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*Denotes Personal Law Corporation

†Denotes Associate Counsel

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

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

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

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

November 10, 2020

Michael Del Grande
Trustee, Toronto District Catholic School Board

Via E-Mail

Attention: Mr. Del Grande,

Re: Attempt to Re-Open A Determination Made on August 20, 2020

Introduction

This legal opinion was prepared at the request of Mr. Michael Del Grande. It was prepared on an expedited basis for use at a special meeting of the Toronto District Catholic School Board (Board) to be held on November 11, 2020, to discuss a purported exigent matter, to reconsider the prior Determination by the Board that Mr. Del Grande was not in violation of the Board's Code of Conduct. The scope of this opinion is limited to the jurisdiction of the Board to reconsider its Determination.

Specifically excluded from my term of reference are unanswered crucial questions that include: 1) the limits upon freedom of expression expressed by an elected public official, whether personal or representative of constituents, whether offensive or not to others; 2) whether or not the Board's assigned investigative fact finder, the law firm of Rubin Tomlinson and investigator Michelle Bird, delegated by the Board to make an inquiry, exceed its mandate by rendering an opinion concluding that Mr. Del Grande violated the Code of Conduct, the very question that only the Board sitting as an independent judicial body is lawfully entitled to determine, as set out in s. 218.3(2) of the *Education Act*; 3) whether or not the Minister of Education Stephen Lecce and former Premier

Kathleen Wynne acted legally by exerting their influence to motivate the Board to reverse its Determination, and the impact of this kind of influence upon the integrity of the independence of the judicial role exercised by the Board; and 4) whether or not the Board was lawfully permitted to disclose to the public a privileged and confidential legal document, the report of Michelle Bird, in whole or in part. These unresolved questions are important and need to be eventually resolved in the public interest to preserve the integrity of the administration of justice and to maintain public confidence in the rule of law.

Because of time constraints, this opinion is not comprehensive nor exhaustive and does not integrate the law with the legal analysis. What follows is my opinion, followed by Appendix A, containing the applicable case law.

It would be advisable for the Board itself to delay a rush to reconsider its prior Determination, in order to obtain its own legal independent opinion, prior to taking steps that may end up being resolved in a court of law, at great expense to all concerned.

Summary of Opinion

1 The Board has no jurisdiction under its By-law 10.11 to have a second chance to have another vote on the dismissed complaints. To proceed would be unlawful and amount at a minimum to an abuse of process that will harm the credibility of the Board. The legal issues that apply go far beyond the interests of the adversaries involved, and undermine the integrity of the Board itself.

The Original Determination

2 On August 20, 2020 the Board made a “Determination” that the accused trustee, Mr. Del Grande, did not breach its Code of Conduct (Policy Document T.04) with respect to all charges laid against him.

3 The minutes recording this Determination were approved by the Board as correct on September 17, 2020.

The Board is Court of Competent Jurisdiction under the *Education Act* for Limited Purposes

4 Section 218.3(2) of the *Education Act* and the Code of Conduct, set out a quasi-judicial scheme analogous to court of competent jurisdiction to make a “Determination.” Under this grant of authority, the Board sits in a judicial capacity to make a “Determination” whether the Code of Conduct was breached or not.

What is a “Determination”?

5 “Determination” is defined as “a judicial decision settling and ending a controversy.” (Merriam-Webster and Webster’s)

6 In the legal world, “Determination” means a decision of a court or administrative agency regarding an issue, case or controversy.” (Merriam-Webster law dictionary).

7 Black’s Law Dictionary speaks of a final, non-appealable Determination of a court of competent jurisdiction or the decision of a court of justice.

Is there a Procedure to Appeal an Acquittal?

8 Section 218 of the enabling legislation, the *Education Act*, does not have a scheme set out to reconsider what in effect is an acquittal on Code charges.

9 Neither does the Code itself.

10 Once an accused trustee is found not to be in breach of the Code, that Determination is a final Determination that cannot be appealed by a “reconsideration.”

11 The *Education Act* sets out the legal appeal process for a trustee who has been found to be guilty of a breach. There is no process to appeal the acquittal of a trustee.

The Law Prohibits Reconsideration

12 Reconsideration is not legally possible by the Board.

13 Just as a court is *functus officio* once a final Determination has been rendered, so is the Board.

14 Once the Board made its judicial Determination on August 20, 2020, the Board no longer has any authority to undertake any further steps, except for the very limited exception of an inadvertent slip. There are no exceptions in this case, because the Board affirmed the correctness of its not guilty verdicts in its September 17, 2020 minutes.

15 Judicial reconsideration of a final verdict by a court of competent jurisdiction is not allowed in Canada, with rare exceptions that are not relevant here.

16 Since August 20, 2020 the Board is *functus officio*.

17 The Determination of the case was in the nature of a judicial decision, and was final and binding upon the Board.

18 There is no provision in the *Education Act* for an appeal of a Determination that operates in its effect as an acquittal.

19 The legal doctrines of estoppel, *res judicata*, *functus officio* and abuse of process all prohibit reconsideration by the Board of its own prior Determination in the matter of Mr. Del Grande. This is binding law found in the laws of both Ontario and Canada, which all trustees may not violate. See Appendix A for selected passages from applicable case law.

