, "[a] litigant ... is only entitled to one bite at the cherry" (para. 18). Underlying the application of issue estoppel in this context is the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

97 This Court revisited the exercise of discretion to apply issue estoppel in the context of prior administrative proceedings in *Boucher c. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 (S.C.C.). The Court acknowledged the different purposes of the competing procedures. Nevertheless, in that case considerable emphasis was placed on the stability and finality of decisions and the importance of deference and adequate alternative remedies in the administrative context as crucial considerations in determining whether issue estoppel should be applied in a particular case:

The situation in which the respondent could find itself if the principles of *res judicata* or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties

[Emphasis added; para. 35.]

98 More recently, in *Figliola*, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, "should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of ... relitigation" (para. 36).

99 In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice.

Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

100 This approach is consistent with the longstanding principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

C. Issue Estoppel and Administrative Decisions

101 This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.

102 In *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), the purpose of administrative tribunals was described as follows:

[Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.

... The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers.

[Emphasis in original; pp. 279-80.]

103 In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.), at para. 41).

104 The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

105 The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in *Figliola*,

[r]espect for the finality of a[n] ... administrative decision increases fairness and the integrity of ... administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34].

106 Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that "[p]arties should be able to rely particularly on the conclusive nature of

administrative decisions ... since administrative regimes are designed to facilitate the expeditious resolution of disputes" (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see, for example, *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 11). It also gives effect to the "adequate alternative remedy" principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

107 The court's residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schweneke*, an overly broad application of discretion in the administrative context would "swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39). *Penner v. Niagara Regional Police Services Board*, [2013] 2 S.C.R. 125 (SCC)(Dissent) at para. 94-107.

Political Influence Corrupting the Process

65 It is an abuse of process for a Minister or a trustee of the Board or for both to act in concert to re-open an Original Determination that was recognized and confirmed by the Board. In this case, the Minister personally intervened to pressure the Board into holding a new Second Determination. There was no statutory authority to do so. The Minister and the individual Board members are presumed to know the law, and cannot rely upon the pretext of using By-law 10.11, when the Board has never used this bylaw before for purpose of reversing an original determination. The required number of Trustees already made up their minds in advance of the Board meeting of November 11, 2020 to vote against the Appellant. Those who decided to change their vote were presumed to be influenced by the common knowledge that the Minister might seize control of the Board and put it under his supervision, and by the outrage expressed by a few LGBTQ+ activists and sympathizers, who oppose the teachings of the Catholic Church that do not conform to their opposing cultural, educational, social, legal and political goals and agenda. Legal advice obtained from the BLG law

firm should have been viewed with caution, given that firm's solidarity with the LGBTQ+ community.

66 By giving in to these outside influences, the Board failed to act independently, abandoned their discretion, and acted improperly. The Board members knew or ought to have known that their actions at the Second Determination were wrong, unlawful and likely to harm the Appellant. Minister Lecce knew or ought to have known that he exceeded his legal authority and discretion when he "bullied" or set up alliances with "onside" individual Board members to achieve a Second Determination that was intended to harm the Appellant, both in his capacity as a trustee and as a teacher in good standing with the Ontario College of Teachers. The Minister is not above the law, but subject to the legal doctrine known as misfeasance in public office: see: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (SCC) at para. 18-32. Even the appearance of a conflict of interest ought to have resulted in the recusal of the BLG firm in this matter.

Paramountcy of Freedom of Speech, Religion and Inviolability of the Person

67 Section 26 of the Charter explicitly preserves certain fundamental freedoms of the constitutional common law: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." These entrenched constitutional rights existed without limitation prior to the enactment of both the *Constitution Act, 1867* and the *Constitution Act, 1982*, and are neither diminished nor modified by either instrument. Unlike the statutes that enacted the foregoing constitutional instruments by the force of positive law, fundamental freedoms are the expressions of natural law that is inherent to all people, and properly referred to as "original freedoms" that may not be infringed upon or denied by any positive law or judicial pronouncement. While certain sections of the Charter, including s. 2 (a), 2(b) 7, and 15(1) are properly regarded as constitutional rights, these rights are more in the nature of civil rights that can be limited by s. 1 of the Charter or totally excluded by the notwithstanding clause of s. 33(1) of the Charter. Section 1 states, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 33(1) states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Significantly, neither s. 1 nor s.

33 limit the original freedoms, but only the rights and freedoms set out in the text of the Charter. Of further importance, is s. 29 of the Charter that states: "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." This means neither s. 1 nor s. 33 of the Charter apply to Catholic denominational rights, so that the original rights to freedom of religion and freedom of speech exercised by the Appellant are unrestricted by positive law and completely immune from state interference, including the Second Determination made by the Board and the consequent sanctions.

68 The decision by the Supreme Court of Canada in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 (SCC) is as relevant today as it was in 1953. At para. 95-98 the majority of the Court agreed:

> 95 The only powers given by sec. 92 of the *Confederation Act* which have been suggested to extend to legislation in relation to religion are nos. 13, Property and Civil Rights, and 16, Matters of a merely local or private nature in the province. The statutory history of the expression "Property and Civil Rights" already given exhibiting its parallel enactment with special provisions relating to religion shows indubitably that such matters as religious belief, duty and observances were never intended to be included within that collocation of powers. If it had not been so, the exceptional safeguards to Roman Catholics would have been redundant.
> 96 Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.
> 97 That legislation "in relation" to religion and its profession is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive.
> 98 There is, finally, the implication of sec. 93 of the *Confederation Act* which deals with education. In this section appear the only references in the statute to religion. Subsec. (i) speaks of "*Denominational Schools*" and preserves their existing rights and privileges. Subsec.

(ii) extends to the separate schools "of the Queen's Protestant and Roman Catholic subjects" in Quebec the same "powers, privileges and duties" then conferred and imposed upon the separate schools of the "Queen's Roman Catholic subjects" in Upper Canada. Subsec. (iii) provides for an appeal to the Governor-General in Council from any act or decision of a provincial authority "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Subsec.(iv) declares that in the event of any failure on the part of the provincial authority to observe or enforce the provincial laws contemplated by the section, Parliament may provide for the execution of the provisions of the section. On the argument advanced, and apart from the question of criminal law, these vital constitutional provisions could be written off by the simple expedient of abolishing, as civil rights and by provincial legislation, the religious freedoms of minorities, and so, in legal contemplation, the minorities themselves." [Emphasis added]

69 The facts of this case demonstrate that original freedoms of speech and religion are under attack by the Province of Ontario and through it agents who are on the Board, a government actor. The Appellant's conduct in his defence of the freedom of the Catholic religion by exercising his freedom of speech, to make his forceful dissent, even if is viewed as offensive by those who oppose the Catholic faith, cannot be restricted by this Board. It is unlawful to do so.

70 There are in Canada fundamental unwritten constitutional principles. These principles go to the core of the meaning of just government and give robust authority to the courts to exercise their common law inherent jurisdiction and serve as a check upon abuse of power by the state. These unwritten constitutional norms are rooted in fundamental principles and conventions that are foundational to the common law. The language of s. 52 of the *Constitution Act, 1982* defines the Constitution to "include" the *Constitution Act, 1867* and the *Constitution Act, 1982*. This indicates that the textual sources of the Constitution are not exhaustive and that they may be supplanted and, if necessary, altered by principles and conventions found in the unwritten *Constitution*. The unwritten *Constitution* includes "organizing principles" which are derived from Canada's history and traditions. Organizing principles can take precedence over formal legal norms. The preamble to the *Constitution Act, 1867* states, in part, that Canada is to have a constitution similar in principle to that of the United Kingdom. This means that Canada's unwritten constitutional principles derive their authority from the common law. The preamble to the Charter adds the "organizing principles" of the supremacy of God and the rule of law. Section 26 of the Charter is a gateway as to how unwritten common law constitutional law principles remain alive and are incorporated by reference into the *Constitution*. These unwritten constitutional principles are capable of limiting the Parliament's authority under s. 32 of the Charter. See: Rt. Hon. Beverley McLachlin, *Unwritten Constitutional Principles: What is Going On?* at

https://www.scc-csc.ca/judges-juges/spc-dis/bm-2005-12-01-eng.aspx pp. 1-2, 4, 7-9; *Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)*, 1997 CarswellNat 3038 SCC at para. 90, 94-95, 109; *Babcock v. Canada (Attorney General)*, 2002 SCC 52 at para. 54; Preamble, Sections 26, 32, 52 *Constitution Act, 1982*; Preamble, *Constitution Act, 1867*.

71 Section 26 of the Charter was not considered or argued in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (SCC) , nor *in Law Society of BC v. Trinity Western University*, [2018] 2 S.C.R. 293 (SCC) or its companion case, *Trinity Western University v. Law Society of Upper Canada*, [2018] 2 S.C.R. 453 (SCC). Even if TWU had argued s. 26, it might not have enjoyed the constitutional protection guaranteed unconditionally to denominational schools given by s. 93 of the *Constitution Act, 1867*.

72 Finally, the Board might consider that it is not a public government actor and therefore not subject to judicial review, relying upon the authority of *Highwood Congregation of Jehovah Witnesses (Judicial Committee) v. Wall*, [2018] 1 S.C.R. 750 (SCC), where the Court ruled at para. 12:

> Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake. Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.

73 In this case, the Board is a government actor and its determinations were "state action." The Board in the Original Determination exercised statutory authority. In the Second Determination, it purported to exercise statutory authority, but did not, for it did not possess statutory authority to reconsider its Original Determination. The Appellant's legal rights are at stake. Judicial review is available in this case.

74 The *Wall* decision is a matter for Cardinal Collins and the Archdiocese of Toronto to seriously consider. Each trustee of the Board is required to abide by the Church's theology and mandates this by requiring that every trustee be faithful to a religious oath each is compelled to accept without qualification or reservation. Any trustee who fails to abide to the spirit and to the letter of the Catholic Church's teaching and embraces conflicting secular positive laws enacted by

the Province may be in jeopardy of being disciplined and or removed from office by Cardinal Thomas Collins. This would be a purely theological decision insulated from judicial review, according to *Wall.*

75 Below is the most relevant part of the oath that each trustee is sworn to uphold:

> Cardinal Collins: "As Catholic School Trustees, what do you promise?"
>
> Trustees: "We promise to be faithful to the teachings of the Church, and express our fidelity to the primacy of the Pope and the authority of the Magisterium."
>
> Affidavit, Para. 16, Ex. B.

76 The Board now has its last clear chance to voluntarily revoke its abusive Second Determination that violates the law and for individual trustees to search their conscience to assess whether they may have violated their oath, an ultimate determination that is within the exclusive jurisdiction of Cardinal Collins, the Archdiocese of Toronto, the Pope and the Magisterium of the Holy Roman Catholic Church, whose decisions are not subject to judicial review. This is the time for trustees to come forward to right a great wrong done to the Appellant.

Sanctions Are Unjust and Unlawful

77 Since the Second Determination is unlawful and void *ab initio*, any sanctions imposed by the Board fail by operation of law. As well, if the Board accepts the legal arguments herein and revokes it Second Determination, then s. 218.3(7) of the Act applies, and the sanctions imposed are automatically revoked.

Part Four

Remedies Sought

78 The Appellant seeks the following remedies:

A The Appellant requests that this Board revoke its Second Determination and re-recognize its Original Determination.

B The Appellant requests his legal costs be reimbursed in full, in accordance with para. 10 of the Code, as these proceedings that ensued after the Original Determination of August 20, 2020 are "extraordinary circumstances."

C The Appellant requests an official apology from the Board for its illegal, oppressive and unfair behavior.

All of which is Respectfully Submitted,

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Per: 

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