

**Eric M. Roher**  
T: 416-367-6004  
eroher@blg.com

**Maciej Lipinski**  
T: 416-367-6555  
mlipinski@blg.com

Borden Ladner Gervais LLP  
Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto ON M5H 4E3  
Canada  
T 416-367-6000  
F 416-367-6749  
blg.com



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**DELIVERED BY EMAIL** (joseph.martino@tcdsb.org)

**PRIVATE AND CONFIDENTIAL**

Mr. Joseph Martino  
Chair  
Toronto Catholic District School Board  
80 Sheppard Avenue East  
Toronto, ON  
M2N 6E8

Dear Mr. Martino:

**Re: Trustee Code of Conduct**

You have asked us to consider and advise on the extent to which trustees of the Toronto Catholic District School Board (the “**TCDSB**”) are bound by the current requirements of the TCDSB’s Trustees Code of Conduct (TCDSB Policy T.04; the “**Code of Conduct**”) that permit a “Roman Catholic Elector and Eastern Right Catholics” to “petition to the Board of Trustees directly” with respect to alleged breaches of the Code of Conduct.

**Brief Conclusion**

The current provisions of the Code of Conduct comply with the requirements of the *Education Act*, and trustees accordingly have a duty under the *Education Act* to comply with those provisions.

In our view, the TCDSB’s Board of Trustees (the “**Board of Trustees**”) have the authority and the mandate under the *Education Act* and the TCDSB’s Operating By-Law Number 174 (the “**Bylaws**”) to address a public petition arising from the Code of Conduct, and are required to do so in accordance with the principles of procedural fairness. While the extent of procedural fairness owed to public petitioners is likely minimal, a failure to acknowledge and make a determination in response to a public petition in accordance with the principles of procedural fairness would likely render such a Board of Trustees determination vulnerable to legal challenge via judicial review, along with potential public and/or reputational damage to the Board of Trustees related to public confidence in the Board of Trustees’ compliance with its own publicly accessible policies, which may be raised. Such minimal procedural fairness measures would include a means for electors to submit a petition directly to the Board of Trustees, and to receive notice of the Board of Trustees’ resulting decision.

As the current provisions of the Code of Conduct requiring the Board of Trustees to receive public petitions are not required by the *Education Act*, the TCDSB may amend its Code of Conduct at any time, through a resolution passed by the Board of Trustees, to remove these provisions.

## Analysis

### *The Code of Conduct Complies With the Requirements of the Education Act*

Sections 218.2 and 218.3 of the *Education Act* and Ontario Regulation 246/18 (Members of School Boards - Code of Conduct; the “**Regulation**”) together set out the legislative requirements that apply to the establishment of the Code of Conduct and the corresponding duties of individual TCDSB trustees. These duties are also impacted by the TCDSB’s Bylaws, as discussed in the next section.

Pursuant to Section 218.2 of the *Education Act*, school boards have the power to “adopt a code of conduct that applies to the members of the board”. In accordance with the modern approach to the interpretation of statutory grants of power to administrative authorities affirmed by the Supreme Court of Canada in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,<sup>1</sup> the language in Section 218.2 grants the TCDSB “broad authority” over a “generally defined” matter. Accordingly, the *Education Act* broadly authorizes the TCDSB to establish a code of conduct in compliance with the provisions in the Act, but does not limit the TCDSB’s authority to establishing a code of conduct that incorporates *only* the requirements set out in the Act.

The Regulation further expressly mandates that every school board “shall adopt a code of conduct that applies to the members of the board” and “shall make its code of conduct available to the public” [emphasis added]. In turn, subsection 218.1(h) of the *Education Act* requires that every “member of the board shall [...] comply with the board’s code of conduct” [emphasis added]. Accordingly, each TCDSB trustee has a duty to comply with the Code of Conduct once it is established or amended and made available to the public as mandated by the *Education Act*.

Section 218.3 of the *Education Act* sets out various requirements that apply to the enforcement of a school board’s trustee code of conduct, once established. These enforcement requirements include:

- The ability for Board of Trustees members who suspect breaches of the trustee code of conduct to bring those alleged breaches to the “attention of the board” (subsection 218.3(1));
- The requirement for the Board of Trustees to “make inquiries” into alleged breaches that are “brought to the attention of the board” (subsection 218.3(2));
- The types of sanctions that may be imposed by the Board of Trustees if a breach of the trustee code of conduct is found (subsection 218.3(3)); and
- Procedures to be followed by the Board of Trustees in finding that a board member has breached the trustee code of conduct and in subsequently addressing a member’s challenge to such findings (subsection 218.3(6) through 218.3(13)).

We confirm that the TCDSB’s Code of Conduct complies with the above requirements and incorporates the language and procedures set out under Section 218.3 of the *Education Act*.

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<sup>1</sup> *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para 6.

By expressly permitting any “Roman Catholic Elector and Eastern Right Catholics” to “petition to the Board of Trustees directly” with respect to alleged breaches, the TCDSB’s Code of Conduct also provides for procedures that go beyond the strict requirements of the *Education Act*.

These additional procedures set out in the TCDSB’s Code of Conduct have been established in accordance with the Board of Trustees’ powers provided for in Section 218.2 of the *Education Act* and are not contrary to other requirements set out in the *Education Act*. Indeed, the Code of Conduct’s provision for members of the public to petition the Board of Directors directly is consistent with the Regulation’s requirement for school boards to make their codes of conduct available to the public. As such, pursuant to subsection 218.1(h) of the *Education Act*, members of the TCDSB’s Board of Directors are required to comply with the existing provisions of the Code of Conduct.

### ***Addressing Public “Petitions” Arising from the Code of Conduct***

As the Code of Conduct provides for electors to “petition to the Board of Trustees directly”, this calls for a response to such a petition to be made by the Board of Trustees collectively. Such a response must accordingly be governed by the TCDSB’s Bylaws and the principles of procedural fairness. To the extent that a decision of the Board of Trustees fails to meet these criteria, that decision will be vulnerable to challenge in court via judicial review.

Moreover, should the Board of Trustees decline to carry out an inquiry pursuant to the Code of Conduct and Bylaws, electors will have further avenues to pursue allegations against individual trustees via procedures established under other TCDSB policies, as described below.

### ***The Collective Decision-Making of the Board of Trustees***

The TCDSB is a corporate body, and as such is a distinct legal entity from individual trustees and from the Board of Trustees that oversees its policies. Pursuant to the *Education Act*, individual trustees are “members” of the corporate school board, whose duties include participation in meetings, upholding the implementation of resolutions and complying with the Code of Conduct, as discussed above. The corporate board, as governed by the collective decisions of the Board of Trustees, must in turn fulfill duties and exercise powers to uphold a responsibility for student achievement and effective stewardship of the TCDSB’s resources. The corporate board fulfills its duties and exercises its powers through resolutions passed at duly constituted meetings of the Board of Trustees, which is in turn governed by the Bylaws.

### ***Applicable TCDSB Bylaws***

Various provisions in the TCDSB Bylaws address the duties of members of the Board of Trustees with respect to addressing concerns raised by the public, whether through a petition or other means. These provisions in the Bylaws include the following:

2.1 In addition to any other duties under the Act or this By-law or otherwise, the Board of Trustees shall: [...]

2.1.12 manage the resources entrusted to it in a manner that upholds public confidence. [...]

## 2.2 Trustees

In addition to any other duties under the Act or this By-law or otherwise, each Trustee shall:  
[...]

2.2.4 bring concerns of parents, students, and supporters of the TCDSB to the attention of the Board of Trustees; [...]

## 2.6 Duties of the Chair of the Board of Trustees

In addition to any other duties under the Act or the By-laws or otherwise, the Chair of the Board of Trustees shall: [...]

2.6.5 act as spokesperson to the public on behalf of the Board of Trustees, in consultation with the Director, unless otherwise determined by the Board of Trustees, provided, however, that when there is doubt as to the interpretation of policy, or there is no established policy, the Chair of the Board of Trustees shall seek direction from the Board of Trustees regarding the substance and manner in which the matter is to be expressed;

[emphasis added]

Bylaw 2.2.4 is particularly salient with respect to elector petitions concerning alleged breaches of the Code of Conduct, as that Bylaw requires individual trustees to bring the concerns of parents, students and supporters “to the attention of the Board of Trustees” and the Code of Conduct in turn requires the Board of Trustees to make inquiries with respect to “an alleged breach [of the Code of Conduct] brought to the attention of the Board”. Taken together, these provisions in the Bylaws and Code of Conduct establish a policy-based requirement for the concerns of parents and school board supporters over Code of Conduct breaches to give rise to inquiries by the Board of Trustees.

In the face of these requirements, a decision by the Board of Trustees to *not* inquire into an elector’s petition alleging breaches to the Code of Conduct would likely in itself be considered by a court as an administrative “decision” subject to judicial review.

While no specific timeline or requirements concerning the nature of the Board of Trustees’ “inquiry” is set out in the Code of Conduct, such administrative action must comply with the principles of procedural fairness in order to mitigate against the risk of the Board of Trustees’ corresponding decisions being vulnerable to challenge via judicial review.

### *Principles of Procedural Fairness*

Being a decision-making body established by legislation, the Board of Trustees must exercise its decision-making authority in accordance with the principles of procedural fairness.<sup>2</sup>

Broadly, the principles of procedural fairness require that the Board of Trustees’ administrative decisions “are made using a fair and open procedure, appropriate to the decision being made and its

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<sup>2</sup> See *Schreiber (Township) v. Superior Greenstone District School Board*, 2002 CarswellOnt 2798 (ONSC Div Ct).

statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker”.<sup>3</sup>

The extent of procedural fairness owed to an individual who is affected by an administrative decision will differ according to context. In general, less extensive procedural fairness is required where the decision-maker is afforded extensive discretion to choose its own procedure. At the same time, where an individual to be affected by a decision has a legitimate expectation that a certain process will be followed and/or where that individual may be significantly impacted by the resulting decision, more extensive procedures may be called for.

In general, policy-based decisions of a school board’s board of trustees are considered by reviewing courts as managerial or administrative rather than judicial or quasi-judicial in nature, and accordingly give rise to limited procedural fairness requirements.<sup>4</sup> At the same time, the legitimate expectations of electors arising from the above-referenced provisions in the TCDSB’s Code of Conduct and Bylaws likely give rise to a requirement for the Board of Trustees to provide at least a minimal degree of procedure in addressing elector petitions alleging the Code of Conduct breaches. Such minimal procedures would include a means for electors to submit a petition directly to the Board of Trustees, have their petition acknowledged, and to receive notice of the Board of Trustees’ resulting decision.

#### *Alternative Recourses Will Remain Available to Electors Under Other TCDSB Policies*

In the event that the Board of Trustees declines to inquire into an elector petition alleging a breach of the Code of Conduct, electors will retain other recourses against individual trustees pursuant to other TCDSB policies, subject to the nature of the allegations at issue. Such policies include the following publicly-available TCDSB policies:

- *Harassment and Discrimination* (TCDSB Policy H.M.14), allows parents and students who believe they have been harassed or discriminated against, who have witnessed harassment or discrimination, or who have reasonable grounds to suspect harassment or discrimination at the TCDSB to make complaints accordingly, inclusive of filing a complaint against individual trustees;
- The *Respectful Workplace Guidelines* set out the processes for harassment and discrimination complaints against individual trustees to be submitted to the TCDSB’s Director or Education and investigated accordingly;
- *Workplace Violence* (TCDSB Policy H.M. 37), which provides that the TCDSB and its Supervisors shall investigate and deal with all incidents, complaints or threats of workplace violence, inclusive of any incidents involving individual trustees; and
- *Whistleblower Policy* (TCDSB Policy A. 39), which applies to all internal and external stakeholders of the TCDSB community, and provides for an investigation to be carried out by the TCDSB under the supervision of the Director of Education in response to alleged incidences of wrongdoing. The definition of “wrongdoing” under this policy includes conduct that presents a danger to the health, safety, or well-being of TCDSB students and employees.

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<sup>3</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>4</sup> *Simpson v. Ottawa-Carleton (District) School Board*, 1999 CarswellOnt 1279 (ONSC Div Ct), as cited in *Schreiber (Township) v. Superior Greenstone District School Board*, 2002 CarswellOnt 2798 (ONSC Div Ct) at para 28.

### ***The TCDSB May Amend its Code of Conduct***

Pursuant to the Regulation, the TCDSB has authority to carry out a review of the Code of Conduct and, by passage of a resolution of the Board of Trustees, to amend provisions in the Code of Conduct, subject to such amendments being compliant with the requirements of the *Education Act* and other applicable laws.

As discussed above, section 10 of the Code of Conduct presently provides that “[i]n accordance with the provisions of section 218.3 of the Education Act [...] a Roman Catholic Elector and Eastern Right Catholics may petition to the Board of Trustees directly [and if] an alleged breach is brought to the attention of the Board, the Board shall make inquiries into the matter [...].”

As elaborated above, these provisions in the Code of Conduct, when read alongside TCDSB Bylaw 2.2.4, effectively require the Board of Trustees to inquire into alleged breaches of the Code of Conduct that are raised by electors. This is not strictly required by the *Education Act* and is therefore not “[i]n accordance with the provisions of section 218.3 of the Education Act” as currently stated in the Code of Conduct.

To be compliant with the *Education Act* without introducing such additional requirements and corresponding risks related to judicial review, as discussed herein, the above-referenced language under section 10 of the Code of Conduct may be amended to read as follows:

A Trustee who has reasonable grounds to believe that another Trustee has breached this Code of Conduct may bring the alleged breach to the attention of the Board.

If an alleged breach is brought to the attention of the Board by a Trustee who has reasonable grounds to believe that another Trustee has breached this Code of Conduct, the Board shall make inquiries into the matter and shall, based on the results of the inquiries, determine whether there has been a breach.

I trust the foregoing is satisfactory for your purposes. Should you have any further questions in this matter, please do not hesitate to contact me.

Yours truly,

Eric M. Roher  
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