20 At its proposed hearing for reconsideration, the facts are the same, the issues are the same, the question to be decided is the same and the parties are the same. That is why the legal doctrine of *res judicata* applies, for it includes the components of issue estoppel and cause of action estoppel. Even if the technical requirements to satisfy the legal tests of estoppel are not met, the test for abuse of process is satisfied. The doctrine of abuse of process prohibits reconsideration of the issues of

fact, law and mixed fact and law that were all bundled together when the Board made its August 20, 2020 Determination.

21 In this case, there is nothing new offered to force a new vote except a motivation to reverse the due process that resulted in the acquittal of the accused trustee. This kind of motivation has no place in disturbing a verdict lawfully rendered. Not long ago, a jury in the case of *R. v. Gerald Stanley*, acquitted a white male of the charge of murder, and many members of the First Nations community were outraged, perceiving racial prejudice by members of the jury resulted in an unjust result. Did the resulting public outrage and condemnation of the verdict by noted high profile politicians result in a new vote by the members of the jury? No. The rule of law demands that unjust verdicts be appealed, not reconsidered. The rule of law applies not just to results that the public approves, but also to results the public disapproves.

22 It remains an open question whether the constitutional right found in s. 11(h) of the Charter not to be placed in “double-jeopardy” applies in the context of a Determination made by an elected school board. If it does, the proposed reconsideration is clearly unlawful. But the “spirit” of s. 11(h) must be obeyed by every trustee, in accordance with the Board’s By-laws. Placing Mr. Del Grande in legal jeopardy again at the very least violates the constitutional value expressed in s. 11(h).

23. Other sections of the Charter may apply: sections 2(a), 2(b), 7, 11(d), 12, and 15(1). There is no need at this time to go further than s. 11(h), and further consideration of other sections of the Charter can be left for another day. It is sufficient to say that Mr. Del Grande is entitled to his freedoms of opinion, thought, belief, expression, religion and conscience, and to substantive and procedural due process. Continued oppression of him may be viewed as cruel and unusual punishment. He is entitled to equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, just like any individual who has an opposing viewpoint from his.

Duty of Trustees

24 According to s. 4 of the Code of Conduct, every trustee is compelled to comply with the letter of the law, and the spirit of the law.

25 The trustees are bound by their Code of Conduct to abide by the Determination of acquittal on August 20, 2020. Failure to do so could be the subject of a fresh complaint as a breach of s. 5(b) of the Code of Conduct.

Dual Role of the Board

26 The trustees need to understand the Board acts in two capacities: 1) as a business organization, and 2) as a judicial body that must abide by laws (common law, legislation, and the Constitution) and legal requirements, including natural justice.

Role as a Judicial Authority

27 When the Board acts in a judicial capacity regarding an accused trustee, its judicial Determination is final and binding, such as when an accused trustee is found not guilty of a breach.

28 There is no provision in s. 218.3 of the *Education Act* or any other Act that permits the Board to reconsider an acquittal.

Role As a Business Manager

28 Board business that does not deal with an inquiry followed by a “Determination” is ordinary business that is dealt with by decisions of the Board.

29 In these kinds of matters, the Board is acting in its capacity as a corporate actor, and not as a judicial authority.

30 It is in this limited context that Bylaw 10.11 applies, to any previous matter that has been “decided.”

31 Note the language in By-law 10.11 explicitly omits the use of the word, “determined.”

32 By-law 10.11 is limited to reconsidering business matters of the Board.

33 It is a legal error to assume By-law 10.11 extends to matters of a judicial or quasi-judicial nature when the Board is sitting in its capacity as a judge and jury.

34 Only matters that are of a non-judicial nature may be revisited, such as where to build a new school, and increasing the budget.

Does “Determination” and “Decision” mean the Same Thing?

35 Some trustees of the Board may cling to an assumption that “decision” and “Determination” mean the same thing.

36 This assumption is a legal error.

37 If this assumption is accepted for argument’s sake, then By-law 10.11 is vulnerable to being declared by a court to be null and void, and any fresh Determination reversing the previous Determination would also be null and void *ab initio*.

38 There is no delegated authority granted by the governing statute, the *Education Act*, to have a re-Determination. Even if there were such statutory authority, it would be subject to a constitutional challenge as to its legitimacy, for it would be in conflict with the existing jurisprudence.

Free and Democratic Society

38 The losing trustees are compelled by law to accept the democratic vote at the Determination that ruled in favor of the accused trustee.

39 It would be unwise for the dissatisfied trustees who desire reconsideration to place themselves at risk of violating Code of Conduct s. 5.5, by failing to uphold the implementation of any Board resolution after it has been lawfully passed, particularly since they now have notice of the applicable law.

Conclusion

40 The proposed motion to reconsider the prior verdicts is out of order for lack of jurisdiction to proceed, as set out in all the foregoing reasons. If the Chair fails to heed the point of order, a motion may be made and seconded, for the entire Board to rule on the point of order. If that fails, and a new vote is taken that reverses the Determination of August 20, 2020, an appeal is available under the *Education Act*. If that appeal is dismissed, judicial review will then ensue, ultimately resulting in a judgment declaring any reversal of the original Determination to be null and void *ab initio*.

Yours very truly,

CREASE HARMAN LLP

Per: *Charles Lugosi*

Electronic signature

Dr. Charles I M Lugosi, SJD

Doctor of Juridical Science

Barrister-At-Law (Ontario, BC) Attorney-At-Law (Michigan, Washington)

Admitted to the Bar of Supreme Court of the United States

Appendix A begins on the next page: